

How the Right Could Actually End Birthright Citizenship

theatlantic.com/magazine/2026/10/birthright-citizenship-trump-barbara-supreme-court/688342

Quinta Jurecic

August 31, 2026

[Politics](#)

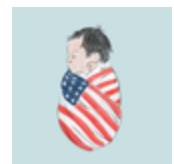
The conservative legal movement doesn't consider the Supreme Court's recent ruling to be the final word on the Fourteenth Amendment. And it already has a playbook for overturning it.



Concept by Oliver Munday; Illustration by The Atlantic

This article was featured in the *One Story to Read Today* newsletter. [Sign up for it here.](#)

Early last year, a woman named Liza and her husband were busy preparing for the birth of their child. On top of the normal stresses of pregnancy, they faced another, less typical concern: that their baby would be stateless. The couple had left Russia for the United States. Liza is legally in the U.S. on a temporary status, and her husband is seeking asylum. They could in theory have applied for Russian citizenship for the baby at the consulate, though Liza told me that would have been risky, in light of her husband's asylum application.



Before January 20, 2025, this would not have been a concern: Although Liza and her husband are Russian citizens, their baby, born on American soil, would have

automatically received U.S. citizenship under the Fourteenth Amendment of the Constitution. But an executive order signed by Donald Trump on the day of his second inauguration had called that guarantee into question. After February 19, according to the order, only children with at least one biological parent who was either a U.S. citizen or a green-card holder could be legally considered American. That would have left Liza's baby without U.S. citizenship—or citizenship anywhere at all. Liza, who asked that I withhold her last name out of concern for her family's safety, worried that her child would be entirely without legal protection if she and her husband were deported.

"I was really, really anxious," she said. "I was even blaming myself, like, *Why didn't I have the baby sooner?*" On January 21, Liza and four other expectant mothers joined a lawsuit against the order—one of several challenges to Trump's decree. (The plaintiffs sued using pseudonyms or only their first names, to protect their identities.) Within days, federal courts blocked the policy from going into effect.

At the end of June, a year and a half after Trump issued the order, the Supreme Court [ruled in *Trump v. Barbara* that the policy violated the Fourteenth Amendment](#). Civil-liberties groups and immigration advocates cheered the ruling. Headlines declared it a major loss for Trump. Anna O. Law, a political scientist who studies constitutional law and immigration at CUNY, told me she had been scheduled to join two news broadcasts to discuss the ruling. Once the Court decided against Trump, both canceled because, as one put it, "the danger has passed."

But the Court made its decision by [a far tighter margin](#) than most observers had anticipated: Only five of the nine justices took the view that Trump's executive order was constitutionally prohibited. Four justices, all conservatives, would have allowed at least some restrictions on birthright citizenship. "*Trump v. Barbara* was not a win; it was a reprieve," Law said.

Administration officials were hardly coy about their plans. "We have to keep fighting," Vice President Vance told the Fox News host Laura Ingraham, "because we actually have an opportunity to reverse this decision." A month later, the White House [announced a second, narrower executive order purporting to restrict certain limited categories of people from birthright citizenship](#), such as children born to members of legally designated foreign terrorist groups.

The new order also appears largely unconstitutional, and is more a howl of frustration than a serious effort to pare back the Supreme Court's ruling in *Barbara*. But it signals that MAGA's assault on the Fourteenth Amendment is far from over. And the right already has a proven model for how to overturn a Supreme Court ruling, one more

careful and systematic than a single executive order: the campaign against *Roe v. Wade*. The conservative movement never regarded *Roe* as the final word on abortion. The MAGA movement does not regard *Trump v. Barbara* as the final word on birthright citizenship.

The citizenship clause of the Fourteenth Amendment makes a simple guarantee: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.” The country ratified the amendment in 1868 as a response to the *Dred Scott* decision, which had barred Black Americans from citizenship. As the nation reconceived itself during Reconstruction, the Fourteenth Amendment represented a rejection of the system of racial subordination that had brought America to civil war—and it was meant to be definitive. Senator Jacob Howard, a supporter of the amendment, told his colleagues that the clause “removes all doubt as to what persons are or are not citizens of the United States.”

