

WHAT WENT WRONG IN *TRUMP V. BARBARA* AND WHAT DOORS REMAIN OPEN

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INTRODUCTION

Experts promised that *Trump v. Barbara*¹ would be a rout against President Trump's Executive Order "Protecting the Meaning and Value of American Citizenship." That order excluded from birthright citizenship children of tourists and illegal aliens. At best, the experts said, the President could lose only 7–2.² Indeed, one of the first judges to confront President Trump's Executive Order derided it: "There are other times in world history where we look back and people of goodwill can say, 'Where were the judges? Where were the lawyers?'"³

Yet the placid surface of the Chief Justice's majority conceals shifting currents below. The effort to recover the Citizenship Clause's original meaning has opened a new frontier of immigration Originalism—as to the Founding, the Fourteenth Amendment, and the statutes built on both. On a compressed timeline, Originalist scholarship convinced four Justices that the Constitution did not mean what many had assumed.⁴ *Barbara* now poses the next questions. What is the original public meaning of the Citizenship Clause? What children fall within *Wong Kim Ark*'s exceptions?⁵ What room remains to legislate? A majority of Justices identify as Originalists, so it is fair to judge their work against an Originalist scorecard.

The majority's Originalist analysis fails at every step: text, history, and precedent. This Essay takes up that failure. Part I disaggregates the vote. Part II identifies four errors in the majority opinion. Part III maps the avenues that remain—and assesses which are promising and which are harder than their proponents suppose.

I. *TRUMP V. BARBARA*: NUTS AND BOLTS

Chief Justice Roberts's opinion commanded five votes: his own, plus Justices Sotomayor, Kagan, Barrett, and Jackson.⁶ Justice Kavanaugh supplied the sixth vote for the judgment only. His separate opinion rests on the proposition that Executive Order 14,160 "does not violate the Fourteenth Amendment," but does contravene 8 U.S.C. § 1401(a).⁷ Justices Thomas, Alito, and Gorsuch dissented.

Four Justices—Kavanaugh, Thomas, Alito, and Gorsuch—wrote that the Fourteenth Amendment does not foreclose legislatively narrowing birthright citizenship. Justice Kavanaugh

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¹ *Trump v. Barbara*, 146 S. Ct. 2438 (2026). The Order under review was Exec. Order No. 14,160, *Protecting the Meaning and Value of American Citizenship*, 90 Fed. Reg. 8449 (Jan. 29, 2025). Following *Barbara*, President Trump signed a new Executive Order intended to further the goal of limiting birthright citizenship. See Exec. Order No. 14,418, *Continuing to Protect the Meaning and Value of American Citizenship*, 91 Fed. Reg. 51991 (Aug. 11, 2026).

² Erwin Chemerinsky, *Trump Is Likely to Lose on Birthright*, CONTRARIAN (Apr. 2, 2026), <https://www.contrariannews.org/p/trump-is-likely-to-lose-on-birthright> [https://perma.cc/4U5L-KA7B].

³ Brian Mann, *U.S. judge temporarily blocks Trump's birthright citizenship order*, NPR (Jan. 23, 2025), <https://www.npr.org/2025/01/23/g-s1-44411/birthright-citizenship-immigration-trump-border> [https://perma.cc/K5FF-DGRY].

⁴ See, e.g., Samuel Estreicher & Rudra Reddy, *Revisiting the Scope of Constitutional Birthright Citizenship*, 24 GEO. J.L. & PUB. POL'Y (forthcoming 2026), <https://ssrn.com/abstract=5223361>; Ilan Wurman, *Jurisdiction and Citizenship*, 49 HARV. J.L. & PUB. POL'Y 315 (2026); Randy E. Barnett & Ilan Wurman, *Trump Might Have a Case on Birthright Citizenship*, N.Y. TIMES (Feb. 15, 2025), <https://www.nytimes.com/2025/02/15/opinion/trump-birthright-citizenship.html>; Brief for Professor Richard A. Epstein as Amicus Curiae Supporting Petitioners, *Trump v. Barbara*, No. 25-365 (U.S. filed Jan. 27, 2026).

