

THE COURT'S DECISION IN *BARBARA* WILL NOT BE THE LAST WORD

Gene Hamilton*

The passage of time will reveal the Supreme Court majority's decision in *Trump v. Barbara*¹ for what it is: a grandiloquent, outcome-oriented decision dressed in the foliage of faux-originalism, rooted in the sandy soils of rhetoric and improper historical practice. The majority's key holding, that the children of practically *anyone* born on United States soil will forever and always be citizens of the United States at birth due to the text of the Fourteenth Amendment, can and will change based on a proper interpretation by a future Supreme Court majority. The precise avenue by which we will reach that result remains to be seen,² but one possibility is that a future Congress will pass legislation that alters aspects of our existing statutory framework for implementing the Fourteenth Amendment's Citizenship Clause to ensure it only applies to those subject to our "complete" jurisdiction.³

In *Trump v. Barbara*, five Supreme Court Justices held that children born in the United States to parents unlawfully or temporarily present are, in fact, "subject to the jurisdiction" of the United States, and therefore, are U.S. citizens at birth.⁴ In so doing, the

* President and Co-Founder of America First Legal. Former roles include Deputy White House Counsel to President Donald Trump, Counselor to Attorney General at the U.S. Department of Justice, and Senior Counsel to the Secretary of Homeland Security.

¹ 146 S. Ct. 2438 (2026).

² President Trump recently issued a new Executive Order addressing the subject of birthright citizenship. See Exec. Order No. 14,418, 91 Fed. Reg. 51991 (Aug. 11, 2026).

³ Nothing in this article should imply that I believe that *only* a statutory change could preserve the privileges of citizenship to those who truly are, in a mutual way, "subject to the jurisdiction" of the United States.

⁴ *Barbara*, 146 S. Ct. at 2450; see U.S. Const. amend. XIV, § 1.

Court set aside President Trump's Executive Order of January 20, 2025, Protecting the Meaning and Value of American Citizenship.⁵

After embarking on a selective historical journey that primarily addressed general practices regarding birthright citizenship and allegiance to a sovereign as understood by some throughout English practice,⁶ the Court's majority decided that the drafters of the Fourteenth Amendment's text intended to put "the 'great question of citizenship' 'beyond the legislative power' altogether."⁷ Accordingly, the Court's majority determined that the Civil Rights Act of 1866,⁸ which had bestowed citizenship upon "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," had been entirely replaced and supplanted by the text of the Fourteenth Amendment (potentially implying that there could be no legislative adjustments).⁹

The Court's sweeping interpretation was not universal amongst its members. Justice Thomas said in dissent that Reconstruction citizenship required birth and domicile and that "subject to the jurisdiction thereof" excluded children of foreign temporary visitors.¹⁰ Justice Alito rejected the majority's account that the Clause transplanted British subjecthood and treated much of *United States v. Wong Kim Ark*¹¹ as dicta (an interpretation that I believe is certainly closer to the right answer).¹²

For his part, Justice Gorsuch said in dissent that a facial challenge to the Order should have failed if the Order was lawful as to temporary visitors, while separately questioning whether the Order can deny citizenship to children of parents who have made a permanent home here unlawfully.¹³ And while I certainly hold a position closer to that of any of those three justices—and certainly even closer to the original position of President Trump outlined in his January 20, 2025, Executive Order—this article addresses

⁵ See Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 20, 2025). It is worth noting that the Executive Order was just that: an Executive Order applied only on a prospective basis to "persons who are born within the United States after 30 days from the date of this order." *Id.* at § 2(b).

⁶ See *Barbara*, 146 S. Ct. at 2445–53.

⁷ *Id.* at 2449 (quoting Cong. Globe, 39th Cong., 1st Sess. 2891, 2896 (1866) (statement of Sen. Howard)).

⁸ Civil Rights Act of 1866, 14 Stat. 27.

⁹ *Barbara*, 146 S. Ct. at 2448–49 (quoting Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27).

¹⁰ *Id.* at 2474–76 (Thomas, J., dissenting).

¹¹ 169 U.S. 649 (1898).

¹² See *Barbara*, 146 S. Ct. at 2525, 2536–39 (Alito, J., dissenting).