The Supreme Court reaffirmed the Fourteenth Amendment’s meaning 30 years later in *United States v. Wong Kim Ark*, in which it upheld the citizenship of a man born in San Francisco to Chinese parents. The Court identified only a handful of exceptions to the amendment’s broad sweep, excluding children not fully subject to U.S. law—such as babies born to foreign diplomats, soldiers in invading military forces, and members of Native nations. (In 1924, Congress passed the Indian Citizenship Act, which [automatically granted American citizenship to Native people born within the United States.](#))

Despite the clarity of the constitutional language, birthright citizenship has never been entirely uncontroversial. Along with the other Reconstruction amendments, it committed the country to a radical vision of equality—unlinking Americanness from a person’s race or how long their family had been in the country.

Even after the Court’s ruling in *Wong Kim Ark*, Chinese Americans—including Wong himself—had to fight to convince immigration officials of their status as citizens. During World War II, nativist groups in California tried, and failed, to challenge the citizenship of children born to Japanese immigrants. As the 20th century came to a close, right-wing activists fought to deny citizenship to the children of undocumented migrants. But those aiming to restrict who counted as an American strained against the plain meaning of the Fourteenth Amendment. The rejection of birthright citizenship has always been “a cause that’s in search of a theory,” Rachel Rosenbloom, a law professor at Northeastern University who studies immigration law, told me.

Despite this history of opposition, Trump lacked any real legal foothold for his executive order—a precarious position to be in as the Supreme Court prepared to hear the case. Fortunately for Trump, a small group of right-leaning law professors busied themselves with the work of casting doubt on the question that judges in the lower courts—and, for more than 150 years, nearly every other expert—had found so clear. Some were upfront about their motivations. “My political predisposition was actually to think birthright citizenship is morally quite a complex issue and that the Trump position might be the right moral answer,” Ilan Wurman, a law professor at the University of Minnesota, explained in an interview on *Moment of Truth*, a podcast produced by a MAGA-aligned think tank. He [co-wrote a New York Times op-ed in February 2025](#) and later published a law-review article. Both drew selectively from Anglo-American legal history to suggest that the words *subject to the jurisdiction thereof* might be read to mean “subject to America’s ‘social compact,’” whereby an individual gives up certain rights so that the state can guarantee others. People in the United States illegally haven’t entered into an “exchange of allegiance and protection,” Wurman argued, and therefore might not be guaranteed birthright citizenship for their children.

Scholarship proceeds through debate and contestation, but the convenient timing of this intervention and the patchiness of the historical work looked a great deal like an effort to sway the Court in Trump’s favor. Prior to Trump’s executive order, Wurman hadn’t published any academic work questioning the conventional understanding of birthright citizenship; he pressed forward with his op-ed, he said on the podcast, because he “wanted to move the Overton window.” Other scholars were appalled by his argument. Law, the CUNY professor, described the revisionist conclusions as “hogwash” that elide “mountains of scholarship on the other side.” Even fellow conservative originalists, who share Wurman’s approach to constitutional interpretation rooted in historical meaning, questioned his interpretation of *subject to the jurisdiction thereof*. Under common law and the public understanding of the Fourteenth Amendment at the time of the amendment’s drafting, they argued, *subject to the jurisdiction thereof* meant “subject to the law of”—which would include just about everyone on U.S. soil. “Aliens within the territory owe obedience to the law just like a natural-born citizen does,” the originalist law professor Keith Whittington wrote in a February 2026 paper. (Asked about his methodology, Wurman responded over email, “There is no single answer to the question of when sufficient historical data has been presented to make historical claims convincing.”)

Yet the revisionist scholarship found a receptive audience among the conservative justices on the Court. During oral arguments in April, most of the justices seemed skeptical of, even hostile toward, Solicitor General D. John Sauer’s case against

birthright citizenship. By the time the Court handed down its ruling at the end of June, however, only five—the three liberals, along with Chief Justice John Roberts and Justice Amy Coney Barrett—found the executive order to be unconstitutional. Justice Clarence Thomas drew from what he termed a “groundswell of new scholarship” in his dissent. Justice Brett Kavanaugh, dissenting in part, likewise pointed to the debate on the question to suggest that “the constitutional issue is not straightforward.” He argued that Congress would need to rewrite existing law to create exceptions to birthright citizenship for “children born to foreign citizens unlawfully or temporarily in the country.”

Anthony Michael Kreis, a law professor at Georgia State University, believes the revisionists’ rapid work helped sway several conservative justices. “Without that kind of sustained public offensive, I’m not sure that you have more than one or two people in the dissent,” he told me. Wurman seems to agree. “I think four votes on the Supreme Court for what was thought to be off-the-wall a year and a half ago is a huge victory,” he said in a taping of his own podcast shortly after the Court released its opinion.