⁵ *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

⁶ *Barbara*, 146 S. Ct. 2438. Justice Jackson concurred; Justice Kavanaugh concurred in the judgment and dissented in part; Justice Thomas dissented, joined by Justice Gorsuch; and Justices Alito and Gorsuch also filed separate dissents.

⁷ *Id.* at 2469 (Kavanaugh, J., concurring in the judgment and dissenting in part).

wrote: “Congress could—consistent with the Fourteenth Amendment—amend § 1401(a) or otherwise enact new legislation establishing exceptions to birthright citizenship for children born to foreign citizens unlawfully or temporarily in the country. But Congress has not yet done so.”⁸ That sentence may be the most consequential in the United States Reports this Term. It charts a path from constitutional defeat into a legislative agenda.

Justice Gorsuch joined Justice Thomas in full and then wrote separately to say that the Executive Order was lawful as applied to the children of temporary visitors—“[b]y definition, temporary visitors to this country do not choose to make a permanent home here, and their children thus cannot claim the privilege of citizenship”⁹—while reserving doubt as to the children of long-settled unlawful residents. Justice Thomas also reserved “for another day the question whether the children of illegal aliens can be domiciled here.”¹⁰ So on the narrow question of birth tourism, the dissenting bloc is unified and the reasoning is developed.

II. BARBARA’S FOUR MAJOR ERRORS

A. Reading the Jurisdiction Requirement Out of the Clause

The Citizenship Clause confers citizenship on those “born . . . in the United States, and subject to the jurisdiction thereof.”¹¹ The majority treats the second condition as satisfied by anyone amenable to American law—which is to say, by everyone physically present, save a handful of persons enjoying diplomatic immunity. On that reading, the clause performs almost no work. A tourist is subject to our laws. So is a smuggler. So, for that matter, was every one of the eight Nazi saboteurs in *Ex parte Quirin*.¹²

The Civil Rights Act of 1866—which the Fourteenth Amendment was designed to constitutionalize—used the formulation “not subject to any foreign power.”¹³ When asked on the floor what “subject to the jurisdiction of the United States” meant, Senator Trumbull answered: “Not owing allegiance to anybody else. That is what it means.”¹⁴ Senator Howard described the clause as excluding “foreigners, aliens, who belong to the families of ambassadors or foreign ministers.”¹⁵

These are allegiance formulations, not geographic formulations. The majority’s answer—that there is “scant evidence” for a “dramatically revisionist” allegiance-plus-domicile reading¹⁶—does not even purport to engage the text or history. Its alternative mere-presence rule is an implausible reading of the text—albeit one that may have been liquidated by practice.

B. Importing Feudal Subjecthood into a Republic of Consent

The majority’s historical account runs through *Calvin’s Case* and Blackstone to the proposition that English *jus soli* “crossed the Atlantic with the colonists.”¹⁷ But English *jus soli* was a doctrine of perpetual, unrenounceable allegiance owed by subjects to a king. Justice Gorsuch, quoting the 1874 Congressional Record, described that allegiance as personal service that “was born with the child and only ended in the grave.”¹⁸

The American revolutionaries rejected the King and with him their status as subjects. And in 1868, Congress enacted the Expatriation Act, declaring the right of expatriation “a natural and inherent right of all people.”¹⁹ A Congress that in one breath declared allegiance renounceable did not in the next silently constitutionalize a feudal rule under which allegiance attaches irrevocably by the accident of birthplace. The majority never reconciles the two.

⁸*Id.*

⁹*Id.* at 2546 (Gorsuch, J., dissenting).

¹⁰*Id.* at 2505 n.10 (Thomas, J., dissenting).

¹¹U.S. CONST. amend. XIV, § 1 (emphasis added).

¹²*Ex parte Quirin*, 317 U.S. 1, 20–24, 37–38 (1942).

¹³Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27.

