

**ENDING BIRTHRIGHT
CITIZENSHIP FOR
THE CHILDREN OF
ILLEGAL ALIENS:
*A PRIMER***

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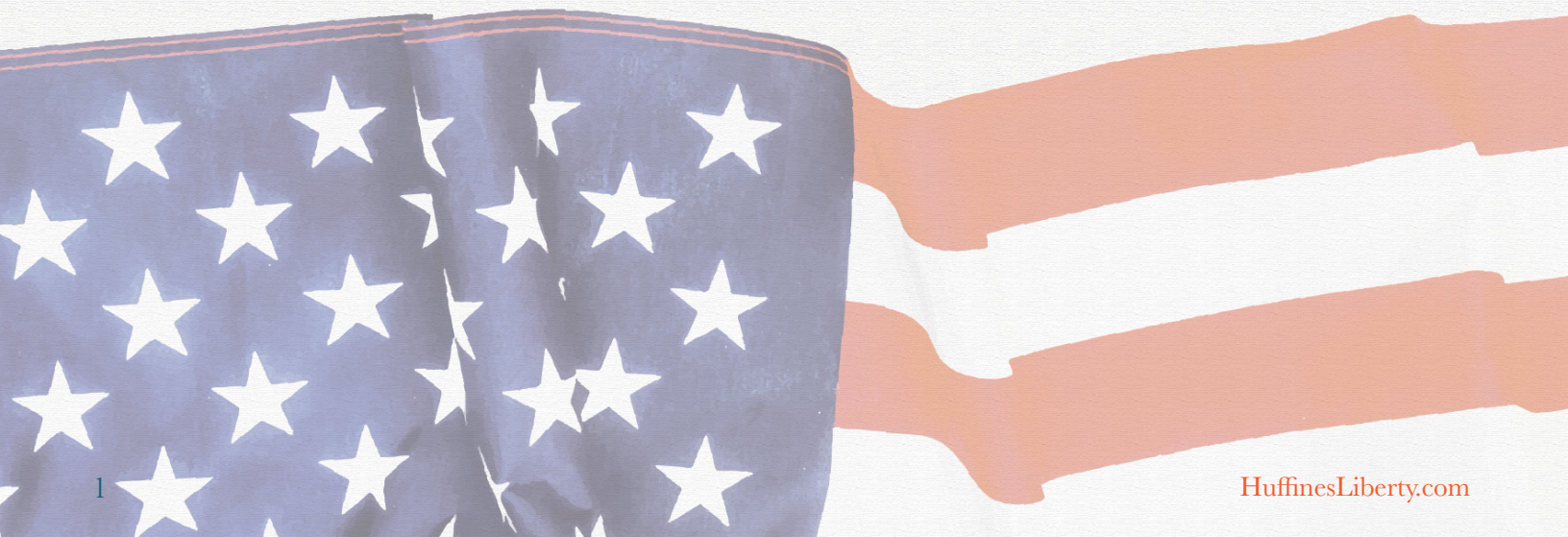
Executive Summary

Prior to 1868, no one argued that children born in America to noncitizens automatically became American citizens; however, with the ratification of the Fourteenth Amendment, that changed. In 1898, the U.S. Supreme Court decided that a child born of permanent residents who legally entered the United States was a citizen. Today, this has led to the practice of granting citizenship to the children born of illegal aliens in America.

However, there is much debate about whether granting citizenship to children of illegal aliens is required by the Fourteenth Amendment. Certainly, this question has never been addressed by the Supreme Court.

Given the possibility that the Fourteenth Amendment does not grant citizenship to everyone who is born here, it is possible that universal birthright citizenship could be ended, or at least restricted, without an amendment to the U.S. Constitution. One way to do this is through the passage of legislation by Congress under its powers in Article I, Section 8 of the Constitution. Another way is through the adoption of an executive order by the president of the United States. Perhaps the only certainty in this debate is that if one of these methods is tried, it will wind up in court.

The primary reason that universal birthright citizenship is a major issue today is because of the uncontrolled mass illegal immigration that is overwhelming the country. While taking legal steps to end universal birthright citizenship should be pursued, the best way to restrict it is for America to regain control of its national borders.