After the ruling, Republican members of Congress rushed to follow Kavanaugh’s advice. Some lawmakers took a relatively modest approach: Representative Morgan Griffith argued for restricting the statutory granting of birthright citizenship in U.S. territories, where the Supreme Court has never extended the full reach of the citizenship clause. (Political leaders in Guam and the Northern Mariana Islands promptly objected.) Other members of Congress chose to attack the Court’s majority directly. Senator Eric Schmitt, for example, acknowledged that his bill restricting citizenship to children of citizens or green-card holders would be unconstitutional under *Barbara*, but said that his initiative would “restart our fight in the courts for sanity in birthright citizenship.”

Griffith’s and Schmitt’s proposals represent two different potential approaches for immigration restrictionists, neither of which precludes the other. One is to acknowledge the loss in *Barbara* and work within its constraints. The other approach is to get *Barbara* overturned.

“There’s a lot of practical things that this administration could do” with *Barbara* still on the books, Simon Hankinson, who researches immigration at the conservative Heritage Foundation, told me. When we spoke, he was fresh off a daylong event discussing how to respond to the Court’s ruling. Among other ideas, he suggested banning U.S.-based commercial surrogacy for foreign parents and aggressive visa enforcement to prevent women from traveling to the U.S. to give birth.

In August, Trump appeared to endorse both ideas, [issuing an executive order](#) on “birth tourism” alongside his follow-up order on birthright citizenship, which, among other

things, would prevent the children of foreign nationals born to U.S.-based surrogates from receiving citizenship. The new birthright-citizenship order claims to be compliant with *Barbara*, though much of it flatly contradicts the ruling. Parts of the decree engage in what amount to word games, redefining certain babies to fit within the existing exceptions for diplomats and invading armies under *Wong Kim Ark*. This second order is less ambitious than Trump's initial, sweeping attempt. It would bar only a small number of people from citizenship—and the government has already faced legal challenges.

For the new decree to have any real effect—and to roll back birthright citizenship more broadly—the right will need to undo *Barbara* in court. This is where the strategies developed during the long effort to overturn *Roe* will come into play. Over the course of decades, the conservative movement refined its legal arguments, stacked the courts with sympathetic judges, and chipped away at precedent until the decision collapsed.

The right has had remarkable success pursuing this strategy in recent years. The Roberts Court has reversed precedents that once protected affirmative action, shielded independent government agencies from presidential interference, and limited racial gerrymandering. Legal principles that long seemed stable are newly uncertain.

Conservatives should attack *Barbara* with “the model that dismantled *Roe*,” the conservative strategist Rachel Bovard [wrote in *First Things*](#), a right-leaning religious publication. “*Trump v. Barbara* must act as a litmus test for every future conservative nominee.” The movement is in many ways better situated today than it was after *Roe* was decided. Trump's spree of judicial appointments during his first term has widened the right's advantage in the courts, and this new generation of judges may be more open to the revisionist view of the Fourteenth Amendment. Less than a month after the Court's ruling in *Barbara*, the Senate confirmed Benjamin Flowers to the appellate bench. Flowers had filed an amicus brief in *Barbara* on behalf of a law professor who urged the Court to deny birthright citizenship for the children of undocumented immigrants.

For now, however, the effort to gut birthright citizenship lacks key votes on the Supreme Court. And there may be other obstacles in the path to overturning *Barbara*. Mary Ziegler, a law professor at UC Davis who studies the history of anti-abortion activism, told me that the *Roe* comparison likely “underestimates the level of difficulty” of weakening birthright citizenship. Conservatives opposed to *Roe* successfully painted the decision, which enshrined a new constitutional right, as an example of judicial overreach, whereas *Barbara* reaffirmed existing constitutional language. Ziegler also questioned whether opponents of birthright citizenship could muster the “singular focus” of the anti-abortion movement. But opponents of birthright citizenship are not starting

from zero: They can build upon the infrastructure that the conservative legal movement and anti-abortion activists spent decades putting into place.

“We came to the U.S. for protection,” Liza told me. She and her husband had arrived in America “having seen in the movies, having read in the books, and really thinking that it’s the most democratic and free country in the world.” As the Trump administration turned against immigrants, Liza was baffled by the sudden hostility from a country she had understood as a locus of freedom.

Liza gave birth in the spring of 2025, and her baby is an American citizen. Still unsettled, though, is whether her child will grow up in an America that recognizes the equality of all who are born within its borders.

This article appears in the [October 2026](#) print edition with the headline “The War on Birthright Citizenship.”

About the Author