¹⁴CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866) (statement of Sen. Trumbull); see also *id.* at 572 (same, referring to “persons temporarily resident”); *Barbara*, 146 S. Ct. at 2505 (Thomas, J., dissenting) (quoting same).

¹⁵CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (statement of Sen. Howard).

¹⁶*Barbara*, 146 S. Ct. at 2453.

¹⁷*Id.* at 2445–46 (citing *Calvin’s Case*, 7 Co. Rep. 1a, 77 Eng. Rep. 377 (K.B. 1608), and 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 354 (1765)).

¹⁸*Id.* at 2545 (Gorsuch, J., dissenting) (quoting 2 CONG. REC. 3282 (1874)).

¹⁹Act of July 27, 1868, ch. 249, 15 Stat. 223, 223 (“[T]he right of expatriation is a natural and inherent right of all people . . .”).

C. Elevating Dicta Over Holding

Wong Kim Ark involved a child born to parents who were lawfully and permanently domiciled in the United States. The Court said so repeatedly; Justice Gorsuch emphasizes that the parents “had made their home in this country lawfully.”²⁰ The sweeping common-law disquisition on which the *Barbara* majority relies was not necessary to that judgment. Justice Alito puts the point with some asperity, explaining that the Court should not “take the position that our hands are tied by dicta in a sprawling 19th-century opinion that is, to put the point gently, very far from a model of careful judicial craftsmanship.”²¹ And he is right about why: “Too much is at stake.”²²

The majority’s treatment of *Elk v. Wilkins* is the least persuasive part of the opinion. John Elk was born within the United States, resided here, and was in every territorial sense subject to American law—yet the Court held he was not “subject to the jurisdiction thereof.”²³ The *Barbara* majority relegates *Elk* to a footnote and explains it as an application of the same common-law rule.²⁴ But if territorial amenability to law were sufficient, *Elk* was wrongly decided, and the majority does not say so. The majority offers no principled basis for placing one class of people who could be criminally charged—and who were, on the majority’s reading, “subject to the jurisdiction thereof”—outside the Clause’s scope.

D. Facial Invalidation Without Salerno

The fourth error is procedural. Respondents mounted a facial challenge and won relief barring every application of the Executive Order. Under *United States v. Salerno*²⁵ and *Moody v. NetChoice, LLC*,²⁶ such a challenge fails unless “no set of circumstances exists” in which the Order could lawfully be applied. As Justice Kagan wrote, facial challenges are “hard to win.”²⁷ The majority never engages with that standard.²⁸ Both Justices Thomas’s and Gorsuch’s dissents pressed the point, and Justice Thomas laid out the infirmity of the facial position. Under the judgment below, the President “cannot enforce the Order against a child of an alien enemy or a child of a foreign spy.”²⁹

III. NEXT STEPS AFTER BARBARA

A. Kavanaugh’s Roadmap

The most important doctrinal disagreement in *Barbara* is between Justice Kavanaugh and everyone else. *Wong Kim Ark* identified four exceptions—children of foreign sovereigns and their ministers, children born on foreign public ships, children “of enemies within and during a hostile occupation of part of our territory,” and children of tribal members.³⁰ *Barbara* accepted that those four are a *closed set* that was fixed as of 1868.

But the constitutional practice is not “trapped in amber.”³¹ So Justice Kavanaugh supplies a two-part test: a new exception is permissible where it (i) rests on developments “largely unknown or unanticipated by the Framers of the Fourteenth Amendment,” and (ii) is “relevantly similar to the four previously recognized *Wong Kim Ark* exceptions.”³²

In his view, both conditions are satisfied for children of aliens unlawfully or temporarily present. Unlawful presence did not exist as a legal category in 1868; Congress imposed no general restriction on immigration until 1875.³³ And the unifying principle of the four exceptions—“especially in light of the exception for tribal American Indians”—is that the parents “were not

²⁰*Barbara*, 146 S. Ct. at 2546 (Gorsuch, J., dissenting); see *United States v. Wong Kim Ark*, 169 U.S. 649, 652, 693, 705 (1898).

