

SUBJECT TO THE JURISDICTION THEREOF

Birthright Citizenship from

Reconstruction to Trump v. Barbara

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Author's Note

What follows is a collection of the record of birthright citizenship in the United States from Dred Scott (1857) until Trump v Barbara (2026). It draws from court rulings, governmental letters and records, and other writings of the time. All but the afterwards was written and collected in the early summer of 2026, before the Trump v Barbara ruling.

I. The Spark

Dred Scott sued for freedom in Missouri and was sold to owners in New York, creating a Federal case which landed in the Supreme Court.

The decisions sparked reactions ranging from the Civil War to the 14th Amendment.

March 6, 1857 - Dred Scott v. Sandford, 60 U.S. 393

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen?

We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.

March 6, 1857 - Chief Justice Roger Taney, majority opinion

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect.

April 9, 1866 - Civil Rights Act of 1866, 14 Stat. 27

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.

June 16, 1866 - 39th Congress of the United States

The same Congress, shortly afterwards, evidently thinking it unwise, and perhaps unsafe, to leave so important a declaration of rights to depend upon an ordinary act of legislation, which might be repealed by any subsequent Congress, framed the fourteenth amendment of the constitution.

July 28, 1868 - Fourteenth Amendment to the Constitution of the United States

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.

II. What They Said It Meant

Birthright citizenship, or jus soli (from the soil) citizenship, is guaranteed as only qualified by births "subject to the jurisdiction" of the United States. There is a range of interpretation in the discussions by lawmakers while crafting both The Civil Rights Act of 1866 and the 14th Amendment. The Civil Rights Act used different language, "not subject to any foreign power." Discussions of who qualifies range from those the United States cannot make citizens (diplomats whose allegiance is formally and legally committed to a foreign sovereign) to those it chose not to make citizens, like "Indians not taxed."

February 1, 1866 - Senator Lyman Trumbull, 39th Congress Congressional Globe, p. 572

We cannot make a citizen of the child of a foreign minister who is temporarily residing here...upon investigation it was found that a sort of allegiance was due to the country from persons temporarily resident in it whom we would have no right to make citizens.

...

I said not subject to any foreign power. I wanted to say born in the United States and owing allegiance to the United States, but I was aware that there is a sort of allegiance for persons temporary resident in the United States whom we have no right to make citizens.

...

Then it was proposed to adopt the amendments it now stands [*note: not the final version*], that all persons born in the United States not subject to any foreign power, excluding Indians not taxed, shall be citizens.

...

What does the phrase 'Indians not taxed mean?...It is a constitutional term used by the men who made the Constitution itself to designate...a class of persons who were not a part of our population...They are not counted in the census. They are not regarded as part of our people.

1866 - Senator Trumbull, asked what 'subject to the jurisdiction thereof' means Congressional Globe, 39th Congress

Not owing allegiance to anybody else. That is what it means.

1866 - Representative John Bingham, framer of the Fourteenth Amendment
Congressional Record, p. 1291

Within the jurisdiction of the United States parents not owing allegiance to any foreign sovereignty.

1866 - United States Senate, Congressional Globe, 39th Congress, 1st Session, Senate floor debate on the Fourteenth Amendment

Senator William Pitt Fessenden (R-Maine): Suppose a person is born here of parents from abroad temporarily in this country.

Senator Benjamin Wade (R-Ohio): The Senator says a person may be born here and not be a citizen. I know that is so in one instance, in the case of the children of foreign ministers who reside near the United States.

February 1866 - Senators Cowan and Howard, opposing the Civil Rights Act
Congressional Record, p. 2890

Senator Howard: I hope that the amendment to the amendment will not be adopted. Indians born within the limits of the United States, and who maintain their tribal relations, are not, in the sense of this amendment, born subject to the jurisdiction of the United States.

Senator Cowan: We can't have children of gypsies, children of Chinese immigrants, we can't have them become citizens. Have they any more rights than a sojourner in the United States?

March 27, 1866 - President Andrew Johnson, veto message
Congressional Record, p. 1679

By the first section of the bill, all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States. This provision comprehends the Chinese of the Pacific States, Indians subject to taxation, the people called Gypsies, as well as the entire race designated as blacks, persons of color, negroes, mulattoes, and persons of African blood. It would, in my opinion, exchange the condition of the children of all domiciled aliens and foreigners, even if not naturalized.

