The Washington Post

The constitutional debate over birthright citizenship

By Ilya Somin August 27, 2015

Some conservatives have long argued that the Constitution does not preclude the federal government from denying American citizenship to children of illegal immigrants born in the United States. Donald Trump's anti-immigration presidential candidacy has rekindled the longstanding constitutional debate over this issue. While both sides have some serious arguments, the defenders of birthright citizenship ultimately have the better case. Legal scholar Michael Ramsey has an excellent summary of the key reason why:

> The first sentence of the Fourteenth Amendment conveys U.S. citizenship on all persons "born … in the United States and subject to the jurisdiction thereof." Obviously we are talking here about persons "born … in the United States." Thus the children of illegal aliens are not U.S. citizens only if they are not "subject to the jurisdiction" of the United States.
>
> But there is no sense in which children of illegal aliens are not "subject to the jurisdiction" of the United States. So long as they remain in the United States, they are subject to U.S. law. If they violate U.S. law, they can be arrested by U.S. law enforcement, brought before a U.S. court, and sentenced to U.S. prison.

In respect of being subject to the jurisdiction of US law, illegal immigrants clearly differ from foreign diplomats and their families, who are exempt from most US laws. As Ramsey explains, their circumstances are also different from those of some Native Americans living on tribal lands where US sovereignty was constrained by that of the Indian tribes themselves.

Ramsey gave a more detailed defense of the constitutional case for birthright citizenship in several previous posts linked in the one quoted above. Other insightful recent defenses include those by Cornell law professor Michael Dorf, and (interestingly) John Yoo.

In my view, the best recent statement of the opposite case is that by prominent conservative legal scholar John Eastman (see also related arguments by Mark Pulliam and Howard Foster). I think Eastman shows that the anti-birthright citizenship side of the debate cannot be easily dismissed.

But, ultimately, his argument fails because it relies on a dubious distinction between "complete, political jurisdiction; and… partial, territorial jurisdiction." Eastman explains that a person subject only to the latter "does not get to vote, or serve on a jury; he cannot be drafted into our armed forces; and he cannot be prosecuted for treason if he takes up arms against us, because he owes us no allegiance." Eastman argues that birthright citizenship applies only to children of parents subject to "complete political jurisdiction."

One obvious problem with this distinction is that it is nowhere to be found in the text of the Fourteenth Amendment, which simply refers to "the jurisdiction" of the United States. This language encompasses all forms of jurisdiction, not merely that which applies only to citizens subject to "complete political" jurisdiction. The framers could have used the phrase "complete political jurisdiction" (or similar language), but did not. Another problem with the complete jurisdiction theory is that it would enable Congress to deny citizenship even to children of legal immigrants who are not yet citizens themselves. After all, they too do not get to vote or serve on juries, and some of them might not be subject to a military draft if we had one.

But perhaps the most important flaw in this argument is that it would undermine the central purpose of the Citizenship Clause of the Fourteenth Amendment, which was to reverse the *Dred Scott* decision's notorious holding that blacks – even those who were not slaves – could not be citizens of the United States. In his infamous opinion in *Dred Scott*, Chief Justice Roger Taney concluded that blacks could not be citizens in part precisely because of the sorts of distinctions Eastman relies on. As Taney pointed out, in most states free blacks could not vote, could not serve on juries, and were barred from serving in the militia (including under the 1792 federal Milita Act, which limited militia service to white men). While Taney did not deny that free blacks were subject to what Eastman calls "territorial jurisdiction," most were not subject to what he calls "political jurisdiction." If Eastman's analysis is correct, Congress (or possibly state governments) could have prevented newly freed slaves and their children from becoming citizens simply by declaring that they were not entitled to vote, could not serve on juries, and so on.

While modern precedent interprets the Fourteenth Amendment as forbidding racial discrimination in legislation regulating eligibility for voting, military service, and jury service, this was not the dominant understanding in 1868. Indeed, the Fifteenth Amendment, which banned racial discrimination with respect to voting rights, was enacted in 1870 in large part because most contemporaries did not believe that the Fourteenth Amendment applied to voting rights. The federal government continued to engage in massive racial discrimination with respect to eligibility for military service until at least the late 1940s.

Most of the above points are relevant primarily from the standpoint of textualist or originalist approaches to constitutional interpretation. There might be a stronger living constitutionalist argument against birthright citizenship (though that argument would have to overcome many decades of contrary precedent and practice). But most of the opponents of birthright citizenship are themselves conservative originalists.

Finally, it's worth noting that at least one of the considerations often raised as a justification for denying birthright citizenship (and a possible reason for living constitutionalists to oppose it) is seriously misguided: the fear that these children will use their votes to change American public policy for the worse. In reality, the political views of immigrants differ only modestly from those of natives, and those of second-generation immigrants who grow up in the United States differ even less. By facilitating the integration of immigrants into American society, the policy of birthright citizenship can help further diminish the difference. This result, of course, is a two-edged sword. It tends to undermine hopes that immigrants' political influence will change government policy for the better. But most immigration restrictionists probably don't assign a lot of weight to that possibility to begin with.

Ilya Somin is Professor of Law at George Mason University. His research focuses on constitutional law, property law, and popular political participation. He is the author of "The Grasping Hand: Kelo v. City of New London and the Limits of Eminent Domain" and "Democracy and Political Ignorance: Why Smaller Government is Smarter."