The Birth of Universal Birthright Citizenship in the United States

In 1895, Wong Kim Ark was denied entry into the United States at the port of San Francisco ([Devore](#)). Though he was born in the United States and had resided here his entire life, the customs authorities denied his reentry into the United States under the Chinese Exclusion Acts after visiting his parents in China because he was not a citizen of the United States. Almost three years later, the [United States Supreme Court](#) declared Wong Kim Ark to be a U.S. citizen under the Fourteenth Amendment. This was the first time the federal courts had spoken on the practice of granting “birthright citizenship” to those born in the United States to parents who are not U.S. citizens.

The U.S. is one of about 39 countries (out of 174 according to available data) that allows children of non-citizens and non-permanent residents to become citizens by right of birth ([Zhou](#)). The vast majority of countries restrict the grant of citizenship by birth to those born of citizens or permanent residents. Yet, although the U.S. today automatically grants citizenship to anyone born here, no matter the legal status of their parents, that was not the case with Wong Kim Ark. His parents had entered the U.S. legally and were permanent residents.

Those who say the Fourteenth Amendment grants universal birthright citizenship often ignore the status of Native Americans after the amendment was adopted. They “were not granted citizenship as they owed allegiance to their tribe. Individual tribal members could apply for citizenship or be considered citizens if they were taxed and lived off a reservation. It wasn’t until Congress passed the Indian Citizenship Act of 1924, signed into law by President Coolidge, that the entire Native population became citizens—some 92% were not at the time” (DeVore)

Taking these two facts into account, it is legitimate to ask whether America’s birthright citizenship policy could be changed without amending the U.S. Constitution. This possibility is supported by [John Eastman](#), who wrote, “Indeed, most constitutional scholars have recognized that neither the Supreme

Court nor any lower court has ever held that the children of illegal immigrants born on U.S. soil are automatically citizens by virtue of the 14th Amendment.” He continues:

If anything, the opposite is true. It was long considered a matter of settled law that, as the text of the 14th Amendment makes clear, two requirements are necessary for automatic citizenship: being born on U.S. soil and being “subject to the jurisdiction” of the United States. The two requirements are not redundant. Being “subject to the jurisdiction” of the United States means something more than simply being physically present in the United States, which subjects one to what the drafters of the 14th Amendment called “partial” or “territorial” jurisdiction. It means, rather, being subject to the full and complete jurisdiction of the United States, owing allegiance to it in some measure.

Options for Ending Universal Birthright Citizenship

Given the possibility that the Fourteenth Amendment does not grant citizenship to all who are born here, what are the options for restricting birthright citizenship?

Congressional Legislation

When the Fourteenth Amendment was being debated in Congress, many members were concerned that the amendment would confer citizenship on anybody born in the United States, regardless of their legal status. Here is the text of the amendment’s language relating to citizenship:

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.

There are two distinct requirements for citizenship in the text. First, a person must either be “born or naturalized in the United States.” Second, a person must also be “subject to the jurisdiction” of the United States.

The question raised by many of the members was whether the qualification that a person must be

“subject to the jurisdiction” of the United States would still allow for everyone born in the country, except those born to “ambassadors or foreign ministers,” to automatically qualify as citizens. The response to this question by the sponsors and supporters of the amendment made it clear they did not believe its language would provide for the type of birthright citizenship we have today. The reason for this is simple: the purpose of the Fourteenth Amendment was to ensure citizenship for recently freed American slaves, not to change how immigrants became American citizens.

For instance, here is how Senator Jacob Howard answered the question:

This will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons.

According to Howard, those who are born to foreigners or aliens would not become citizens. Others made similar statements. Here is Representative John Bingham of Ohio:

I find no fault with the introductory clause, which is simply declaratory of what is written in the Constitution, that every human being born within the jurisdiction of the United States of parents not owing allegiance to any foreign sovereignty is, in the language of your Constitution itself, a natural born citizen.

When specifically addressing the meaning of “subject to the jurisdiction thereof,” members were equally clear about its limitation on birthright jurisdiction. [Michael Anton](#) explains the statement of Senator Lyman Trumbull:

Senator Trumbull says that “[subject to the jurisdiction](#)” means:

not owing allegiance to anybody else and being subject to the complete jurisdiction of the United States.