Note: Johnson opposed the act and is saying the children born in the United States to resident alien parents would receive citizenship.

April 1866 - United States Senate

The Civil Rights Act passed overriding the Presidential veto.

1873 - Attorney General George H. Williams, letter to President Ulysses S. Grant
Papers Relating to the Foreign Relations of the United States (1873), p. 1216

The word 'jurisdiction' must be understood to mean absolute or complete jurisdiction, such as the United States had over its citizens before the adoption of this amendment. Aliens, among whom are persons born here and naturalized abroad, dwelling or being in this country, are subject to the jurisdiction of the

United States only to a limited extent. Political and military rights and duties do not pertain to them.

Note: Williams voted for both the 1866 Civil Rights Act and the Fourteenth Amendment in his prior role as Senator from Oregon.

1880 - Thomas Cooley, The General Principles of Constitutional Law in the United States of America, pp. 242-43(Cooley: Michigan Supreme Court justice, dean of University of Michigan Law School)

The fourteenth amendment indicates the two methods in which one may become a citizen: first, by birth in the United States; and, second, by naturalization therein. But a citizen by birth must not only be born within the United States, but he must also be subject to the jurisdiction thereof; and by this is meant that full and complete jurisdiction to which citizens generally are subject, and not any qualified and partial jurisdiction, such as may consist with allegiance to some other government.

1884 - Francis Wharton, Commentaries on Law (7th ed.), p. 666(Wharton: former Assistant Attorney General of Pennsylvania)

But the object of the clause now specifically before us is (1) to confer citizenship on the negro race, excluding Indians and Chinese, and (2) to give equal civil rights, in terms hereafter to be more fully discussed, to all persons in the United States of whatever race.

1884 - Elk v. Wilkins, 112 U.S. 94Justice Horace Gray, majority opinion

The main object of the opening sentence of the fourteenth amendment was to settle the question as to the citizenship of free negroes, and to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and owing no allegiance to any alien power, should be citizens of the United States.

The evident meaning of these last words is, 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.

...

The alien and dependent condition of the members of the Indian tribes could not be put off at their own will without the action or assent of the United States. They were never deemed citizens of the United States except under explicit provisions of treaty or statute to that effect either declaring a certain tribe, or such members of it as chose to remain behind on the removal of the tribe westward, to be citizens or authorizing individuals of particular tribes to become citizens on application to a court of the United States for naturalization and satisfactory proof of fitness for civilized life...

III. Sacramento Street

Wong Kim Ark was a laborer. He was born at 751 Sacramento Street, San Francisco, CA. He wanted to return home.

August 1895 - Port of San Francisco

[I]n August, 1895, from a temporary visit to China, he applied to said collector of customs for permission to land, and was by the collector refused such permission...solely upon the pretence that he was not a citizen of the United States.

October 2, 1895 - District Court of the United States, Northern District of California Writ of Habeas Corpus

That the said Wong Kim Ark was born in the year 1873, at No. 751 Sacramento Street, in the city and county of San Francisco, State of California, United States of America, and that his mother and father were persons of Chinese descent, and subjects of the Emperor of China, and that said Wong Kim Ark was and is a laborer.

That at the time of his said birth his mother and father were domiciled residents of the United States, and had established and enjoyed a permanent domicile and residence therein at said city and county of San Francisco, State aforesaid.

That said mother and father of said Wong Kim Ark continued to reside and remain in the United States until the year 1890, when they departed for China.

That Wong Kim Ark has not, either by himself or his parents acting for him, ever renounced his allegiance to the United States, and that he has never done or committed any act or thing to exclude him therefrom.

March 28, 1898 - United States v. Wong Kim Ark, 169 U.S. 649 - Justice Horace Gray, majority opinion

The question presented by the record is whether a child born in the United States, of parents of Chinese descent, who at the time of his birth are subjects of the Emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the fourteenth amendment of the constitution: '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.'

March 28, 1898 - Wong Kim Ark, 169 U.S. at 693 Justice Gray, majority opinion - the rule

The fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single

additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes.