¹³ See *id.* at 2545–47 (Gorsuch, J., dissenting).

the avenue identified by Justice Kavanaugh in his partial dissent: that a future Congress could amend § 1401 to end the practice of universal birthright citizenship.¹⁴

The Fourteenth Amendment, of course, provides that “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.”¹⁵ The Court’s majority in *Barbara* held that, essentially, the framers of the Fourteenth Amendment intended for its text to confer automatic birthright citizenship to practically *anyone* born in the United States (subject to limited exceptions),¹⁶ a position belied by subsequent congressional action.

Indeed, in *Elk v. Wilkins*, the Court held that a person born a member of an Indian tribe was not a citizen under the Clause, because “subject to the jurisdiction thereof” requires being “not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance.”¹⁷ Congress later conferred citizenship on non-citizen Indians born in the United States by statute.¹⁸ The current text of 8 U.S.C. § 1401 provides that “[t]he following shall be nationals and citizens of the United States at birth,” including “(a) a person born in the United States, and subject to the jurisdiction thereof.”¹⁹

A future Congress could amend § 1401(a), or add a subsection or subsections, so that a person born here would not be a citizen at birth when they are not subject to our complete jurisdiction. For example, neither parent is a citizen, and both parents are unlawfully present or only temporarily present. Or lines President Trump’s most recent Executive Order is already administering: children of accredited foreign officials; births under hostile occupation; births in outlying possessions where statute does not confer

¹⁴ See *id.* at 2469 (Kavanaugh, J., concurring in the judgement and dissenting in part).

¹⁵ U.S. CONST. amend. XIV, § 1.

¹⁶ See *Wong Kim Ark*, 169 U.S. at 693 (children of foreign sovereigns or their ministers, persons born on foreign public ships, children of enemies during hostile occupation, and children of members of the Indian tribes); *Barbara*, 146 S. Ct. at 2458–50 (narrow common-law exceptions for lands the sovereign did not control, areas temporarily outside sovereign control, and children of foreign ministers by a fiction of extraterritoriality).

¹⁷ 112 U.S. 94, 102 (1884).

¹⁸ See Act of June 2, 1924, ch. 233, 43 Stat. 253.

¹⁹ 8 U.S.C. § 1401(a).

citizenship;²⁰ and Exec. Order No. 14,418's additional categories for designated hostile actors and commercial arrangements to obtain a U.S. birth.²¹

In so doing, Congress would be acting consistent with (though not necessarily required by) the underlying issues identified by Justice Thomas pertaining to a person's domicile,²² and Justice Alito's reading of *Wong Kim Ark*.²³ It would also clarify the Court's "complete jurisdiction" language in *Elk*.²⁴

The statutory change would be met with an immediate flood of litigation seeking to enjoin any limits to the existing status quo. The outcome in the lower courts is likely determined by the *Barbara* majority's overbroad decision, at least immediately, but that does not mean that a future Court could not revisit the ultimate decision in *Barbara*. Indeed, Justice Kavanaugh wrote that the Court "could have (and in my respectful view, should have) decided the case on that narrow [statutory] ground," and that Congress could amend § 1401(a).²⁵

The Supreme Court's majority in *Barbara* purported to answer, once and for all, existential questions pertaining to the meaning and value of citizenship. But they do not get the last word. Congress can, and should, amend § 1401 to clarify that "subject to the jurisdiction thereof" requires domicile and complete political jurisdiction, not mere physical presence on U.S. soil. It should pursue that path immediately, while presidential action continues. Ultimately, the Supreme Court will adjudicate future cases addressing this issue in the manner its future members deem most consistent with the Constitution. But there is no reason for Congress and the President to stop trying to preserve the meaning of the most critical benefit any country can ever bestow: membership in the body politic as a *citizen*.

²⁰ See 8 U.S.C. § 1408.

²¹ See Exec. Order No. 14,418, § 2, 91 Fed. Reg. 51991, 51991–92 (Aug. 11, 2026).

²² See *Barbara*, 146 S. Ct. at 2474–75 (Thomas, J., dissenting) (concluding that Reconstruction citizenship required birth plus domicile and that the Clause excluded children of foreign temporary visitors).

²³ See *id.* at 2525, 2536–39 (Alito, J., dissenting) (rejecting the majority's account that the Clause transplanted British subjecthood and treating *Wong Kim Ark*'s broader language as dicta).

²⁴ *Elk*, 112 U.S. at 102 (requiring that a person be "completely subject to their political jurisdiction, and owing them direct and immediate allegiance").

²⁵ *Barbara*, 146 S. Ct. at 2469–70 (Kavanaugh, J., concurring in the judgment and dissenting in part).