Senator Trumbull does not say “Not owing allegiance to a foreign government for whom one serves as an ambassador or minister.” He plainly says “anybody else,” i.e., any foreign nation or tribe whatsoever. To hammer the point home, he continues: “and being subject to the complete jurisdiction of the United States.” To be “subject to the complete jurisdiction of the United States” is to owe allegiance to no other country or tribe.

Senator Howard supported the understanding of the term as explained by Trumbull:

I concur entirely with the honorable Senator from Illinois, in holding that the word “jurisdiction,” as here employed, ought to be construed so as to imply a full and complete jurisdiction on the part of the United States, coextensive in all respects with the constitutional power of the United States, whether exercised by Congress, by the executive, or by the judicial department; that is to say, the same jurisdiction in extent and quality as applies to every citizen of the United States now.

Anton explains the importance of Howard’s use of the term “same jurisdiction”:

the “same jurisdiction in extent and quality as applies to every citizen of the United States now” cannot apply to foreigners. To claim otherwise is to claim that U.S. law applies to foreigners even when they are residing in their own countries! It is to claim, in effect, that U.S. law rules the world. Which is absurd.

In his concurrence in [Oforji v. Ashcroft](#), U.S. federal Judge Richard Posner of the Seventh Circuit Court of Appeals follows this original purpose of birthright citizenship in the Fourteenth Amendment as he explains why congressional action ending birthright citizenship would not be unconstitutional:

We should not be encouraging foreigners to come to the United States solely to enable them to confer U.S. citizenship on their future children. But the way to stop that abuse of hospitality is to remove the incentive by changing the rule on citizenship, rather than to subject U.S. citizens to the ugly choice to which the

Immigration Service is (legally) subjecting these two girls. A constitutional amendment may be required to change the rule whereby birth in this country automatically confers U.S. citizenship, but I doubt it. ... The purpose of the rule was to grant citizenship to the recently freed slaves, and the exception for children of foreign diplomats and heads of state shows that Congress does not read the citizenship clause of the Fourteenth Amendment literally. Congress would not be flouting the Constitution if it amended the Immigration and Nationality Act to put an end to the nonsense. On May 5, 2003, H.R. 1567, a bill "To amend the Immigration and Nationality Act to deny citizenship at birth to children born in the United States of parents who are not citizens or permanent resident aliens," was referred to the House Subcommittee on Immigration, Border Security, and Claims. I hope it passes.

Article I, Section 8 of the U.S. Constitution gives Congress the power "To establish an uniform Rule of Naturalization." Congress, then, has the authority to pass laws governing the citizenship of those not considered citizens by birth. Prior to the Fourteenth Amendment, there was a universal agreement that this authority applied to those born in the U.S. to parents who were not citizens. With the debate over the actual meaning of the amendment, Congress would be entirely within its powers to pass a law outlawing birthright citizenship to the children of illegal aliens.

Executive Order

In 2018, President Donald Trump announced [in an interview with Axios](#) that he was going to issue an executive order targeting birthright citizenship. The following are from Axios' reporting on Trump's statement:

- "It was always told to me that you needed a constitutional amendment. Guess what? You don't," Trump said, declaring he can do it by executive order.
- When told that's very much in dispute,

Trump replied: "You can definitely do it with an Act of Congress. But now they're saying I can do it just with an executive order."

- "We're the only country in the world where a person comes in and has a baby, and the baby is essentially a citizen of the United States ... with all of those benefits," Trump continued. "It's ridiculous. It's ridiculous. And it has to end." (More than 30 countries, most in the Western Hemisphere, provide birthright citizenship.)
- "It's in the process. It'll happen ... with an executive order."

Of course, it did not happen. Yet, it still could. According to the Constitution, only Congress has legislative power. So, the president cannot use an executive order to give himself new powers. But they can be used to ensure that his executive authority is being properly carried out by the executive branch. [The Heritage Foundation](#) explains how this works:

Article II of the Constitution assigns the president the roles of commander in chief, head of state, chief law enforcement officer, and head of the executive branch. The president has the sole constitutional obligation to "take care that the laws be faithfully executed," and is granted broad discretion over federal law enforcement decisions.