²¹*Barbara*, 146 S. Ct. at 2524 (Alito, J., dissenting).

²²*Id.*

²³*Elk v. Wilkins*, 112 U.S. 94, 99–102 (1884).

²⁴*Barbara*, 146 S. Ct. at 2456 n.5.

²⁵*United States v. Salerno*, 481 U.S. 739, 745 (1987).

²⁶*Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024).

²⁷*Id.*

²⁸The majority cites neither *Salerno* nor *Moody*’s standard. Compare *Barbara*, 146 S. Ct. at 2444–58, with *id.* at 2504 (Thomas, J., dissenting), and *id.* at 2546 (Gorsuch, J., dissenting).

²⁹*Barbara*, 146 S. Ct. at 2504 (Thomas, J., dissenting).

³⁰*United States v. Wong Kim Ark*, 169 U.S. 649, 682, 693 (1898).

³¹*Barbara*, 146 S. Ct. at 2472 (Kavanaugh, J., concurring in the judgment and dissenting in part) (quoting *United States v. Rahimi*, 602 U.S. 680, 691 (2024)).

³²*Id.* at 2473.

³³See Page Act of 1875, ch. 141, 18 Stat. 477; Immigration Act of 1882, ch. 376, 22 Stat. 214.

U. S. citizens and were citizens of other nations, whether tribal or foreign.”³⁴ He closes with the operative sentence: such legislation “would pass constitutional muster.”³⁵

Justice Kavanaugh has propped a legislative door open. President Trump has already modeled his newest Executive Order to fit within Justice Kavanaugh’s framework. Among the Order’s new limits on automatic birthright citizenship, President Trump’s new Executive Order directs agencies to withhold recognition of citizenship for a child, neither of whose parents is a citizen, who is “born in a territory or territorial waters of the United States where citizenship is not conferred by Federal statute.”³⁶ That acknowledges the statutory basis of citizenship for children born in American territories, and conditions President Trump’s proposed change on statutory amendment.

And that distinction is already doing work. A district court has preliminarily enjoined Sections 2(a) through 2(c) of the new Order as to a certified class, concluding that “*Barbara* is the law of the land” and that the alien-enemy section does not fit any recognized exception. It left Section 2(d) alone.³⁷ The part that survived is the one that leaves the territorial question to what Congress has conferred by statute.

B. *The Enemy Exception Remains Undertheorized*

A second avenue invokes the enemy exception directly: declare unlawful mass entry an “invasion,” and treat the children of those who enter as falling within *Wong Kim Ark*’s carve-out for “enemies within and during a hostile occupation.”³⁸ The intuition has force. *Ex parte Quirin* confirms that covert, out-of-uniform individual belligerents are enemies in the constitutional sense.³⁹ The *Quirin* saboteurs occupied no territory and displaced no American authority—the United States caught and tried them, and executed six—yet their hypothetical American-born children would not have been citizens. Justice Thomas’s dissent makes precisely this point about the “child of a foreign spy.”⁴⁰

Judge Ho has already read *Barbara* the same way. Six weeks after the decision, concurring in a pair of Fifth Circuit citizenship appeals, he wrote that it is “unfathomable that a federal judge would extend the precious privilege of U.S. citizenship under the Fourteenth Amendment to those born to alien enemies,” and that because “the Supreme Court did not ultimately address these arguments in *Barbara*,” the point “remains an open question in future cases and controversies.”⁴¹

President Trump’s new Executive Order clarifies who, under the President’s view, fits within that category. He includes “alien enem[ies],” members of “designated Foreign Terrorist Organization[s],” and others that clearly fit within the context of an invading army.⁴²

And whether an influx constitutes an invasion is committed to the political branches. As Judge Ho has explained, there are no judicially manageable standards for adjudicating when an influx becomes an invasion; that judgment belongs to the branches accountable for repelling it.⁴³ He repeated the point last month, concurring in the en banc disposition of the Alien Enemies Act litigation: “determining the existence of a state of invasion is a quintessentially executive prerogative—not a judicial one,” and there is “no basis for requiring courts to defer to a Congressional declaration of war, but not a Presidential proclamation of invasion.”⁴⁴ If a State’s Article I, § 10 invocation of invasion lies beyond judicial second-guessing, a congressional finding rests on firmer ground still.

