Birthright Citizenship Should Not Be Eliminated

written consent of the American Bar Association.

Margaret Stock is a retired military officer and an attorney who teaches in the Department of Political Science at the University of Alaska, Anchorage.

No one doubts the dysfunction of the current US immigration system, a dysfunction that has resulted in the presence in America of millions of illegal or unauthorized immigrants. Some have suggested that one partial "solution" to the problem of illegal immigration is to reinterpret or amend the Fourteenth Amendment to the US Constitution to eliminate birthright citizenship. Those who suggest this change argue that giving automatic American citizenship to persons born within the geographic limits of the United States encourages foreigners to enter or remain in the United States illegally. They refer pejoratively to "anchor babies," children born in the United States who are birthright citizens and who have parents who are not authorized to be here. They believe that children who gain citizenship by birth in the US serve to "anchor" their parents, because when the children turn 21, the parents can sometimes migrate legally based on their adult child's status as a citizen. This "anchor," they say, should be eliminated.

Yet, such a change would be ill-advised from a policy perspective.

US Citizenship Law

Legal scholars refer to the concept of birthright citizenship as "jus soli," the law of the soil, and the United States has had some form of this rule since the dawn of the Republic, although the concept was only enshrined in the US Constitution after the Civil War. Of course, there are other ways that one can become a United States citizen besides having the fortune of being born here—one can also derive citizenship through one's parent or parents ("jus sanguinis," or the law of blood) or obtain citizenship by applying for it through the naturalization process, usually after having first obtained "lawful permanent residence" first. Thus, if birthright citizenship is eliminated, many people born in the United States would still be American citizens by inheritance or could perhaps become citizens by filing an application for naturalization. Others, however, would not be eligible for derivative citizenship and would have no status allowing them to apply for American citizenship. They would remain "foreign denizens" resident here—at least until they legalized, left, or were deported.

Unfortunately, US law with regard to derivative citizenship is extremely complex. In fact, with the exception of the current birthright citizenship presumption, all of US immigration and nationality law is tremendously complicated, such that many people in the world who are US citizens—and many of their lawyers—do not know that they are citizens, or if they know, have trouble getting documents proving that they are. Immigrating legally to the United States is also a process of great difficulty and complexity, and unattainable by most.

It is also true that many native-born (birthright citizens) have trouble proving their citizenship. The United States has no national register of its birthright citizens; documents evidencing birth in America are created by thousands of state and local governmental entities as well as the Department of Homeland Security and the Department of State. Because the fact of birth in the United States has been the rule for hundreds of years, however, many Americans do not routinely obtain any governmental documents evidencing their citizenship status. A recent survey by the Brennan Center [for Justice] at New York University [School of Law] found that more than 13 million American adults cannot easily produce documentation proving their citizenship. But at least birthright citizenship can be proved by producing a valid US birth certificate, something that most birthright citizens can obtain without too much expense or difficulty if they are forced to do so.
The Alternative to Birthright Citizenship

If birthright citizenship is eliminated, however, those born in the United States will lose their access to easy proof of citizenship. Instead, they will find it necessary to turn to the exceptionally complex US rules for citizenship by blood (the majority will be unable to qualify for the immigration visas necessary as a prerequisite to citizenship by naturalization). Yet the rules for derivative citizenship are so complicated that it can take an experienced immigration attorney more than an hour to determine conclusively whether someone is an American citizen by derivation—the lawyer must inquire about grandparents as well as parents, about marriage dates and birth dates of ancestors, and about the time that one's parents or grandparents spent in the United States prior to one's birth. In some cases, whether one's parents were married or unmarried at the time of one's birth makes a difference. Whether one's United States citizen parent was male or female also can be crucial to the determination (as a result of the US Supreme Court's decision in *Nguyen v. Reno*, the children of American men cannot claim US citizenship as easily as the children of American women).

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Over more than two hundred years of American history, Congress has been responsible for creating the "jus sanguinis" rules in America, and Congress has made them so complicated that figuring out whether someone is a US citizen by blood is sometimes the equivalent of figuring out whether a patent application is valid. So, if we rid ourselves of the birthright citizenship presumption, what we will be doing is replacing a simple rule for most people with one that will be tremendously complex, as our current jus sanguinis rule is.