"He has not only the power, but also the responsibility to see that the Constitution and laws are interpreted correctly," Heritage Foundation scholar Todd Gaziano wrote in 2001.

When the president lawfully exercises one of these responsibilities, scholars generally agree, the scope of his authority to issue executive orders and other directives is especially broad. As such, Congress has little ability to regulate or limit that authority.

Since Congress has never passed legislation to codify the current practice of birthright citizenship, the president has significant authority to address the issue himself. While he could not completely ban the current interpretation of birthright citizenship,

what he could do is “specify to federal agencies that the children of noncitizens are not citizens” ([Anton](#)). This could result in, for instance, federal agencies treating all children born to illegal aliens as non-citizens.

Chuck DeVore [examines another possibility](#):

Regarding an executive order, might there be guidance given to the executive branch regarding, for example, the citizenship status of children born to so-called “birth tourists?” That is, mothers, late in their term, who fly into the U.S. specifically to give birth to U.S. citizens, conferring upon the children the ability to avoid mandatory military conscription in nations such as South Korea, China, and Turkey, while giving their parents an advantage in future immigration via so-called “chain migration.”

Regardless of what an executive order on this issue would look like, absent federal law otherwise, the president might have broad discretion to change the way America deals with this issue.

The Cost of Universal Birthright Citizenship

The cost to taxpayers of illegal aliens is well documented. As the [Huffines Liberty Foundation](#) explains:

One group estimated the 2022 costs of illegal aliens to Texans at \$9.9 billion. Add in the children of illegal aliens, and the costs expand to \$13.3 billion. The Huffines Liberty Foundation estimates that the cost of educating illegal aliens in Texas public schools was \$6.6 billion for the 2022-23 school year. Texas’ border security costs are about \$2.6 billion, while criminal justice costs run about \$1.7 billion.

Even though it is difficult to quantify how much universal birthright citizenship contributes to the flow of illegal immigration into the U.S., [President Trump noted](#) that it “is a reward for breaking the laws of the United States and is obviously a magnet helping draw the flood of illegals across our borders.”

The numbers cited above from the Federation for American Immigration Reform illustrate Trump’s point. In 2022, FAIR estimates that the cost of the children of illegal aliens to taxpayers was \$3.4 billion. Applying this approach to the cost of Huffines Liberty Foundation education cost estimates would mean that the cost to Texans of educating the children of illegal immigrants was \$2.3 billion in the 2022-23 school year.

Texas Attorney General [Ken Paxton estimated](#) that “Texans pay between \$62 million and \$90 million [annually] to include illegal aliens in the state Emergency Medicaid program.” Part of this cost is the cost of giving birth to many of the children of illegal aliens who receive birthright citizenship. The Texas Department of Health and Human Services [defines Emergency Medicaid](#) as “All types of emergency Medicaid coverage programs for people who are nonimmigrants, undocumented aliens or certain legal permanent resident aliens who have emergency medical conditions and who, except for alien status, would be Medicaid-eligible.” One of the coverage programs under Emergency Medicaid is for “pregnant women.” It is unknown how much of the costs identified by Paxton can be attributed to births from illegal aliens, but it is well documented that in many urban Texas hospitals, over half of the women giving birth are in the country illegally.

The costs of universal birthright citizenship are not just financial. Universal birthright citizenship could also contribute to increased illegal immigration and increased chain migration. “Securing birthright citizenship holds great value that can be viewed as an incentive by parents-to-be to enter the U.S. illegally in order to give birth. It can also enhance an illegal alien’s chances of gaining permanent status if their child is an American” ([Styma](#)). The process can spread even further to other relatives through birth and marriage ([Bartleby](#)). There are also concerns about the effects of universal birthright citizenship on American culture. Since universal birthright citizenship can be both a motivation for illegal immigration and a multiplier of its effects, it may add to the problems America is already having with the cultural assimilation of immigrants.