March 28, 1898 - Wong Kim Ark, 169 U.S. at 705 - Justice Gray - the holding

The facts of this case, as agreed by the parties, are as follows: Wong Kim Ark was born in 1873, in the city of San Francisco, in the state of California and United States of America, and was and is a laborer. His father and mother were persons of Chinese descent, and subjects of the emperor of China. They were at the time of his birth domiciled residents of the United States, having previously established and are still enjoying a permanent domicile and residence therein at San Francisco.

[T]he single question stated at the beginning of this opinion, namely, whether a child born in the United States, of parent of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States. For the reasons above stated, this court is of opinion that the question must be answered in the affirmative

March 28, 1898 - Chief Justice Melville Fuller, dissent - Joined by Justice John Marshall Harlan

I cannot accept the conclusion that persons born in the United States of foreign parentage, who have never been naturalized, are 'subject to the jurisdiction of the United States' in the same sense in which citizens of the United States are subject to that jurisdiction.

...

Blackstone distinguished allegiance into two sorts, the one natural and perpetual, the other local and temporary. Natural allegiance, so-called, was allegiance resulting from birth in subjection to the Crown, and indelibility was an essential, vital and necessary characteristic.

Date unknown, post-1898 - Justice John Marshall Harlan, lecture (Harlan had dissented in Wong Kim Ark)

Suppose an English father and mother went down to the hot springs to get rid of the gout, and while there, they have a child, now back in England. Is that child a citizen of the United States born of the jurisdiction thereof by mere accident of birth? Under Wong Kim Ark, he is.

I was one of the minority, and of course I was wrong.

IV. The Executive application of jurisdiction

The State Department determined whether children born in America were citizens. Here is what it said.

January 15, 1885 - Secretary of State Frederick Theodore Frelinghuysen: Ludwig Hausding, born in the United States to parents living temporarily in the country Papers Relating to the Foreign Relations of the United States (1885), p. 395

His claim for citizenship by birth was untenable, for by section 1992, Revised Statutes, it is made a condition of citizenship by birth that the person be not subject to any foreign power.

Sections 1992 and 1993 of the Revised Statutes clearly show the extent of existing legislation: that the fact of birth, under circumstances implying alien subjection, establishes of itself no right of citizenship; and that the citizenship of a person so born is to be acquired in some legitimate manner through the operation of statute.

January 21, 1884 - Secretary of State Frelinghuysen: Alfred P. Jacob, born in Philadelphia, registered in French consulate as a Frenchman Papers Relating to the Foreign Relations of the United States (1884), p. 135

His American birth at Philadelphia is not pertinent, it being asserted that his father registered him in the French consulate as a Frenchman.

Note: Jacob was not a citizen by birth because his registration as a foreigner exempted him from United States military duties. He was therefore not subject to all the duties of an American citizen and thus not 'subject to the jurisdiction' of the United States. Jacob only became a citizen when his father was naturalized, at which point Jacob was seventeen years old.

November 28, 1885 - Secretary of State Thomas Bayard: Richard Greisser, born in Ohio, moved to Germany before age two, lived there thereafter Papers Relating to the Foreign Relations of the United States (1885), p. 814

Richard Greisser was no doubt born in the United States, but he was on his birth 'subject to a foreign power' and 'not subject to the jurisdiction of the United States.' He was not, therefore, under the statute and the Constitution a citizen of the United States by birth.

Had he remained in this country till he was of full age and then elected an American nationality, he would on the same general principles of international law be now clothed with American nationality.

July 10, 1889 - U.S. Ambassador Robert Lincoln to Secretary of State James Blaine: Rudolph Ernest Brünnow, born in Michigan 1858, moved to Germany age five, applied for passport Papers Relating to the Foreign Relations of the United States (1889), p. 450

His own failure, during the ten years which have elapsed since he attained his majority, to assume any of the duties of our citizenship, and his present utter lack of a reasonably definite purpose ever to assume them, and, more, his declared purpose of its renunciation if necessary to obtain a petty office in Germany, make me reluctant to give him a badge of the citizenship he appears to value so lightly.

August 20, 1901 - Secretary of State John Hay: Carl Schimanek, born in the United States to alien parents, moved to Bohemia at age four - Papers Relating to the Foreign Relations of the United States (1901), p. 13

When a person who has attained his majority removes to another country and settles himself there, he is stamped with the national character of his new domicile; and this is so, notwithstanding he may entertain a floating intention of returning to his original residence or citizenship at some future period, and the presumption of law with respect to residence in a foreign country, especially if it be protracted, is that the party is there animo manendi [with intention to establish a permanent residence] and it lies with him to explain it.

