

THE SUPREME COURT'S ERROR IN *TRUMP V. BARBARA*: CITIZENSHIP, CONSENT, AND THE SELF-GOVERNING REPUBLIC

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In *Trump v. Barbara*,¹ the Supreme Court struck down Executive Order 14,160,² which sought to clarify that the Fourteenth Amendment's Citizenship Clause does not automatically confer U.S. citizenship on children born in the United States to parents who are unlawfully present or only temporarily present. The majority held that mere birth on American soil, combined with territorial presence under U.S. laws, satisfies the requirement of being "subject to the jurisdiction thereof."

This decision represents a profound misreading of the Constitution's text, its historical context, the Founding principles of consent and self-government, and the limited scope of earlier precedents. Moreover, the Court wrongly constitutionalized a policy of universal territorial birthright citizenship that the Framers of the Fourteenth Amendment never intended and that undermines the very idea of a self-governing political community.

At the heart of the American experiment lies the principle that legitimate government rests on the consent of the governed. The Declaration of Independence announced that governments derive "their just powers from the consent of the governed" and that the American people had absolved themselves of all allegiance to the British Crown, assuming a "separate and equal station" under the laws of nature.³ Citizenship in this new order was not a feudal status of perpetual subjectship owed to a monarch's person, as articulated in the 1608 English decision *Calvin's Case*.⁴ It was an active, consensual membership in a political community dedicated to the natural equality of all human beings and the capacity of mankind for self-government.

Early American practice confirmed this understanding. After independence, states required Loyalists to take oaths of allegiance by specified deadlines; those who refused were treated as aliens, denied voting rights, office-holding, and other privileges of membership.⁵ Citizenship was tied to allegiance to the rightful sovereign of a free republic, not the mere accident of birth on American soil. The majority's narrative in *Trump v. Barbara*—that the story of American citizenship begins with English common-law *jus soli* and continued uninterrupted after the Revolution—is therefore ahistorical. The argument is often made that because states adopted many elements of the British common law, they must have adopted the common law of subjectship, and that rejecting this understanding rejects the foundation of the Anglo-American legal system. The truth of the matter, however, is that American jurisdictions generally received English common law only insofar as it suited local conditions and was not "repugnant" to republican principles; many feudal, ecclesiastical, or monarchical elements fell away.⁶ These included trial by combat, deodand (an object forfeited to the Crown because it had caused the death of a person), and the law of primogeniture, all of which were rejected because of their antagonism to republican principles. Birthright citizenship under the British common law was not adopted wholesale by the states; indeed, it was qualified in important respects by the new Republic's allegiance-based understanding of citizenship.⁷ The Founders deliberately rejected

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¹ *Trump v. Barbara*, 146 S. Ct. 2438 (2026).

² Exec. Order No. 14,160, *Protecting the Meaning and Value of American Citizenship*, 90 Fed. Reg. 8449 (Jan. 29, 2025).

³ THE DECLARATION OF INDEPENDENCE paras. 1–2, 32 (U.S. 1776).

⁴ *Calvin's Case* (1608) 77 Eng. Rep. 377 (KB).

⁵ See generally JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870* (1978).

⁶ See *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137, 144 (1829).

⁷ See Ian Wurman, *Jurisdiction and Citizenship*, 49 HARV. J.L. & PUB. POL'Y 315, 345–51 (2026) (collecting Revolutionary-era authorities tying membership to allegiance and protection rather than birthplace alone).

monarchical principles of allegiance: to import them wholesale into the Constitution is to ignore the revolutionary break that defined the nation.

The Fourteenth Amendment did not reverse this foundational understanding. Ratified in 1868, the Citizenship Clause—“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”⁸—was designed primarily to overturn *Dred Scott v. Sandford*,⁹ and secure citizenship for the newly freed slaves. It was declaratory of the Civil Rights Act of 1866,¹⁰ which provided that “all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.” Congressional debates make clear that “subject to the jurisdiction thereof” required more than physical presence or subjection to ordinary criminal and civil laws. Senator Jacob Howard, who introduced the clause, described it as simply declaratory of existing law and explained that it excluded “persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers.”¹¹ Senator Lyman Trumbull emphasized that jurisdiction meant “complete jurisdiction,” that is, “not owing allegiance to anybody else.”¹² Indians living under tribal authority were treated as quasi-foreign nations and excluded until Congress acted by statute.¹³ The clause thus presupposed full political allegiance and the absence of competing foreign allegiance—conditions that temporary visitors, diplomats, invading armies, and those present unlawfully do not meet. Not only did this formulation overturn the Supreme Court’s infamous *Dred Scott* decision that blacks could not be citizens of the United States; it also guaranteed that states could not deprive the newly freed slaves of the protections of privileges and immunities, due process, and equal protection, articulated in the remainder of Section 1 of the Fourteenth Amendment, by denying them state citizenship. And again, Congress (not the Supreme Court) was authorized to enforce these protections by appropriate legislation. It is implausible to assert that the common law practice of states prior to the Civil War should govern our understanding of the citizenship clause, when the purpose of the Fourteenth Amendment was to revoke state authority over national citizenship and to ensure that Congress, not the states, would have the enforcement power.