Under the birthright citizenship presumption in effect today, most Americans—but not all—have it much easier than the minority who are derivative citizens. Most Americans are presumed to be citizens by virtue of birth here. All they have to do to prove citizenship is produce a valid birth certificate. Were they not so presumed—and the hundreds of thousands of Americans born overseas do not have the benefit of such a presumption—a complex and individualized assessment of their status is required.

There are many such Americans born every year—the children of military members deployed overseas, missionaries, oil company employees, or Americans who choose to have their children in another country while visiting there. The State Department and the Department of Homeland Security [DHS] charge substantial fees to make derivative citizenship assessments (the current DHS fee is $457)—and depending on the facts, the assessment can take weeks, and require production of numerous documents, including very old historical records. The government also frequently makes mistakes with regard to people who have not undergone this assessment; any experienced immigration lawyer has stories of US citizen clients who have been deported—mistaken deportations of US citizens are relatively common.

A Good Rule

So what would it mean to eliminate birthright citizenship, as a practical matter? The United States has no national registry of American citizens. Presumably, we would have to create one. Each person born in America—at thousands of localities, hospitals, midwiferies—would have to have his or her citizenship adjudicated. Someone expert would have to do the adjudication—most probably a trained immigration attorney—unless we allow these complex adjudications to be made randomly by bureaucrats. Finding such attorneys is very difficult today, but will likely become even more difficult, in that immigration and citizenship law is a field that a Department of Homeland Security spokesperson has accurately called "a mystery and a mastery of obfuscation."
As a practical matter, the elites of American society are unlikely to be affected much by this. A change in the current system will cause little trouble for those who have the money to hire highly trained lawyers to handle their paperwork. The burden of proving citizenship is likely to fall mostly on the less favored elements in society. As mentioned above, one of the little-known facts of US immigration law is that the US government frequently deports US citizens—but those US citizens who get deported are mostly the less favored in our society—the poor, the uneducated, the mentally disturbed, and minorities. This trend will accelerate if we eliminate birthright citizenship.

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So the first policy argument against eliminating birthright citizenship is this: We have a clear, long-standing rule of citizenship law—one that is easy to understand and easy to administer. It is also a constitutional rule. This rule has been in effect, de facto, since the dawn of the Republic, and by constitutional law since the end of the Civil War. Those who would overturn or change this rule have the burden of proving why this rule should be changed, as a matter of policy and not just as a matter of law. This rule is much easier to administer than other rules like jus sanguinis (the rule of citizenship by blood). Everyone should appreciate long-standing, easy to use, "bright line" rules. To date, advocates of change have not made the policy case for why the long-standing rule should be changed.

**The Arguments for Ending Birthright Citizenship**

The test of any public policy is whether the benefits of the policy are likely to outweigh the costs. Here, there is no question that proponents of changing the current default rule have not made even a marginal case on policy grounds. They cite vague policy reasons for changing the law such as the need to make US citizenship more valuable; the need to stop what they term an "industry" of women coming to the US to have babies. They seem to assume, without benefit of any hard data, that the US does not benefit from birthright citizenship. And yet there is ample evidence that it does; hundreds of thousands of birthright citizens make tremendous contributions to American society every day, serving in our military, in public office—Senator Pete Domenici, the most famous anchor baby in America, is one example. Opponents of birthright citizenship also assume—again without data—that illegal immigration will lessen or even stop if birthright citizenship is eliminated. Although there may be some people who might be deterred from coming to the US if birthright citizenship is eliminated, instead of reducing the number of illegal migrants within our borders, changing the current rule will make even more people into illegal migrants. We know from the European and Asian experiences with jus sanguinis rules that eliminating jus soli does not stop illegal immigration, but does increase the number of illegal aliens within a country, because fewer people are able to gain legal status.

