

**“Subject to the Jurisdiction Thereof”:
Birthright Citizenship and the Fourteenth Amendment, Part II**

**Hearing Before the House Committee on the Judiciary
Subcommittee on the Constitution and Limited Government**

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Wednesday, September 2, 2026

Chairman Roy, Ranking Member Scanlon, and distinguished members of the Subcommittee:

Thank you for the invitation to testify here today. Birthright citizenship is a matter of surpassing importance.

You all know that in the case of *Trump v. Barbara*, the Supreme Court held that the Constitution guarantees U.S. citizenship for every person born in this country, subject only to a few small exceptions set out 128 years ago in the *Wong Kim Ark* case. I could take my five minutes today to explain why that decision was correct as a matter of constitutional law, but I don't think that would address any live issue before the subcommittee. The Court has issued its decision. It has told us that the well-settled understanding of the Constitution's citizenship guarantee set out in 1898 in the *Wong Kim Ark* case was correct then, and is correct now. It has told us that nothing gives us license to make a hard swerve from the understanding of the Framers of the Fourteenth Amendment, and to cut back on the guarantees they provided. If there were any doubt about those matters before, the Court has dispelled that doubt. Folks in debating societies can debate whether they agree with the ruling, if that's how they like to spend their time, but for lawyers and lawmakers, the *law* has been decided.

Instead, I'd like to do two things in this statement. First, I'll address the legal constraints of the post-*Trump v. Barbara* world – to what degree, if any, does the Supreme Court's ruling leave the Executive or Congress room to hack away at birthright citizenship? And second, I want to talk about what it means to be an American, and how our citizenship law fits into that. Instead of explaining why the Supreme Court's decision in *Trump v. Barbara* was correct as a matter of constitutional law, I'll speak to why it was correct as a matter of this country's long-established understanding of what American citizenship is all about.

First, the law. In *Trump v. Barbara*, the Supreme Court explained that the Fourteenth Amendment guarantees U.S. citizenship to all persons born in the United States, with specified, very limited, exceptions – namely, children of foreign ambassadors; children of foreign enemies “within and during a hostile occupation of part of our territory”; and certain children of members of the Indian tribes.

The exceptions, the Supreme Court explained, have one common rationale. Each of them relates to children who are not “subject to the jurisdiction of the United States,” in the sense that the U.S. government is not in a position to exert power over them. It isn't in a position to exert power over the children of ambassadors, because it has granted full diplomatic immunity not only to ambassadors but also to their families.¹ It can't exert power over children born in parts of the country that are under military occupation by foreign armies, because the foreign armies have ousted the U.S. government from any position of control.² And so on.

¹ See *Trump v. Barbara*, 146 S. Ct. 2438, 2450 (2026); *Moncada v. Rubio*, 153 F.4th 733, 739 (9th Cir. 2025); *Carrera v. Carrera*, 174 F.2d 496, 498 (D.C. Cir. 1949); *In re Look Tin Sing*, 21 F. 905, 906 (C.C.D. Cal. 1884) (Field, J.). This understanding is memorialized in 8 C.F.R. § 101.3(a), excluding from citizenship the children of persons “listed in the State Department Diplomatic List, also known as the Blue List.”

² See *Trump v. Barbara*, 146 S. Ct. at 2449; *United States v. Wong Kim Ark*, 169 U.S. 649, 657-58, 665, 682-83, 688 (1898); *United States v. Rice*, 17 U.S. 246, 254 (1819).

So that's what the Supreme Court said. Does this give the U.S. government leeway to enact rules denying citizenship to children, born in this country, who *are* subject to U.S. government authority? The answer is no. President Trump recently issued an executive order purporting to limit birthright citizenship in the wake of *Trump v. Barbara*. It purports to deny citizenship to the U.S.-born children of noncitizens – even if both parents are green card holders who have lived here for decades – in a variety of arbitrary new situations, such as one parent being a janitorial worker at a foreign embassy, or a parent being an employee of an international organization such as the International Pacific Halibut Commission or the Great Lakes Fisheries Commission, or a parent being somebody the Administration has decided is an “alien enemy,” or when a parent has “engaged in commercial transaction” – like, presumably, buying a bus ticket – to ensure that she was “present in the United States . . . to give birth.”³

None of these categories are permissible under the Supreme Court's opinion in *Trump v. Barbara*, because none of them relate to the decisive key factor identified in that opinion: whether the U.S. government can exercise jurisdiction over the child. In each of those cases, the U.S. government can and does exercise jurisdiction, so in each of those cases, the child is a U.S. citizen no matter what the Administration says. That's all there is to it.