1938 - Code of Federal Regulations, 22 C.F.R. § 33.23(a)-(c), United States passport application requirements

If the applicant's father was foreign-born, the applicant had to provide the date of the father's emigration to the United States, the period of his residence in the United States, and, if naturalized, the date and place of his naturalization as a citizen of the United States.

Such further information as the Secretary of State may require to establish satisfactorily the American citizenship of the applicant.

V. The Twentieth Century: Settled or Shifted?

Richard Flounoy's influence on theory and within the Executive Branch is a powerful force in a consistent interpretation for much of the 20th century.

1921 - Richard W. Flounoy, Jr. Dual Nationality and Election, 30 Yale L.J. 545, 552-553 (1921)

The law of this country concerning citizenship by birth has been misstated by a number of writers on international law, who have assumed that, in order that a person born in the United States of alien parents may have American citizenship, his parents must have been domiciled in this country at the time of his birth.

Both of those decisions relied to a considerable extent upon the decision in *Lynch v. Clarke*, in which the person concerned, who was declared a citizen of the United States, was born in this country of parents who were mere sojourners. All of these decisions were based upon the theory that the law of citizenship of the United States was taken from the common law of England, and the latter makes no distinction between persons born in the country of alien sojourners and those born of domiciled aliens.

"But if a Chinese merchant and his wife are returning from Europe to China via the United States, and a child is born to the woman in San Francisco the day before they sail, is such child, by the mere accident of having first seen the light in this country, a citizen of the United States?" Absurd as it may seem, the child is indeed a citizen of the United States under the law of this country.

Note: Richard W. Flounoy Jr. became Assistant Solicitor of the State Department and testified before Congress on the Nationality Act of 1940. Whether he shifted American policy or simply documented what the courts had already settled is the question this section cannot resolve.

June 2, 1924 - Indian Citizenship Act, 43 Stat. 253

All non-citizen Indians born within the territorial limits of the United States are hereby declared to be citizens of the United States.

October 14, 1940 - Nationality Act of 1940, 54 Stat. 1137, § 201(a)

The following shall be nationals and citizens of the United States at birth: (a) a person born in the United States, and subject to the jurisdiction thereof.

June 27, 1952 - Immigration and Nationality Act, 8 U.S.C. § 1401(a)

The following shall be nationals and citizens of the United States at birth: (a) a person born in the United States, and subject to the jurisdiction thereof.

Schuck & Smith, *Citizenship Without Consent*, Yale University Press, 1985

Hence the birthright status of children stem from consensual agreement between the state and those citizens most entitled to speak for the children until they could speak for themselves – their parents...

Three basic steps are required to achieve a law of citizenship at birth that is theoretically consistent, practical for addressing current policy problems, and consonant with the nation's fundamental claim that its government rests on the consent of the governed. The first step requires a reinterpretation of the Citizenship Clause of the 14th Amendment. Its guarantee of those born 'subject to the jurisdiction' of the United States...[should] embody... the conception of consensual membership and therefore refer only to the children of those legally admitted to permanent residence...

A communication to the Editor from Roger Smith, *The Social Contract*, Vol. 7 No. 1 (1996).

Schuck and I have never endorsed actually denying birthright citizenship to children of illegal aliens. We have simply suggested that the Constitution is most coherently read as permitting Congress to decide that question.

1990s–2000s - United States Congress

Multiple bills introduced to restrict birthright citizenship by legislation. Some implying a Constitutional right exists and some implying no Constitutional changes needed.

H.J.Res.357 (1975)

Proposing an amendment to the Constitution of the United States to restrict the requirement of citizenship at birth by virtue of birth in the United States to persons with legal resident mothers.

H.R.1363 (1995) - Citizenship Reform Act of 1995

A bill to amend the Immigration and Nationality Act to deny citizenship at birth to children born in the United States of parents who are not citizens or permanent resident aliens

H.R.319 (1999)

To clarify the effect on the citizenship of an individual of the individual's birth in the United States. Declares that the Congress has determined that a person born in the United States to a mother who is not a U.S. citizen, national, or immigrant, and is eligible to become or is a citizen or national of a country of which either of his or her natural parents is a citizen or national, shall not be a U.S. citizen solely by reason of U.S. birth.