The number of US-born children of illegal immigrants is estimated to be 3 million—but nobody really has a good idea how many there actually are. And yet facts are critically necessary to evaluate the efficacy of any seismic change to the birthright citizenship rule. Some 200,000-400,000 "anchor babies" are believed to be born each year, but there's no real way to track it because hospitals in America don't report the citizenship status of parents when children are born. They do report—without verification—what the parents self-report as the birthplace of the parents—but a parent's birthplace tells nothing about the parent's citizenship status. And yet without any hard data, or proof that a change in policy will achieve the policy goals sought by the change, proponents of a change want to cause tremendous hardship and expense to all the rest of America.

**The Consequences of Ending Birthright Citizenship**

While opponents of birthright citizenship seem to assume without facts that their rule will do some
good, we do have a pretty good idea what bad things will happen if we eliminate the birthright citizenship rule:

First, we will have thousands of children born every year who have no citizenship. To cite just one group, under the pending congressional legislation, children of asylees and refugees will have no citizenship. They will be left without a country, creating an underclass of "exploitable denizens." This is what has happened in countries—like France—that do not have a jus soli ("common law") rule.

Second, the benefit does not seem to outweigh the cost. Why not just take the money we'd use to adjudicate the citizenship status of 300 million Americans and use it to enforce existing immigration laws?

Third, eliminating birthright citizenship is un-American. This is our unique heritage, one that hundreds of thousands of soldiers—citizens and noncitizens—fought the Civil War to enforce. Birthright citizenship has been the rule since the dawn of the Republic, and we ought to have a pretty good reason to change it—one better than some frustration with the federal government's inability to enforce existing immigration law. Further, what we are really talking about here is punishing children for something "bad" that their parents did—or maybe not even anything bad but just being from the wrong country.

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Finally, changing our rule would cause us to contribute heavily to the current global population of stateless people. And we as a nation have professed that people have a human right to have a country.

In sum, the policy arguments in favor of retaining birthright citizenship as a rule are very, very strong. The policy arguments against it are weak. Even if we believe that it is possible to interpret the Fourteenth Amendment differently than we have been interpreting it for more than a hundred years, it's not clear why we would want to do so. Trading an easy and egalitarian birthright citizenship rule for one that will cause hardship to millions of Americans is not a smart way to solve our complex immigration problems.
Congress Should End Birthright Citizenship

Will Wilkinson is a research fellow at the Cato Institute and editor of *Cato Unbound*.

Even as Arizona continues to distinguish itself as America's undisputed leader in harebrained xenophobia, the state has stumbled upon a very good idea. Hot on the heels of SB 1070, the controversial Arizona law that hands cops expansive powers to detain anybody who gives off an insufficiently American vibe, Republican lawmakers in the state have set their sights on a new state law to deny citizenship to babies born on American soil whose parents lack proper papers.

Currently, anyone born within U.S. boundaries counts as a U.S. citizen, and it doesn't matter a bit how mom got in. The proposal to end "birthright citizenship" for the children of unauthorized immigrants springs from less than generous motives, and almost surely runs afoul of the U.S. Constitution. But ending it altogether is a better idea than you might think. (And if you already think it's a good idea, it's good for reasons you might find surprising.) For one, it would likely achieve the opposite of its intended result by making America more, rather than less, welcoming to newcomers.

The Need for a Common Labor Market

Well-ordered societies are extended networks of peaceful and productive cooperation, and those networks don't suddenly stop at political borderlines drawn by conquest and colonization. Americans and Mexicans are deeply intertwined by blood, soil, travel, toil and trade. After all, Arizona was Mexico once upon a time, until the U.S. seized Northwest Mexico and pushed the border south. Efforts to arbitrarily segregate people tied by history, culture, and mutual economic interest are bound to fail. The draconian Arizona model of immigration reform seeks to complete the colonizing work of Manifest Destiny by instituting a more perfect apartheid. It seeks to address the perception of a breakdown in the rule of law by ignoring causes in favor of aggressively treating symptoms. Higher walls. More guards, more guns, more jails. Your papers, please.

The alternative is to secure a peaceful and humane order through policies that acknowledge the cultural, economic, and geographical unity of northern Mexico and the American Southwest. The rule of law demands a clear set of equitable rules that respects and regulates natural patterns of traffic, that sets and sustains long-term expectations, and that facilitates and channels the fundamental human inclination to seek out opportunity and the benefits of cooperation. To set up a stop sign every five feet and then to crack down on people who don't follow the rules misses the point. So does establishing an imaginary line that restricts trade and travel while making a muddle of citizenship.

