

By the Skin of Our Teeth . . . But for How Long?

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Introduction

“Justices Reject Trump’s Effort to End Birthright Citizenship.”¹ “Supreme Court Upholds Birthright Citizenship, Rejecting Trump’s Proposed Limits.”² These headlines in the *New York Times* and the Associated Press reporting on the Supreme Court’s decision in *Trump v. Barbara* implied that birthright citizenship was once again on strong footing once the Supreme Court had reaffirmed it as a constitutional principle.

Yet close readers of the majority opinion and its many dissents understood that the shared understanding of birthright citizenship that had prevailed for decades—as Justice Elena Kagan noted at argument, “[w]hat . . . people have thought the rule was for more than a century”—was instead saved by the slimmest of majorities.³ It was accompanied by dissents that manufactured constitutional confusion, where there previously had been certainty, and provided a road map for opponents of birthright citizenship to try again. A political effort to remake birthright citizenship is now taking form, with a new Executive Order issued that will almost certainly bring the question to the Supreme Court once again.⁴

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¹ *Justices Reject Trump’s Effort to End Birthright Citizenship*, N.Y. TIMES (July 8, 2026), https://www.nytimes.com/live/2026/06/30/us/birthright-citizenship-supreme-court?eafs_enabled=false.

² Mark Sherman, *Supreme Court upholds birthright citizenship, rejecting Trump’s proposed limits*, ASSOCIATED PRESS (June 30, 2026, 1:11 PM), <https://apnews.com/article/supreme-court-birthright-citizenship-trump-immigration-c73cf0c70bb550ebf0a55fafddbd935c>.

³ Transcript of Oral Argument, *Trump v. Barbara*, 146 S. Ct. 2438 (2026), <https://www.oyez.org/cases/2025/25-365>.

⁴ Exec. Order No. 14418, 91 Fed. Reg. 51991 (Aug. 6, 2026).

All of this raises larger questions about *stare decisis* at the Supreme Court and how lasting its rulings truly are. When has the Supreme Court quickly reversed course in the past and why? Placing this decision in that broader context reveals pressure points and weaknesses that proponents of birthright citizenship would be wise to guard against.⁵

This shift—allowing for the executive to narrow birthright citizenship in the face of longstanding understanding about who is covered—carries enormous risks not just for future children of temporary residents or undocumented immigrants, but for any individual whose Americanness is attached to their birth certificate. And for impacted groups, a loss of citizenship is a loss not just of identity or the protection of the sovereign, but of many core benefits that could flow from citizenship, such as the ability to travel internationally, vote, access federal student aid, get a driver’s license, or serve on juries.⁶

This Article proceeds in three parts. Part I explores the *Trump v. Barbara* ruling and where it leaves us. Part II places that ruling in the context of past Supreme Court reversals of precedent in short time frames. Part III notes the risks and costs of a reversal here and describes how limiting birthright citizenship could have wide-reaching negative impacts.

I. *Trump v. Barbara*

On January 20, 2025, President Trump’s first day in office, he signed an Executive Order that stripped citizenship from the children of mothers who were either unlawfully in the country, or present lawfully but temporarily, when the father was neither a U.S. citizen nor a lawful permanent resident at the time of the child’s birth.⁷ At that time, and for at least 80 years prior,⁸ the federal government treated children born on U.S. soil as citizens, regardless of the immigration status of

⁵ See Part II, *Infra*.

⁶ See Part III, *Infra*.

⁷ Exec. Order No. 14160, 90 Fed. Reg. 8449 § 2 (Jan. 20, 2025).

⁸ There is some disagreement in the opinions about the exact length of time the Executive Branch has recognized the citizenship of children born in the United States to temporary visitors and undocumented residents, but the primary dissent acknowledges it runs back to at least President Franklin Delano Roosevelt’s administration. *Trump v. Barbara*, 146 S. Ct. 2438, 2501 (2026) (Thomas, J., dissenting).

their parents. There were a handful of exceptions to this—children of diplomats, for example—but, by and large, birth in the territory of the United States was enough to make one an American citizen.

As the many cases challenging the Executive Order zigzagged their way up to the Supreme Court, every federal judge to look at the merits at the preliminary injunction stage declared the Executive Order likely unconstitutional, often in stark terms.⁹ The first district court to rule against the administration noted that the government's arguments do not have "text or precedent to support its interpretation of the Citizenship Clause [and] rehash[] losing arguments from over a century ago."¹⁰ In its unanimous holding that the order was likely unconstitutional, the First Circuit stated that it was "wary of now blessing this most recent effort to break with our established tradition of recognizing birthright citizenship."¹¹ Notably, when the issue came back to the Court on the grants of class/universal relief following *CASA*, the Court pointedly did not grant certiorari