[Romesh Ponnuru](#) explains the issues surrounding assimilation, “My chief concern is that the country has cultural cohesion, not to say conformity, but that we are all fellow citizens who have common interests and that we can deliberate about those common interests together, which helps if we all, or almost all, speak the same language and have a shared sense of belonging...” When assimilation is not working well, there is evidence that points to the receiving culture being changed to fit the culture of the immigrants. This could be a growing problem today because a “a large number of today’s immigrants come from collective societies [this] tend[s] to create passive, conformist citizens” ([Mead](#)) that may not understand the importance of America’s heritage based on Christianity, individual rights, and liberty.

Opposition to Eliminating Universal Birthright Citizenship

As noted, the U.S. Supreme Court has never ruled on whether a child born in America to illegal aliens is entitled to citizenship under the Fourteenth Amendment. We can be sure, however, that it would if Congress passed a law or the president adopted an executive order saying otherwise.

Of course, the urgency for the Court’s review, if this happened, would be driven in part by loud noises emanating from mainstream and social media, likely much louder than in 2018 when [Michael Anton](#) supported the idea:

I expected the reaction to a recent op-ed I published calling for the end of birthright citizenship to be cantankerous. I even expected it to be hysterical—from the Left. I did not expect self-described “conservatives” to be just as hysterical as the Left, and to use precisely the same terms. “Nativist.” “Xenophobe.” “Bigot.” “Racist.” “White nationalist.” “White supremacist.”

But it wouldn’t just be the cancel culture weighing in on this. Many legal scholars have claimed that the U.S. practice of birthright citizenship is firmly embedded in the Fourteenth Amendment.

One of those is liberal Harvard law professor Laurence Tribe. He [challenges the idea](#) that an “originalist” reading of the text of the Constitution would allow Congress or the president to change our birthright citizenship practices:

the text itself plainly answers the question at hand. All but conceding this universally acknowledged point, Trump and Vice President Michael R. Pence have tried to twist the amendment’s own words to say that “illegal immigrants are not subject to the jurisdiction of the United States” and thus are excluded from the Amendment’s definition of birthright citizenship. ... Anyone who knows how to use the English language has to see that the phrase “and subject to the jurisdiction thereof” qualifies not the parents of persons “born...in the United States,” but the persons born here, who automatically become American citizens upon birth on U.S. soil, whatever the legality of their parents’ presence in America, or of anything their parents, or their parents in turn, may have done.

Liberals are not the only ones, however, who believe that the Fourteenth Amendment confers universal birthright citizenship. James Ho, a conservative judge on the Fifth Circuit Court of Appeals, [wrote in 2011](#):

The plain meaning of this language [of the Fourteenth Amendment] 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.)

Whatever the merits of these arguments, they illustrate that any effort to change the current application of the Fourteenth Amendment to children of illegal aliens born on U.S. soil will be challenged in the courts.

Conclusion

Universal birthright citizenship is a controversial issue today. Of course, the primary reason for this

is that America has lost control of its borders, and the number of illegal aliens giving birth has skyrocketed. While addressing birthright citizenship is important, even more important is for America to regain control over its borders to stop the influx of illegal immigrants.

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About the President

Don Huffines

Former Texas State Senator Donald B. Huffines is a strong Christian, proud fifth-generation Texan, husband, father, grandfather, and self-made businessman.

Don Huffines fought fearlessly for fiscal restraint and government accountability in the Texas State Senate while representing Dallas County.

During his time in the Senate, Senator Huffines served as the Vice-Chairman of the Border Security Committee. Huffines also earned a reputation as one of Texas's most conservative lawmakers.

Don Huffines now serves as President of the Huffines Liberty Foundation and leads the Texas First movement by promoting the values we all cherish that make Texas great.

The Huffines Liberty Foundation is a 501(c)(3) non-profit, non-partisan research institute.

Our mission is to advance the cause of liberty, prosperity, and virtue in the State of Texas by educating citizens so they may hold their elected officials accountable.

We have developed an agenda based upon the common sense liberty principles of individual rights, fiscal restraint, personal responsibility, limited government, and social conservatism.

The Huffines Liberty Foundation encourages and educates citizens so they are better informed to tackle the toughest challenges.