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TRUMP V. BARBARA: HOW THE SUPREME COURT DODGED A BULLET ON BIRTHRIGHT CITIZENSHIP

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The Supreme Court's decision in Trump v. Barbara did far more than invalidate an overreaching executive order – it prevented a wholesale destabilization of American citizenship that could have echoed backward through generations. By a narrow but decisive majority, the Court rejected President Trump's attempt to narrow birthright citizenship, reaffirmed the core holding of *United States v. Wong Kim Ark*, and drew clear lines that future administrations will find difficult to cross.

Trump's executive order tried to rewrite the Fourteenth Amendment's Citizenship Clause by narrowing the meaning of "subject to the jurisdiction thereof." Under the executive order, a person born in the United States would not be a citizen at birth if, at the time of birth, both of the child's parents were either undocumented, or held only a nonimmigrant status (for example, F-1, H-1B, etc.). This clashed directly with the text and history of the Fourteenth Amendment and with 8 U.S.C. § 1401(a), which together embody the longstanding rule that almost all persons born on U.S. soil, regardless of their parents' immigration status, are citizens at birth.

The majority, in an opinion by Chief Justice Roberts, rejected the government's theory and reaffirmed the rule announced in Wong Kim Ark at the end of the nineteenth century. The Citizenship Clause, the Court said, is "declaratory" of the common-law principle of jus soli: if you are born in the United States and are subject to its laws, you are a citizen at birth, with only narrow, historically recognized exceptions such as the children of foreign diplomats, enemy occupiers, and, historically, members of Native American tribes before Congress extended citizenship by statute. The majority emphasized that

neither the word “legal” nor “permanent” nor any reference to parental status appears in the Citizenship Clause, and it declined to read them in. The Court rejected the idea that the meaning of “subject to the jurisdiction” could be transformed in response to modern political anxiety about unauthorized immigration or “birth tourism.”

“Citizenship, then and now,” Roberts states, “was the right to have rights—to freely participate in our political community. The Framers of the Fourteenth Amendment extended that promise to ‘every free-born person in this land.’ We keep that promise today.”

At oral argument, Justice Amy Coney Barrett had highlighted how “messy” and unworkable a parent-focused test would be. If citizenship turned on parental domicile, lawful presence, or subjective intent to remain, the government would be forced into endless, intrusive factual inquiries. Foundlings—abandoned infants whose parents are unknown—would languish in legal limbo if citizenship depended on the status of parents who cannot be identified. Even where parents are known, the government would have to reconstruct, years later, their precise legal status and even their state of mind at the time of birth. Justice Barrett’s hypotheticals, such as that of a U.S. citizen living abroad who returns briefly to the United States to give birth and then leaves again, underscored the absurdity of tying a newborn’s citizenship to parental “intent to stay.” The majority opinion took those concerns seriously, noting that a constitutional rule that invites such guesswork is not a rule at all, but an invitation to arbitrary decision-making.

Had the executive order been upheld, the immediate consequences for future children would have been profound. Children born in the United States to undocumented parents would no longer have citizenship at birth. Depending on the nationality laws of their parents’ home countries, some might qualify for citizenship elsewhere, but others would not, rendering them effectively stateless.

The order would also have swept in children born to parents in lawful but temporary status, including H-1B professionals, H-4 dependents, students, exchange visitors, and tourists. Newborns, however, are not “admitted” at a port of entry and are not assigned a nonimmigrant status at birth. It is far from clear what lawful status such children could hold, if any, from the moment of birth. Parents would have been thrust into a frantic race to file complex

applications with U.S. Citizenship and Immigration Services days after the child's birth, and innocent errors or delays could lead to their infants being treated as out of status and removable.

Beyond these immediate disruptions, the order threatened to draw U.S. citizen parents into the same web of suspicion. Once citizenship no longer flows automatically from birth on U.S. soil, vital records offices, hospitals, and federal agencies could start to demand proof that a child meets whatever conditions the executive or Congress has grafted onto the Constitution. Parents might have been asked to demonstrate not only their own citizenship or lawful status, but also that they were domiciled in the United States and intended to remain here at the time of birth. A U.S. citizen who had long resided abroad and returned home to give birth and before resuming life overseas, could have found her child's citizenship questioned on the ground that she lacked the necessary "ties" at the crucial moment. What is now a simple administrative act—recording the birth of an American child—could easily have become an adversarial process.

The most dangerous implications, however, laid in the potential retroactive use of a narrowed constitutional rule. During oral argument, Justice Sotomayor recalled the historical episode in which Native Americans, who had previously been treated as citizens in some contexts, were denied that status and even stripped of it based on shifting interpretations of law and policy. If the Court were to declare that the Fourteenth Amendment never guaranteed citizenship at birth to those whose parents were unlawfully present or only temporarily in the country, that logic would not be confined to future births. It would invite litigation and executive action to revisit and undo the citizenship of people now living as American citizens.

The majority addressed this concern obliquely by emphasizing continuity and reliance. It cited over 150 years of practice and precedent in which the United States has consistently treated birth on U.S. soil, with very limited exceptions, as sufficient for citizenship. By framing Wong Kim Ark as both historically grounded and repeatedly reaffirmed, the Court signaled that citizenship acquired under that understanding is not a mere policy choice but a constitutional baseline. To overturn that baseline would not simply correct an error; it would reorder the political community in ways the Fourteenth Amendment was adopted to prevent.

