

*E PLURIBUS UNUM FORGOTTEN:
FIVE IMMIGRATION POLICY MISTAKES SOME
CONSERVATIVES MAKE*[†]

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This Article discusses five mistakes that some conservatives are currently making with respect to immigration policy. The following are the five mistakes:

1. Neglecting the importance of assimilation in the public debate about immigration,
2. Opposing birthright citizenship,
3. Supporting racial profiling,
4. Supporting state and local (versus federal) law-enforcement policymaking, and
5. Failing to strike a pro-immigrant tone in discussing immigration.

These are not errors that all conservatives make—neither are they *conservative* mistakes. Conservatism, rightly understood, actually ensures that these mistakes are avoided. This Article addresses each of these five issues in order but focuses primarily on the first and last.

I. NEGLECTING ASSIMILATION

Assimilation is the neglected part of the immigration debate, and it deserves attention. Conservatives differ on what the appropriate level of immigration should be; I believe that America benefits from a fairly high level of immigration and that our nation can successfully assimilate these immigrants.¹ In any event, while conservatives can disagree over what is the right level for future immigration, conservatives can find common ground in promoting the assimilation of immigrants that are

[†] This speech is adapted for publication and was originally presented at a panel discussion as part of the Federalist Society's National Lawyers Convention on Civil Rights: Immigration, the Arizona Statute, and *E Pluribus Unum* in Washington, D.C. on November 18, 2010.

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¹ Compare Linda Chavez, *The Realities of Immigration*, COMMENT., July–Aug. 2006, at 34, 40 (explaining that there are no special circumstances today that would prohibit the assimilation that immigrants to the U.S. have achieved in the past), with PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER 18–19 (1995) (arguing that assimilation techniques fail today because of changed circumstances).

arriving, however many there are. A rather obvious effect of the conservatives' silence on assimilation is the lack of thoughtful and critical perspectives on this issue, since we will have the most insights.

The consensus on the importance of assimilation² is illustrated in the debate regarding the merits of bilingual education. Conservatives generally recognize that bilingual education is a bad idea³—believing instead that we should teach immigrants to speak English as quickly as possible. I believe that teaching immigrants to speak English is the most important goal for our public schools, and bilingual education simply does not do this.⁴ Another troubling example of failure to promote

² The importance of assimilation is nothing new. Speaking in 1915, former President Theodore Roosevelt stated the following:

The one absolutely certain way of bringing this nation to ruin, of preventing all possibility of it continuing to be a nation at all, would be to permit it to become a tangle of squabbling nationalities, an intricate knot of German-Americans, Irish-Americans, English-Americans, French-Americans, Scandinavian-Americans, or Italian-Americans, each preserving its [separate] nationality, each at heart feeling more sympathy with Europeans of that nationality than with the other citizens of the American Republic.

Roosevelt Bars the Hyphenated, N.Y. TIMES, Oct. 13, 1915, at 1 (newspaper quote of Theodore Roosevelt's speech at Knights of Columbus's Columbus Day Celebration on Oct. 12, 1915); see also ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA 118 (1992) ("The republic embodies ideals that transcend ethnic, religious, and political lines. It is an experiment, reasonably successful for a while, in creating a common identity for people of diverse races, religions, languages, cultures. But the experiment can continue to succeed only so long as Americans continue to believe in the goal."). For an excellent recent history and analysis, see MICHAEL BARONE, THE NEW AMERICANS (2001).

³ For example, Newt Gingrich states that "[b]ilingual education has been stunningly destructive." Eric Pfeiffer, *Gingrich Backs English Push as Official Language*, WASH. TIMES, Jan. 25, 2007, at A6, available at <http://www.washingtontimes.com/news/2007/jan/24/20070124-110503-4028r/>. See also Charles Ashby, *Illegal Immigration Focus for Tancredo*, DAILY SENTINEL (Oct. 9, 2010), http://www.gjsentinel.com/breaking/articles/illegal_immigration_focus_for (explaining that a Colorado State House Representative's first proposed bill in 1977 was to abolish bilingual education in Colorado); John J. Miller, *Going Native*, NAT'L REV. ONLINE (July 9, 2008, 11:39 AM), <http://www.nationalreview.com/blogs/print/165620> (noting that "[o]ne of the sad results of bilingual education is that [it] often leaves kids semi-literate in two languages and fluent in none").