The majority’s reading renders the jurisdictional qualifier largely surplusage. If mere territorial presence and liability to local laws suffice, then the phrase adds almost nothing beyond the words “born . . . in the United States.” Reconstruction legislators, however, were addressing a specific problem: the status of a people who had no other homeland and who had demonstrated loyalty to the Union. They were not enacting a universal rule of *jus soli* that would automatically naturalize the children of every transient or lawbreaking foreigner.

Pre-Civil War state practices and selective judicial dicta cannot override the text and debates of 1866–1868. The Fourteenth Amendment explicitly makes federal citizenship primary and state citizenship derivative. The amendment transferred primary authority over national citizenship from the states to the federal government precisely to prevent states from denying membership to those who belonged; it did not strip Congress of its Section 5 enforcement power to define the boundaries of that membership in light of the original meaning.

*United States v. Wong Kim Ark*¹⁴ does not compel a different result. In that 1898 case, the Court held that a child born in the United States to Chinese parents who were legal, permanent residents (though barred from naturalization by treaty and statute) was a citizen. The decision rested heavily on English common-law notions of *jus soli* and treated the jurisdictional language as essentially coextensive with territorial presence, subject only to narrow exceptions for diplomats and invading armies. Yet *Wong Kim Ark* did not involve unlawful presence or temporary visitors engaged in birth tourism. Its facts concerned domiciled aliens who had made their home in the country. Moreover, Chief Justice Fuller’s dissent correctly observed that the Framers were

⁸ U.S. CONST. amend. XIV, § 1.

⁹ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), superseded by constitutional amendment, U.S. CONST. amend. XIV.

¹⁰ Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27.

¹¹ CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (statement of Sen. Howard).

¹² *Id.* at 2893 (statement of Sen. Trumbull).

¹³ The explicit reference to Indians not taxed in the Fourteenth Amendment occurs **not** in the section dealing with citizenship, but in Section 2 dealing with the question of determining who should be counted for purposes of determining representation, overturning the original three-fifths compromise contained in Article I. See U.S. CONST. amend. XIV, § 2; Act of June 2, 1924, ch. 233, 43 Stat. 253 (Indian Citizenship Act).

¹⁴ *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

familiar with the distinctions between Roman and feudal law and that nothing indicated an intention to adhere to citizenship principles derived from monarchical government after the Revolution.¹⁵ Subsequent reliance on *Wong Kim Ark* to constitutionalize citizenship for the children of illegal entrants stretches the precedent beyond its incorrect holding and ignores the original understanding recovered in the Reconstruction debates. The decision should be limited to its facts or, better still, reconsidered and reversed so that the Citizenship Clause can properly be read in light of the consent-based theory of membership that animated both the Founding and the Reconstruction amendments.¹⁶

The practical and theoretical consequences of the *Trump v. Barbara* ruling confirm its error. By converting birth on American soil into an automatic territorial entitlement, the decision devalues citizenship itself. Citizenship ceases to be membership in a distinct political community defined by shared commitment to sovereignty, self-government, and the principles of the Declaration; it becomes a boon available to anyone who can arrange physical presence at the moment of birth. This incentive structure encourages illegal entry, strategic birth tourism, and the creation of “anchor” claims that complicate enforcement of immigration law. No self-governing people can long remain sovereign if it lacks the authority to determine who joins the political community without its consent. The privileges and duties of citizenship—participation in self-rule, mutual obligation, and loyalty—are diluted when membership is extended to those whose parents owe primary allegiance elsewhere. National security is likewise implicated when the children of those who enter or remain in violation of law automatically acquire the full rights of citizens.