³⁴*Id.* at 2474.

³⁵*Id.*

³⁶ Exec. Order No. 14,418, § 2(d), 91 Fed. Reg. at 51991.

³⁷ *CASA, Inc. v. Trump*, No. DLB-25-201, 2026 WL 2592706, at *14 (D. Md. Sept. 2, 2026).

³⁸ *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898).

³⁹ *Ex parte Quirin*, 317 U.S. 1, 30–31, 35–38 (1942).

⁴⁰ *Barbara*, 146 S. Ct. at 2504 (Thomas, J., dissenting).

⁴¹ *Guerra Quezada v. United States*, No. 25-10372, 2026 WL 2364302, at *7–8 (5th Cir. Aug. 14, 2026) (Ho, J., concurring).

⁴² Exec. Order No. 14,418, § 2(a), 91 Fed. Reg. at 51991; see *Hamdi v. Rumsfeld*, 542 U.S. 507, 518–20 (2004) (plurality opinion) (recognizing that enemy combatants in the Global War on Terror are at war with the United States).

⁴³ *United States v. Abbott*, 110 F.4th 700, 727–28 (5th Cir. 2024) (en banc) (Ho, J., concurring in the judgment in part and dissenting in part); see U.S. CONST. art. I, § 8, cls. 4, 15; *id.* art. IV, § 4.

⁴⁴ *W.M.M. v. Trump*, 184 F.4th 780, 788–90 (5th Cir. 2026) (en banc) (Ho, J., concurring).

C. Collateral Consequences for Alien Parents

Finally, and independent of the citizenship question, Congress may address the incentive that *Barbara* leaves in place. *Barbara* rewards parental decisions, and the parents are aliens whose admission, presence, and treatment lie within Congress's plenary authority.⁴⁵

Congress may attach immigration consequences to entry undertaken to obtain a citizen child; may criminalize or license the commercial birth-tourism industry; may tighten visa adjudication where birth tourism is evident; and may narrow the derivative-benefit provisions that make a citizen child an instrument of the parents' own immigration strategy.

None of that disturbs the child's status. All of it operates on aliens, where congressional power is at its zenith and judicial review is most deferential. And no part of it requires overturning *Barbara*.

CONCLUSION

Barbara was wrongly decided. The majority substituted presence for allegiance, feudal subjecthood for republican consent, and dicta for holding. And while the form of the majority was Originalist, Justice Thomas shows that the substance was anything but.

Congress should legislate toward the original understanding of the Citizenship Clause. President Trump has already initiated the next round of consideration with his new Executive Order. And just as Congress passed the Partial-Birth Abortion Ban Act of 2003 to push back against *Planned Parenthood of Southeastern Pennsylvania v. Casey* and *Roe v. Wade*,⁴⁶ Congress can chip away at *Barbara*'s foundation.⁴⁷ Targeted legislation can begin that work. The Court said the Constitution does not permit the President to act alone. Four Justices said the Constitution permits Congress to act. That is an invitation, and it needs only one more vote.

⁴⁵See, e.g., *Arizona v. United States*, 567 U.S. 387, 394–95 (2012); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

⁴⁶*Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), and *Roe v. Wade*, 410 U.S. 113 (1973), both overruled by *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

⁴⁷Pub. L. No. 108-105, 117 Stat. 1201 (2003); *Gonzales v. Carhart*, 550 U.S. 124 (2007); see *America First Citizenship and Allegiance Act*, S. 4547, 119th Cong. (2026); *Citizenship Act of 2026*, S. 4954, 119th Cong. (2026).