VI. January 20, 2025, Executive Order 14160

It is the policy of the United States that no document shall be issued or accepted by any official of the United States Government accepting a claim of citizenship by a person born in the United States: (1) when that person's mother was unlawfully present in the United States and the father was not a United States citizen or lawful permanent resident at the time of said person's birth, or (2) when that person's mother's presence in the United States was lawful but temporary, and the father was not a United States citizen or lawful permanent resident at the time of said person's birth.

January 23, 2025 - Senior U.S. District Judge John C. Coughenour United States District Court, Western District of Washington, Seattle State of Washington v. Trump, 764 F.Supp.3d 1050

I've been on the bench for four decades, I can't remember another case where the question presented is as clear as this one is. This is a blatantly unconstitutional order.

February 19, 2026 - Brief for Respondents Trump v. Barbara, No. 25-365 Cecilia D. Wang et al., American Civil Liberties Union

The Citizenship Clause guarantees that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." That language drew on and reaffirmed a centuries-old, common-law tradition of citizenship by virtue of birth, rather than parentage, repudiating this Court's infamous decision in *Dred Scott*.

...

The qualifying words, "subject to the jurisdiction," signify the Framers' intent to "exclude, by the fewest and fittest words" the English common-law "exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory," and the "single additional exception" of children born into Native American Tribes.

...

The common-law rule and the common-law exceptions are thus two sides of one coin. Ambassadors had immunity for reasons of inter-sovereign comity, and hostile occupation severed practical application of the law. All other foreign nationals within a country, even temporarily, owed local allegiance and were subject to the law - and birth of their children yielded natural-born subjecthood. Domicile was irrelevant.

...

Lynch v. Clarke, the preeminent antebellum American case on birthright citizenship, specifically upheld the U.S. citizenship of a child born "of alien parents, during their temporary sojourn."

VII. Oral Arguments

The Executive Order was challenged and Oral Arguments at the Supreme Court were held on April 1st, 2026.

April 1, 2026 - 10:04 a.m. - Supreme Court of the United States Trump v. Barbara, No. 25-365 Oral Argument

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 25-365, Trump versus Barbara. General Sauer.

April 1, 2026 - Solicitor General D. John Sauer, opening On behalf of the Petitioners

The Citizenship Clause was adopted just after the Civil War to grant citizenship to the newly freed slaves and their children, whose allegiance to the United States had been established by generations of domicile here. It did not grant citizenship to the children of temporary visitors or illegal aliens, who have no such allegiance.

It has spawned a sprawling industry of birth tourism as uncounted thousands of foreigners from potentially hostile nations have flocked to give birth in the United States in recent decades, creating a whole generation of American citizens abroad with no meaningful ties to the United States.

April 1, 2026 - Justice Clarence Thomas

JUSTICE THOMAS: General Sauer, before we get into the broader national issues, would you start with Dred Scott? Dred Scott was a case about state citizenship. How does the Citizenship Clause respond specifically to Dred Scott and answers - or changes - or corrects its answer as to citizenship?

How much of the debates around the Fourteenth Amendment had anything to do with immigration?

April 1, 2026 - General Sauer

GENERAL SAUER: The principal focus of those debates has to do really not with immigrants but with the Indian tribes. The main goal, the one pervading purpose, as this Court said in the Slaughter-House cases, was to establish the citizenship of the freed slaves and their children.

...

April 1, 2026 - Chief Justice John Roberts

CHIEF JUSTICE ROBERTS: Well, starting with that theory, you obviously put a lot of weight on 'subject to the jurisdiction thereof,' but the examples you give to support that strike me as very quirky, you know, children of ambassadors, children of enemies during a hostile invasion, children on warships, and then you expand it to a whole class of illegal aliens are here in the country. I'm not quite sure how you can get to that big group from such tiny and sort of idiosyncratic examples.

You mentioned in your briefing and also this morning the problem of birth tourism. Do you have any information about how common that is or how significant a problem it is?

April 1, 2026 - General Sauer

GENERAL SAUER: No one knows for sure.

April 1, 2026 - Chief Justice Roberts

CHIEF JUSTICE ROBERTS: Having said all that, you do agree that that has no impact on the legal analysis before us?