⁴ In *Horne v. Flores*, where Arizona law required schools to adopt a Sheltered English Immersion (SEI) program in which almost all classroom instruction is in English instead of bilingual education instruction, the Court noted that "[research] indicates there is documented, academic support for the view that SEI is significantly more effective than bilingual education." 129 S. Ct. 2579, 2601 (2009). See also Rosalie Pedalino Porter, *The Case Against Bilingual Education: Why Even Latino Parents Are Rejecting a Program Designed for Their Children's Benefit*, ATLANTIC MONTHLY, May 1998, at 28, 30 (finding that the "accumulated research of the past thirty years reveals almost no justification for teaching children in their native languages to help them learn either English or other subjects").

assimilation is the fact that ballots are printed in foreign languages,⁵ an undesirable disincentive to assimilation that is required by federal law in many jurisdictions.⁶ Here again most conservatives are in agreement.

There are a variety of things government and non-government organizations can do to promote assimilation better. To be effective, both should consider the principles that make America work. Below is my list of the ten characteristics that, for all Americans (including those who have been here for generations), are of critical importance for assimilation and crucial to a successful multiracial, multiethnic society:

1. Don't disparage anyone else's race or ethnicity.
2. Respect women.
3. Learn to speak English.
4. Don't be rude.
5. Don't break the law.
6. Don't have children out of wedlock.
7. Don't demand anything because of your race or ethnicity.
8. Don't believe that working hard, in school and on the job, and saving money are "acting white."
9. Don't hold historical grudges.
10. Be proud of being an American.⁷

Ask yourself, what are the things that we should demand of both immigrants and long-time residents of the United States? Obviously, we cannot demand that all vote Republican, listen to the same music, eat the same foods, or dance the same dances. Instead, we welcome pluralism in these and many other areas. I propose, however, that we can and should encourage all Americans to adopt these ten characteristics. This will ensure the necessary assimilation without destroying pluralism.

⁵ *E.g.*, *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 162 (2006) (testimony of Linda Chavez, Chairman, Center for Equal Opportunity) (arguing that bilingual ballots are a waste of taxpayer money, unconstitutional, and "devalue[] citizenship for those who have mastered English as part of the naturalization process"); JOHN J. MILLER, *THE UNMAKING OF AMERICANS: HOW MULTICULTURALISM HAS UNDERMINED THE ASSIMILATION ETHIC* 133 (1998) ("Not everyone need speak English all of the time in America, but it must be the [common language] of civic life. Because the voting booth is one of the vital places in which citizens directly participate in democracy, it ought to be the official language of the election process."); *see also* LINDA CHAVEZ, *OUT OF THE BARRIO* (1991).

⁶ 42 U.S.C. § 1973aa-1a (2006).

⁷ Roger Clegg, *E Pluribus Unum*, NAT'L REV. ONLINE (Sept. 12, 2000, 1:00 PM), <http://old.nationalreview.com/comment/comment091200d.shtml>; *see also Comprehensive Immigration Reform: Becoming Americans—U.S. Immigrant Integration Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., and Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. (2007) (testimony of Roger Clegg, President and General Counsel, Center for Equal Opportunity), *available at* http://www.ceousa.org/index.php?option=com_docman&task=doc_view&gid=155&itemid=54.

II. THE THREE MISTAKES THAT PRESENT POTENTIAL CONSTITUTIONAL ISSUES

A. *Opposing Birthright Citizenship*

Some conservatives also err in opposing “birthright citizenship,” i.e., the automatic citizenship of any person born on U.S. soil notwithstanding the fact that the parents were in America as illegal immigrants. For example, John Eastman⁸ argues that the Constitution does not require birthright citizenship.⁹ I disagree. I think that the Fourteenth Amendment does support birthright citizenship,¹⁰ and I have never heard a persuasive argument otherwise.¹¹ Given the text of the Fourteenth Amendment, the unlikelihood that it will be amended, and the lack of any significant harm from birthright citizenship, I believe that conservatives should forget about opposing it.

B. *Supporting Racial Profiling*

As conservatives, we argue all the time that the government should not treat people differently because of skin color and their ancestors’ country of origin.¹² Conservatives argue against discriminatory treatment in government contracting,¹³ in college admissions,¹⁴ and in

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⁹ See, e.g., John C. Eastman, *Politics and the Court: Did the Supreme Court Really Move Left Because of Embarrassment Over Bush v. Gore?*, 94 GEO. L.J. 1475, 1484 (2006) (arguing that mere birth on U.S. soil is insufficient to confer U.S. citizenship unless the person is also “subject to the . . . jurisdiction of the United States”).

¹⁰ Linda Chavez, *Eastman Is Wrong: The Constitution Does Guarantee Birthright Citizenship*, DAILY CALLER (Aug. 24, 2010, 1:12 PM), <http://dailycaller.com/2010/08/24/eastman-is-wrong-the-constitution-guarantees-birthright-citizenship/#ixzz1Bnm8eie1> (arguing that “subject to the jurisdiction” of the United States required something more than mere birth on U.S. soil only for Indians and diplomats—not illegal immigrants).