Justice Kavanaugh's concurrence, while more cautious in its constitutional analysis, helped solidify the result. He expressed some sympathy for the view that Congress might, in theory, have authority to define by statute certain narrow categories of noncitizens born here, but concluded that the existing statute, 8 U.S.C. § 1401(a), plainly grants citizenship at birth to almost all persons born in the United States. Whatever Congress's latent power might be, the President lacks any authority to override this statutory command by executive order. Kavanaugh's opinion stressed separation of powers: even if one accepts a more limited view of the Citizenship Clause, it is for Congress, not the president acting alone, to make changes of this magnitude. That concurrence, grounded in statutory interpretation and institutional humility, provided an additional barrier against presidential attempts to unsettle citizenship by decree.

In contrast, the dissents sketched the alternate future the country narrowly avoided. In the principal dissent, Justices Thomas and Gorsuch adopted a narrow reading of the Fourteenth Amendment's Citizenship Clause and would have upheld Trump's executive order. They argued that "subject to the jurisdiction thereof" does not simply mean being subject to U.S. laws in the ordinary sense, but requires a fuller, genuine allegiance and a lawful, consensual relationship with the United States. In their view, the Framers of the Fourteenth Amendment did not intend to confer automatic citizenship on the U.S.-born children of parents who had no legal right to remain in the country or who were present only fleetingly and conditionally. The dissenters relied heavily on historical sources and Reconstruction-era debates to claim that the Clause was aimed at freeing formerly enslaved people and securing their status, not at constitutionalizing a broad jus soli rule for all comers, regardless of parental status. They treated Wong Kim Ark as either wrongly decided or at least tightly limited to its facts: a child born in the United States to parents who were long-term, legally resident subjects of a foreign sovereign. From that perspective, the dissenters maintained that the Trump administration's interpretation was a permissible, even necessary, restoration of the original understanding of the Citizenship Clause, and that the executive order did not contradict the Constitution but implemented it.

Justice Alito wrote separately to stress practical and policy concerns, though he agreed with the core constitutional reasoning of Thomas and Gorsuch. He accepted the premise that "subject to the jurisdiction" incorporates a concept of

allegiance and lawful, non-transient presence. He argued that, in a modern context of large-scale unauthorized migration and what he termed "birth tourism," it is reasonable to interpret the Clause so that birthright citizenship does not extend to the children of those who deliberately evade the immigration laws or enter solely to secure citizenship for a child. Alito's dissent emphasized that the Constitution should not be read to "lock in" what he viewed as unintended consequences of a broad jus soli rule. He suggested that the political branches must retain flexibility to respond to contemporary problems, and saw Trump's order as a permissible exercise of that flexibility. While he disclaimed any desire to strip citizenship from those long recognized as Americans, his framework did not supply a clear constitutional barrier against future retroactive efforts; instead, he gestured to reliance interests and administrative practicality as reasons to proceed cautiously

Gorsuch also wrote a separate brief dissent, in which he suggested that Trump's executive order might violate the Constitution as it applies to the children of undocumented immigrants who intend to live in the United States permanently. "If those parents are not domiciled here," Gorsuch queried, "then where *are* they domiciled? And if the answer is nowhere," he continued, "how can we reconcile that conclusion with this Court's longstanding recognition that every person is domiciled somewhere?" Because the challengers in this case have argued that Trump's order is invalid in all circumstances, rather than just some, Gorsuch explained, "these questions may not be properly before us. But their answers are undeniably important to a Nation committed to a view of citizenship open to all children born here to parents who can call this country their home."

Layered over these doctrinal disagreements was a deeper dispute about the nature of citizenship itself. The majority and concurrences treated citizenship as a foundational status that must be stable, knowable, and insulated from day-to-day politics. They viewed the Citizenship Clause as a hard-won guarantee, adopted in direct response to Dred Scott and the exclusion of Black Americans from the political community, meant to fix in the Constitution a clear, objective rule for who belongs. The dissents, by contrast, cast citizenship as more contingent and malleable, something that can be recalibrated to reflect current policy concerns about migration and enforcement. Under that vision, the meaning of "subject to the jurisdiction" becomes a tool for shaping the membership of the polity rather than a safeguard against its manipulation. Had

the dissenters' view prevailed, the multigenerational implications would have been staggering. If X, born in the United States decades ago to parents now classified as outside the Fourteenth Amendment's protection, was never a citizen at birth, then X could not have lawfully passed citizenship to Y. If Y is not a citizen, Y cannot transmit citizenship to Z. Family trees that stretch back for generations in the United States would be legally reimagined as never having produced a single American citizen. Many who championed the executive order in the name of restricting immigration might have awoken to find that their own citizenship, and that of their children and grandchildren, rested on the very understanding of the Fourteenth Amendment they sought to undo.

By rejecting that path, the Court has allowed the United States to dodge a constitutional bullet. *Trump v. Barbara* confirms that citizenship acquired by birth on U.S. soil, subject to U.S. law, is not a revocable privilege but a constitutional guarantee. It closes the door, at least for now, on efforts to use executive power to narrow that guarantee and to reopen settled questions about who is American. It also restores a clear line between the political branches: whatever debates may arise in Congress about the outer edges of citizenship, the President cannot, by unilateral order, rewrite the constitutional and statutory rules that have defined the national community for more than a century.

Trump and many of his supporters envision mass deportations as a way to reshape the country's demographic and political future. What *Trump v. Barbara* underscores is the peril in trying to achieve that goal by tampering with the foundations of citizenship itself. Had the Court blessed the executive order, it would have created the legal and conceptual space to question the citizenship of millions, including many who never imagined their status could be in doubt. By instead reaffirming the Fourteenth Amendment's broad and inclusive promise, the Court has preserved not only the rights of today's newborns, but also the stability and integrity of American citizenship across generations.