April 1, 2026 - General Sauer

GENERAL SAUER: We're in a new world now, where 8 billion people are one plane ride away from having a child who's a U.S. citizen.

April 1, 2026 - Chief Justice Roberts

CHIEF JUSTICE ROBERTS: Well, it's a new world. It's the same Constitution.

...

April 1, 2026 - Justice Elena Kagan

JUSTICE KAGAN: Where does this principle come from, allegiance, domicile? Allegiance, I think you point to a Lincoln funeral speech as your primary example of where this principle comes from. It's certainly not what we think of when we think of the word 'jurisdiction.' The text of the clause, I think, does not support you. I think you're sort of looking for some more technical, esoteric meaning.

I think even your brief concedes that the position you're taking now is a revisionist one with respect to a substantial part of our history. What would it take - what do you think it should take to accept that story in terms of the magnitude of the evidence that we would need to see in order to change what I think people have thought the rule was for more than a century?

April 1, 2026 - General Sauer, in response

GENERAL SAUER: Page 572 of the Congressional Record, right at the beginning introducing the Civil Rights Act, Senator Trumbull says: I said not subject to any foreign power. I wanted to say born in the United States and owing allegiance to the United States, but I was aware that there's 'a sort of allegiance for persons temporary resident in the United States whom we have no right to make citizens.'

So Senator Trumbull says: The reason I haven't adopted the language and meaning that they say should be packed into these provisions is that everybody knows that the children of temporary visitors should not be citizens.

April 1, 2026 - Justice Kagan

JUSTICE KAGAN: Thank you, General.

...

April 1, 2026 - Justice Neil Gorsuch

JUSTICE GORSUCH: If domicile is the key linchpin to your argument, and I take it that it is, do we look at how domicile was understood in 1868, or do we look at it and how it's understood today in context of the INA?

Today, you can point to laws against immigration that are much more restrictive than they were - we really didn't have laws like that until maybe 1880. So, if somebody showed up here in 1868 and established domicile, that was perfectly fine without respect to anything, any immigration laws. There they were. And so why wouldn't we, even if we were to apply your own test, come to the conclusion that the fact that someone might be illegal is immaterial?

In none of the debates do we have parents discussed. We have the child's citizenship, and the focus of the clause is on the child, not on the parents. And you don't see domicile mentioned in the debates. That - the absence is striking.

April 1, 2026 - Justice Gorsuch

JUSTICE GORSUCH: So - so Congress could continually restrict who may lawfully be present more and more, and you would say that would be incorporated into it even though you're telling us to apply the original meaning of 1868?

At the end of the day then, this is a straight-up constitutional ruling you want from this Court, win, lose, or draw?

...

April 1, 2026 - Justice Samuel Alito

JUSTICE ALITO: Under the minimum definition of 'domicile,' which I think existed in 1868 and continues to exist today, a person's domicile is the place where he or she intends to make a permanent home.

Now, normally, you would think that a person who is subject to arrest at any time and removal could not establish a domicile, but we have an unusual situation here because our immigration laws have been ineffectively and, in some instances, unenthusiastically enforced by federal officials.

...

April 1, 2026 - Justice Amy Coney Barrett

JUSTICE BARRETT: General, you said in your reply brief that the children of slaves who were brought here unlawfully, in defiance of laws forbidding the slave trade, would, in fact, be citizens.

And you can imagine that their parents were not only brought here in violation of United States law but were here against their will and so maybe felt allegiance to the countries where they were from.

But that's not textual. So how do you get there?

How would that apply to the children of illegally trafficked people today? Would the same reasoning apply?

April 1, 2026 - General Sauer

GENERAL SAUER: It would turn on whether the parents are lawfully domiciled in the United States.

...

April 1, 2026 - Justice Ketanji Brown Jackson

JUSTICE JACKSON: Did I understand you to say that domicile is going to be eventually or is controlled by Congress, who is domiciled? I'm struggling to figure out who is domiciled in your argument.

If that's so, then doesn't it make the domicile for the purpose of the Fourteenth Amendment turn ultimately on Congress's will in a way that the Framers did not intend? My understanding was the Framers put this Citizenship Clause into the Constitution to prevent future Congresses from being able to affect citizenship in this way.