¹¹ See, e.g., Roger Clegg, *Rethinking the Birthright Battle*, WASH. TIMES, Feb. 10, 2011, <http://www.washingtontimes.com/news/2011/feb/10/rethinking-the-birthright-battle/print/#>; James C. Ho, *Ban on Birthright Citizenship Unconstitutional*, WASH. TIMES, Apr. 11, 2011, at B1, available at <http://www.washingtontimes.com/news/2011/apr/8/ban-on-birthright-citizenship-unconstitutional/>.

¹² See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (Roberts, C.J., plurality opinion) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

¹³ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224, 238–39 (1995) (holding that when the government hires contractors, the government must justify any racial classification under strict scrutiny, i.e., requiring a compelling interest in the regulation and that the regulation is narrowly tailored).

¹⁴ See *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (holding that the university’s point-based undergraduate admissions policy was unconstitutional because its use of race was not narrowly tailored to achieve the state’s compelling state interest in diversity).

the hiring and promoting of firefighters.¹⁵ But we lose all credibility if we say that there is an exception and that it is okay for state and local government officials to take ethnicity into account in deciding whom to stop during an immigration sweep (when they are looking not for terrorists, not even for drug smugglers, but for people here—yes, illegally—looking for work).¹⁶ Such support for racial profiling is inconsistent and unprincipled.

Let me hasten to add that the controversial Arizona statute is drafted in a way that laudably attempts to avoid the problem of racial profiling by directly addressing that issue in the text.¹⁷ Of course, any statute can be implemented in a racially discriminatory way, but I am hopeful that will not happen in Arizona. As finally passed, the Arizona statute does not include racial profiling, and specifically prohibits law enforcement from unlawfully considering race, color, or national origin in carrying out the law.¹⁸

C. *Supporting State versus Federal Immigration Law-Enforcement Policymaking*

As a conservative, I generally prefer giving authority to private actors over public actors, and local over state, and state over federal. Immigration policy, however, is an element of foreign policy.¹⁹ And as such, it is an area where the federal government necessarily calls the shots.²⁰ Of course, as a constitutional matter, the Supreme Court has developed preemption tests to determine whether federal law actually

¹⁵ See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2664–65, 2681 (2009) (holding that a city may not disregard test results—and thus withhold promotions—solely based on the racial disparity of the scores).

¹⁶ See, e.g., Roger Clegg, *Perfect Profile*, NAT'L REV. ONLINE (June 19, 2003, 8:45 AM), <http://www.nationalreview.com/articles/207259/perfect-profile/roger-clegg>.

¹⁷ ARIZ. REV. STAT. ANN. § 11-1051 (LEXIS through 2010 legislation) (effective 2011) (“A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not consider race, color or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution.”); see also HANS A. VON SPAKOVSKY, THE HERITAGE FOUNDATION, THE ARIZONA IMMIGRATION LAW: RACIAL DISCRIMINATION PROHIBITED, 58 LEGAL MEMORANDUM 4 (Oct. 1, 2010), available at http://thf_media.s3.amazonaws.com/2010/pdf/lm0058.pdf (noting that the language of the Arizona law is “in fact stricter than[] the Department of Justice’s own guidance on racial profiling for federal law enforcement officers”).

¹⁸ SPAKOVSKY, *supra* note 17, at 1, 3, 6–7.

¹⁹ The Supreme Court held in *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889), that the federal government has the power to exclude foreigners as an essential attribute of sovereignty.

²⁰ *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941) (stating that where the federal government has already acted to regulate immigration and where a state also acts, “the act of Congress . . . is supreme; and the law of the State . . . must yield to it” (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824))).

invalidates subordinate government legislation.²¹ But whether or not states and municipalities are technically preempted in a given instance from involvement in regulating immigration, naturalization, and deportation, conservatives should be reluctant to encourage such involvement—even if the federal government is doing a lousy job.²²

Some conservatives argue that all the Arizona law and similar proposals do is enforce existing federal immigration laws.²³ In other words, Congress has enacted immigration statutes,²⁴ and the state is merely taking steps to ensure that they are enforced.²⁵ But the enforcement of statutes is never automatic and always involves discretionary decisions and prioritizing. Because of this, and because of the need for uniformity in the enforcement of immigration, the federal government, and not the states, ultimately has to call the shots in making basic policy decisions about the enforcement of immigration

²¹ See, e.g., *DeCanas v. Bica*, 424 U.S. 351, 356–57, 362–63 (1976).

²² But see Anthony W. Hager, *Federal Failure and Arizona*, AMERICAN THINKER (July 24, 2010), http://www.americanthinker.com/2010/07/federal_failure_and_arizona.html (“For a national government to refuse to exercise an authority—in this case, enforcing the borders—amounts to abandonment. . . . Enter Arizona’s immigration enforcement law. In fact, Arizona’s action is in keeping with our nation’s founding principles. Thomas Jefferson wrote in the Declaration of Independence that when a government no longer meets the needs of the governed, it is open to alteration. Arizona’s reaction is therefore mild. Instead of abolishing federal authority, or supplanting federal statutes, the state has upheld both in enforcing the existing national law.”).