My second point is that that's as it should be. Ronald Reagan described this country as a City upon a Hill, one where, “if there had to be city walls, the walls had doors and the doors were open to anyone with the will and the heart to get here.”⁴ In this city, all who are born here are welcome. In America, we don't say that one person is a citizen, and another is not, based on their parents' race or status or attributes. Citizenship rules that allocate citizenship to one group of people, and deny it to another, based on who their parents are, are how they do things in Europe and Asia. Rules like that foreground race, ethnicity, and purity of blood. But that's not how we do it here. Our strength, now and throughout our history, has derived from our embrace of everyone who migrates to our shores. So we don't have a citizenship regime that's based on who your parents were. Rather, we're all in this together.

That birthright citizenship rule has been the source of the most powerful tool for assimilation and loyalty that the world has even known. Twenty-five Members of Congress, as of fairly recently, could say they were born in this country to two immigrant parents.⁵ Adult U.S. children of immigrants – the beneficiaries of our birthright citizenship rule -- have a stronger belief in the power of hard work, and are more likely to believe that this country is a place where people can get ahead if they're willing to work hard, than the rest of us do.⁶ In that sense, they're more American than the rest of us.

³ E.O. 14418, *Continuing to Protect the Meaning and Value of American Citizenship* (Aug. 6, 2026), at §§ 2(a), 2(b)(ii), 2(b)(iv), 2(c)(i).

⁴ Ronald Reagan, Farewell Address to the Nation (Jan. 11, 1989). *See also* John Winthrop, A MODEL OF CHRISTIAN CHARITY 47 (1630) (“For wee must consider that wee shall be as a citty upon a hill. The eies of all people are uppon us.”).

⁵ See A.W. Geiger, In 116th Congress, at least 13% of lawmakers are immigrants or the children of immigrants, Pew Research Center (Jan. 24, 2019).

⁶ See PEW RESEARCH CENTER, SECOND-GENERATION AMERICANS: A PORTRAIT OF THE ADULT CHILDREN OF IMMIGRANTS 11, 85, 118 (2013).

If you want to know how not to do it, look at European countries like France. There, we've seen large populations of people who -- in part because they didn't get birthright citizenship -- never came to identify with the country they were born and are living in. The rest of the country sees them as strangers. That's a recipe for trouble.⁷

But we don't do it that way here. If you are born here, you are ours. You see yourself as an American and others see you as an American. We don't have a hereditary class of noncitizens, and we shouldn't want one.

The Framers of the Fourteenth Amendment insisted on this rule because they had lived through *Dred Scott*, and they knew well what happened when someone decided that the government could tear away citizenship from people who were entitled to it because they were born here. The Framers enacted the Fourteenth Amendment to remove citizenship from political control. There was a Senator Cowan back in 1866, who urged that the Fourteenth Amendment citizenship guarantee was a mistake; he said it would "tie [government officials'] hands" if they later decided that U.S.-born folks whose parents had migrated from China *shouldn't* be citizens.⁸ But the American people rejected that. They saw the rule of birthright citizenship, in the words of Michigan's Senator Howard, as both "natural law and national law"; it wasn't something that politicians should be able to muck with.⁹

President Trump's recent executive order provides a good illustration of why the Framers made the right choice. The Trump Administration wants to deny citizenship to the children of "enemies," but who decides who is an "enemy"? Back during World War II, the government decided that every Japanese national in the country was an "enemy," and locked them up. It decided that U.S. citizens of Japanese extraction were security threats as members of "an enemy race"; it locked them up too.¹⁰ Would the current Administration have stripped away citizenship from those folks' children? That's what the Fourteenth Amendment was designed to prevent.¹¹

The Trump Administration wants to deny citizenship to children, born in this country, if part of their mothers' motivation in coming here was to have a child here. So government officials would have to read parents' minds, deciding what a person who had come to the U.S. to study or work *really* intended, deciding whether a birth was planned or unexpected, deciding which children, in the eyes of some bureaucrat, deserved citizenship based on an assessment of the parents' particular circumstances.

But the Supreme Court told us sixty years ago that government shouldn't be able to pick and choose that way. The idea that officials "temporarily in office [can] deprive another group of citizens of their citizenship" is inconsistent with the "very nature of our free government."¹² That's why the

⁷ See David Martin, *Membership and Consent: Abstract or Organic?*, 11 YALE J. INT'L L. 278, 292-93 (1985); see also Marisa Cianciarulo, *Unauthorized Americans and European Outcasts*, 27 GEO. IMMIG. L. REV. 519 (2013).

⁸ CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866).

⁹ *Id.* at 2890.

¹⁰ *Korematsu v. United States*, 323 U.S. 214, 236 (1944).

¹¹ See generally Amicus Br. of Prof. Eric Muller, *Trump v. Barbara*, No., 25-365 (U.S. Feb. 26, 2026).

¹² *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967).

Framers told us that *everyone* born subject to the jurisdiction of the U.S. government is a citizen. It's the right rule.