So, if that's true, then it ultimately would impact, in your theory, whether or not this person can claim that they have citizenship for Fourteenth Amendment purposes based on Congress's determination. And I just thought that's what the Fourteenth Amendment was trying to get away from.

...

April 1, 2026 - Justice Brett Kavanaugh

JUSTICE KAVANAUGH: How should we think about the text of the Fourteenth Amendment, 'subject to the jurisdiction thereof,' as distinct from the different language of the Civil Rights Act of 1866, which refers to 'persons not subject to any foreign power'? Those texts are on their face different.

By the time of the 1940 and 1952 congressional actions where Congress repeats 'subject to the jurisdiction thereof,' given Wong Kim Ark, one might have expected Congress to use a different phrase if it wanted to try to disagree with Wong Kim Ark or to eliminate ambiguity. And yet Congress repeats that same language, knowing what the interpretation had been. So how are we to think about that?

If the Court accepted the challengers' interpretation of Wong Kim Ark, her clients would prevail, and the Court could write a fairly short opinion to resolve the case.

...

April 1, 2026 - Justice Sonia Sotomayor

JUSTICE SOTOMAYOR: You are asking us to overrule Wong Kim Ark. Well, there, Wong Kim Ark's parents were domiciled in the U.S., but they owed loyalty

to China. They eventually returned to China. So they didn't have a primary allegiance to the United States.

Hintopoulos: the respondent unlawfully overstayed her visa and gave birth to a child here. The Court, Harlan II, wrote: The child is, of course, an American citizen. That person wasn't domiciled here lawfully. So you're asking us to overrule that case?

When we ruled in *Thind* that Indians could not become citizens, the government then after began to unnaturalize many Indians who had been sworn in as citizens. The logic of your position, if accepted, is that the next president - this president or the next president or a Congress or someone else could decide that it shouldn't be prospective.

April 1, 2026 - General Sauer

GENERAL SAUER: No. We are not asking for any retroactive relief.

...

April 1, 2026 - Chief Justice John Roberts

CHIEF JUSTICE ROBERTS: We've heard a lot of talk about Wong Kim Ark, and you dismiss the use of the word "domicile" in it. It appears in the opinion 20 different times, including in the question presented and in the actual legal holding. Isn't it at least something to be concerned about to say that since it's discussed 20 different times and has that significant role in the opinion that you can just dismiss it as irrelevant?

April 1, 2026 - Cecilia D. Wang

MS. WANG: I think we have to look at what the controlling rule of decision is in Wong Kim Ark. Justice Gray takes pains in the majority opinion to set out his analysis. He first starts with a premise that in construing the Fourteenth Amendment Citizenship Clause, we look to the English common law. Under English common law, if you are born in the dominions of the sovereign, you owe natural allegiance, and those who are present in the dominions of the sovereign owe temporary allegiance for as long as they're present. The only exceptions at common law were ambassadors, people born on foreign ships, and people who are born during periods of foreign occupation. That's the closed set of exceptions.

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April 1, 2026 - Justice Elena Kagan

JUSTICE KAGAN: Everything you say strikes me as, yeah, that's the way I read it too, but then what are those 20 domicile words doing there? Why did they keep on - why did they sprinkle that in the opinion?

April 1, 2026 - Cecilia D. Wang

MS. WANG: Those were the stipulated facts in the case. And it's clear we have textual evidence in the majority opinion that they were simply saying this is an a fortiori application of that controlling rule that comes from the English common law. Justice Gray writes, after setting out the English common law rule and the exceptions, that the amendment in clear words and manifest intent includes children born within the territory of the United States of all other persons of whatever race or color domiciled within the United States. And foreign nationals owe allegiance independently of a residence with the intention to continue such residence, independently of any domiciliation - which is totally contrary to both the government's theory.

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April 1, 2026 - Justice Samuel Alito

JUSTICE ALITO: In Wong Kim Ark, it begins by saying here's the question, and it ends by coming back to the question: whether a child born in the United States of parents of Chinese descent who at the time of his birth have a permanent domicile and residence in the United States. And he says, for the reasons above stated, this Court is of the opinion that the question must be answered in the affirmative. Why put "domicile" in? Sometimes it's hard to figure out what is the holding of a case. Here, he tells us - this is the holding of the case. Why put "domicile" in there if it's irrelevant?