²³ Thus, it is argued that Arizona’s immigration statutes support federal laws, requiring, for example, that state law enforcement verify a person’s immigration status with the federal government, ARIZ. REV. STAT. ANN. § 11-1051 (LEXIS through 2010 legislation) (effective 2011), uphold federal registration requirements, *id.* § 13-1509, and prohibit employers from intentionally employing an unauthorized alien, *id.* § 23-212.01; see also Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 465 (2008) (arguing that federal action does not displace all state immigration laws, but rather there are eight areas in which states can act without being preempted by federal immigration law, citing Arizona, Oklahoma, and Missouri as examples).

²⁴ *E.g.*, 8 U.S.C. § 1304(c) (2006) (“Every alien, eighteen years of age and over, shall at all times carry with him and have in his personal possession any certificate of alien registration Any alien who fails to comply with the provisions of this subsection shall be guilty of a misdemeanor”); *id.* § 1373(c) (“The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.”).

²⁵ *E.g.*, ARIZ. REV. STAT. ANN. § 11-1051 (2010) (effective 2011) (“For any lawful stop, detention or arrest made by a law enforcement official or a law enforcement agency of this state . . . where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. . . . The person’s immigration status shall be verified with the federal government pursuant to 8 United States Code section 1373(c).”).

statutes.²⁶ If the shoe were on the other foot, and state and local governments were second-guessing federal policy in a way that conservatives disliked (for example, by declaring “sanctuary cities”), we would be quick to make this point, and rightly so.

III. FAILING TO STRIKE A PRO-IMMIGRANT TONE

Finally, many conservatives err in failing to strike a pro-immigrant tone. Again, this is a failure of some but not all conservatives. There is nothing wrong with people wanting to come to the United States. There is nothing wrong with people wanting to immigrate, look for jobs, and thus gain better lives for themselves and their families. That is the primary reason why we have immigrants and why we have illegal immigrants.

The appropriate analogy is not people trying to break into a candy store, where we must drive them from our stores to protect our candy.²⁷ That is not the way to look at it. A better analogy is that America is a lifeboat, and a lot of people want to get into the lifeboat. Of course, not everybody should get into the lifeboat at once because then the lifeboat sinks and everyone drowns. You have to wait your turn. We may have to direct people and explain that, because we are almost full, you have to wait or go to another lifeboat. Although it is an imperfect analogy, the basic point is that there is nothing dishonorable or wrong with people wanting to come here and wanting to become Americans. We should *want* people to become Americans.

To use another analogy, it is similar to a sixteen-year-old who wants to join the Marines. Of course, sixteen-year-olds cannot join the Marines.²⁸ They have to wait a year or two. But our attitude when we catch a sixteen-year-old trying to join the Marines is not to vilify him. Rather, the attitude is to say—more in sorrow than in anger—“Kid, I admire your pluck; it’s great that you want to be a Marine; we hope that someday you are a Marine; come back. But we have rules, and you can’t be a Marine now; that’s just not the way the system works.” It is not evil to want to be a Marine. It is not evil to want to come to America looking for better job for yourself and have better opportunities for yourself and your family.

²⁶ See Margaret Stock, *S.B. 1070: The Unconstitutional and Inefficient Law that May Just Fix Immigration*, 23 REGENT U. L. REV. 367, 372–73 (2011).

²⁷ E.g., Patrick J. Buchanan, *Real Message of the Bush Amnesty*, WORLD NET DAILY (Jan. 12, 2004, 1:00 AM), http://www.wnd.com/news/article.asp?ARTICLE_ID=36555 (criticizing the 2004 plan for immigration reform: “[Bush’s] amnesty will send this message to the world: The candy store is open, and the Americans cannot protect it. Now is the time to bust in.”).

²⁸ See U. S. MARINE CORPS, TALKING TO YOUR SON OR DAUGHTER’S MARINE CORPS RECRUITER (2010), available at <http://www.lifeasamarine.com>.

CONCLUSION

While America faces legitimate concerns related to immigration—whether it is protecting the integrity of its borders or determining the economic and social limits of mass immigration—conservatives should not forget that immigration is, overall, a good thing. Instead of asserting dubious interpretations of the Constitution, conservatives should focus more on the assimilation of lawful immigrants. Conservatives best understand the principles that make America thrive, and they can foster these principles by welcoming immigrants who come to the United States to work for a better life. We must keep this in mind as we address illegal immigration and discuss future immigration policies.