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Fortunately, we already have a model of sensible reform from a frequently insensible place—the European Union [EU]. By establishing a common labor market in which Americans and Mexicans (Canadians too!) may range freely, living and working where they please, we can channel the commercial energy of integration while maintaining distinctly separate citizenship. Indeed, the feasibility of this arrangement requires maintaining a clear distinction between the right to live and work in another country's territory and the right to the benefits enjoyed by its citizens. It is a fact of modern life that the redistributive nation-state offers all manner of goods to citizens. To be a citizen of a wealthy country is a lot like being a member of a private club. Yet even the wealthiest national clubs are straining to deliver the benefits promised to members. If a club's rules permit visitors, invited or not, to mint new members simply by giving birth, cash-strapped current members are bound to object.
The EU's shortcomings, from bureaucratic micromanagement to a floundering common currency, have obscured its great practical and moral triumph: the dramatic expansion of European mobility rights and the inspiring integration of the continent's labor markets. When Britain opened its labor markets to Polish workers in 2004, the gap in average income between the two countries was about as big as that between the United States and Mexico. But per capita GDP [gross domestic product] in Poland has improved markedly since then, hastening the day when Poland provides a robust market for British goods—and possibly British labor, too. Similarly, by 2012, Romanians and Bulgarians, who are on average poorer than Mexicans, will be able to live and work in rich countries such as France, Germany, and Britain. It's worth noting, however, that not a single EU country has a birthright citizenship rule like that in the U.S.

**Ending Birthright Citizenship**

Birthright citizenship made sense for a frontier country with open borders; newly freed slaves; and a small, remote bureaucracy. But the time seems ripe to consider alternatives. Ending full birthright citizenship leaves open many intermediate possibilities, such as granting citizenship to children born to foreign citizens who have legally resided in the country for a predetermined number of years. In response to agitation over a growing population of Turkish guest workers, Germany changed its rules to grant citizenship to Germany-born children of Germany-born children of resident foreigners.

There's ample reason to believe a change in policy could make America a more immigrant-friendly place while simultaneously restricting the costly benefits of citizenship. Though undocumented immigrants are ineligible for most forms of government assistance, their America-born kids do qualify, which is no doubt an attraction to some prospective immigrant parents. The hard-right Arizona State Sen. Russell Pearce speaks for many Americans when he says birthright citizenship "rewards lawbreakers." What's more, because these children, once grown, can sponsor family members for authorized migration, they function as border-spanning bridges over which a retinue of relatives may trod. These relatives, once naturalized, can in turn sponsor aunts and uncles and cousins without end. Hence the fear of the "anchor baby," a gurgling demographic land mine set to explode into a multiheaded invasion of Telemundo fans.

Any move to thwart birthright citizenship will require a constitutional amendment.

**The Need for a Constitutional Amendment**

This line of thinking may be ugly, but there is no doubt that many Americans subscribe to it. According to Rasmussen Reports, 58 percent of Americans oppose birthright citizenship for kids of undocumented immigrants. However, those who wish to be rid of birthright citizenship—whether to hasten the freedom-enhancing arrival of a pan-American labor market (like me) or to put an end to the imagined scourge of anchor babies (like Sen. Pearce)—face a truly formidable obstacle: the 14th Amendment of the U.S. Constitution.

"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," states the first sentence of the 1868 amendment. Long-standing precedent has established that the immigration status of the mother is usually irrelevant to the child's qualification for full membership in Club America. Arizona's Pearce, who promoted the state's vile SB 1070, argues that the 14th Amendment "was not intended for illegal aliens." But his constitutional case is hopeless. There were no "illegal aliens" in 1868. Back then, lawful residence in the U.S. merely required stepping over the border or onto the shore. Pearce's argument won't fly in court.

Consequently, any move to thwart birthright citizenship will require a constitutional amendment. So let's get to work! It's a big task, and if it's going to happen, it's going to require the cooperation of unlikely allies. Russell Pearce, call me.