April 1, 2026 - Cecilia D. Wang

MS. WANG: It was a stipulated fact. And regardless of what the judgment in the case was - which was an a fortiori application of the rule of decision - the rule of decision in Wong Kim Ark has binding precedential effect. Even if you think that Wong Kim Ark decided the case based on the stipulated facts, you have to follow that controlling rule of decision, and if you follow that rule, you get to the same result for people without domicile. Wong Kim Ark says six times in the first parts of the opinion that domicile is not relevant.

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April 1, 2026 - Justice Neil Gorsuch

JUSTICE GORSUCH: What do we do with the fact that after Wong Kim Ark, at least some authorities took the view that the non-domiciliary question wasn't decided, remained open? It seems to me it's a mess. But maybe you can persuade me otherwise.

April 1, 2026 - Cecilia D. Wang

MS. WANG: Anyone who wanted to know what the law of citizenship was under the Fourteenth Amendment after Wong Kim Ark would go to the sixth edition of Kent, where he says in that footnote on page 38 that the rule was Lynch versus Clarke and temporary sojourners' children are U.S. citizens. We have members of Congress speaking on the record on debates on immigration laws, all stating that children of Chinese immigrants, these immigrants that Congress is now

trying to bar from entering the United States - if their children are born in the United States, they are citizens.

April 1, 2026 - 12:09 p.m. - Supreme Court of the United States

The Court took the case under submission.

VIII. What remains

The meaning of the phrase 'subject to the jurisdiction' is still an open question.

The most textual and contextual definition is that the 14th Amendment's purpose was to establish citizenship for freed slaves and the phrase was used purely to exclude 'Indians'. In this interpretation, the phrase has been exhausted and the remaining language leaves a purely 'jus soli' scheme in place.

The dialogue from the 39th Congress and in *Elk* and *Wong Kim Ark* includes a range of interpretations from a broad definition of "allegiance" that includes restrictions on temporary visitors, to only excluding persons whose foreign roles would prohibit US citizenship.

Later in the 1890's through 1931, the State Department adjudications on citizenship more generally ("rejected or questioned" the claim that birth within U.S. borders automatically confers citizenship on children born to unlawfully present or temporarily) that form into a discussion of parents time and intent to establish jurisdiction..

The 20th Century interpretation renders the phrase almost meaningless as virtually all, if not all, persons in the United States are subject to the laws of the United States.

A statutory ruling in *Trump v Barbara* defers any clarification of the phrase and almost guarantees future confusion and future cases.

A new interpretation based on residency or time may be needed, but disrupts the administration of citizenship.

Joseph J Donahue, May 29, 2026

Afterword

[One page maximum. Date. What the Court held. What it left open.]

A Note on Sources

Primary sources are identified in the section headers throughout. The following sources required separate citation.

National Museum of African American History and Culture, The Human Factor in History: Dred Scott and Roger B. Taney, <https://nmaahc.si.edu/explore/stories/human-factor-history-dred-scott-and-roger-b-taney> (last visited May 29, 2026).

The Congressional Globe in UNT Digital Library. University of North Texas Libraries. 39th Cong., 1st Sess. accessed May 29, 2026.

Page 572: <https://digital.library.unt.edu/ark:/67531/metadc30864/m1/678/>

Page 2769: <https://digital.library.unt.edu/ark:/67531/metadc30866/m1/851/>

Page 3042: <https://digital.library.unt.edu/ark:/67531/metadc30867/m1/164/>

Papers Relating to the Foreign Relations of the United States, Transmitted to Congress, With the Annual Message of the President, December 1, 1873, Part I, General Correspondence; and *Papers Relating to Naturalization and Expatriation*, Volume II

No. 502., The Attorney-General to the President., Department of Justice, August 20, 1873. <https://history.state.gov/historicaldocuments/frus1873p1v2/d196>

Samuel Estreicher & Rudra Reddy, *Addressing Some Perceived Anomalies Referenced in the Trump v. Barbara Oral Argument*, Harvard Journal of Law & Public Policy: Per Curiam No. 07 (Spring 2026).

Ximena Bustillo, *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>.

Brief for Respondents, *Trump v. Barbara*, No. 25-365 (Feb. 19, 2026). Available at supremecourt.gov/DocketPDF/25/25-365/396806/20260219162058285_25-365%20Trump%20v%20Barbara%20Respondents%20Brief.pdf