This is not some idiosyncratic “natural rights theory” being imposed upon the Constitution. The American Founding constitutes a singular event in political history: the first deliberate attempt by a people to constitute a political community on the basis of a universal principle—the natural equality of all human beings and its corollary that all legitimate government derives from the consent of the governed. Adherence to these principles articulated in the Declaration of Independence is what formed the “one people” who declared themselves a free, independent, and sovereign state. It is undeniable that the Constitution realizes those principles. The Declaration functions not merely as a revolutionary manifesto but as a permanent, aspirational standard against which the Constitution and subsequent American practice must be measured. The Constitution is the law, but the Declaration is the spirit that gives the law meaning. In one of the clearest statements from the Founding era linking the two documents, James Wilson, a signer of both the Declaration and the Constitution and a leading advocate for ratification in Pennsylvania, explicitly identifies the Declaration’s principles of equality and consent as the “broad basis” and “certain and solid foundation” upon which the new constitutional system rests.¹⁷ The Declaration of Independence absolved “Allegiance to the British Crown” and dissolved political connections, grounding government in the “consent of the governed.” Citizenship derived from choice, deliberation, and social compact—not accident of birth. As James Madison affirmed, “all power in just & free Govts. is derived from Compact.”¹⁸ The historical record clearly demonstrates that the founding generation based citizenship on this consent-based framework, not some irrelevant application of English common law governing subjects.

The separation of powers, federalism, and the other limits on governmental power are themselves the practical application of the fundamental principle that government must be based upon consent. As James Madison noted in *Federalist* No. 39, wherein he discusses the republican character of the new Constitution and asserts its federal composition:

It is evident that no other form [of government] would be reconcilable with the genius of the people of America; with the fundamental principles of the revolution; or with that honorable determination, which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government.¹⁹

¹⁵ *Wong Kim Ark*, 169 U.S. at 709 (Fuller, C.J., dissenting).

¹⁶ See Linda Denno, *Wong Kim Ark Must be Reversed*, AM. MIND (Jan. 30, 2025), <https://americanmind.org/features/the-case-against-birthright-citizenship-2/wong-kim-ark-must-be-reversed/> [<https://perma.cc/F59B-HQD2>].

¹⁷ James Wilson, Remarks in the Pennsylvania Ratifying Convention (Dec. 4, 1787), reprinted in 1 THE FOUNDERS’ CONSTITUTION ch. 2, doc. 14 (Philip B. Kurland & Ralph Lerner eds., 1987), <https://press-pubs.uchicago.edu/founders/documents/v1ch2s14.html> [<https://perma.cc/FLG9-3QHE>].

¹⁸ James Madison, Essay on Sovereignty (Dec. 1835), FOUNDERS ONLINE, Nat’l Archives, <https://founders.archives.gov/documents/Madison/99-02-02-3188> [<https://perma.cc/T95F-UPKG>].

¹⁹ THE FEDERALIST NO. 39, at 240 (James Madison) (Clinton Rossiter ed., 2003).

Justice Thomas's dissent in *Barbara* (joined by Justice Gorsuch) and Justice Alito's separate dissent supply the originalist corrective.²⁰ Justice Thomas emphasizes that jurisdiction requires domicile—permanent residence with intent to remain—coupled with the absence of foreign allegiance and genuine integration into the body politic. Temporary visitors and unlawful entrants do not satisfy these conditions. Their children may acquire foreign nationality through parental citizenship; they are not exclusively subject to American political authority at birth. The majority's contrary conclusion elevates a contested policy preference into settled constitutional orthodoxy, transferring from Congress to the judiciary the power to define the nation's membership. Section 5 of the Fourteenth Amendment explicitly assigns enforcement authority to the legislative branch. Congress remains free—and, under a faithful reading of the text, is authorized—to clarify that the Citizenship Clause does not extend to those whose parents are not lawfully domiciled and exclusively subject to U.S. jurisdiction.

The free republic of America is not a hotel open to whoever occupies a room at the moment of birth. It is a people who have consented to live under a Constitution, founded upon and dedicated to the proposition that all men are created equal and that just government rests on the consent of the governed. The children of those who enter or remain in defiance of that consent, or who visit only temporarily, do not automatically inherit membership. The Supreme Court's decision in *Trump v. Barbara* inverted this order of priority. The Court—or Congress acting under its enforcement power—can return the Citizenship Clause to its proper place in the architecture of a self-governing nation. A nation is not merely the land it occupies or the people born on its soil; it is a distinct political community defined by shared history, culture, a common commitment to its own sovereignty and survival, and, in the American case, dedicated to the proposition that legitimate government is based upon consent. The Constitution, properly understood, preserves that truth.

²⁰ See *Trump v. Barbara*, 146 S. Ct. 2438, 2504–05 (2026) (Thomas, J., dissenting); *id.* at 2524 (Alito, J., dissenting).