⁹ Before the Court in *Trump v. CASA, Inc.*, 606 U.S. 831 (2025), cut back on universal injunctions, federal district courts in Washington, New Hampshire, and Massachusetts all enjoined the order. *Washington v. Trump*, 765 F. Supp. 3d 1142 (W.D. Wash. 2025) (granting preliminary injunction); *N.H. Indonesian Cmty. Support v. Trump*, 765 F. Supp. 3d 102 (D.N.H. 2025) (same); *Doe v. Trump*, 766 F. Supp. 3d 266 (D. Mass. 2025) (same); *CASA, Inc. v. Trump*, 763 F. Supp. 3d 723 (D. Md. 2025) (same). Though the government sought emergency stays of these injunctions, stays were denied by the Ninth, First, and Fourth Circuits. *Washington v. Trump*, No. 25–807, 2025 WL 553485 (9th Cir. Feb. 19, 2025) (denying stay); *New Jersey v. Trump*, 131 F.4th 27 (1st Cir. 2025) (same); *CASA, Inc. v. Trump*, No. 25–1153, 2025 WL 654902 (4th Cir. Feb. 28, 2025) (same). Following *CASA*, plaintiffs in these cases sought universal injunctions in class actions and to provide complete relief for state plaintiffs. On remand following *CASA*, district and circuit courts found class or universal relief appropriate. *Washington v. Trump*, 145 F.4th 1013 (9th Cir. 2025); *Trump v. CASA*, 793 F. Supp. 3d 687 (D. Md. 2025); *N.H. Indonesian Cmty. Support v. Trump*, 157 F.4th 29 (1st Cir. 2025); *New Jersey v. Trump*, 800 F. Supp. 3d 180 (D. Mass. 2025), *aff'd*, *Doe v. Trump*, 157 F.4th 36 (1st Cir. 2025). Every judge who had reached the merits of the preliminary injunctions found that the plaintiffs had demonstrated the likelihood of success. The only judge who did not reach the merits was Judge Bumatay on the Ninth Circuit, who would have ruled that the state plaintiffs lacked standing. *Washington v. Trump*, 145 F.4th 1013, 1042 (9th Cir. 2025) (Bumatay, J., concurring in part and dissenting in part).

¹⁰ *Washington v. Trump*, 765 F. Supp. 3d 1142, 1152 (W.D. Wash. 2025). Notably, Judge Coughenour, during the temporary restraining order hearing, stated, "This is a blatantly unconstitutional order." Josh Gerstein, *Judge Blocks Trump Order on Birthright Citizenship*, POLITICO (Jan. 23, 2025), <https://www.politico.com/news/2025/01/23/judge-blocks-trump-order-on-birthright-citizenship-00200267>.

¹¹ *Doe v. Trump*, 157 F.4th 36, 82 (1st Cir. 2025).

in the cases fully decided by the First and Ninth Circuits involving claims by state plaintiffs. Instead, it took certiorari before judgment in *Trump v. Barbara*, a case involving only individual plaintiffs who had sought nationwide class status.¹²

When the Supreme Court finally reached the merits, most of the Justices of the Supreme Court agreed with the interpretation that guided all of the district and circuit courts. But it was a much closer call than many observers had expected,¹³ with only the slimmest of majorities holding that the Executive Order violated the Fourteenth Amendment. Five Justices held the Executive Order was unconstitutional; Justice Brett Kavanaugh wrote a separate concurrence that argued the Executive Order did not violate the Constitution but did violate the Immigration and Nationality Act.¹⁴

It is difficult to square this narrow victory with the voluminous evidence of the Fourteenth Amendment's history, meaning, purpose, and practice as laid out in Chief Justice John Roberts's majority opinion. The decision carefully traced the historical origins of the Fourteenth Amendment's citizenship provision back to English common law, the context of its passage, and prior Supreme Court opinions, especially *United States v. Wong Kim Ark*,¹⁵ that confirmed its expansive meaning.

¹² 146 S. Ct. 879 (2025) (granting cert. before judgment). We speculate that some members of the Court wanted to reserve, for another day, when individual states may get universal remedies.

¹³ See, e.g., A Martínez, *Law Professor Shares His Takeaways from SCOTUS Hearing on Birthright Citizenship*, NPR, MORNING EDITION, Apr. 2, 2026 (quoting law professor Steve Vladeck: "I think it's a pretty good bet that the administration is going to lose and perhaps by that exact margin [of 7-2]."), <https://www.npr.org/2026/04/02/nx-s1-5769996/law-professor-shares-his-takeaways-from-scotus-hearing-on-birthright-citizenship>; David Lat, *5 Observations on the Supreme Court Argument in the Birthright Citizenship Case*, ORIGINAL JURISDICTION (Apr. 1, 2026) ("Before oral argument, my prediction for the outcome of *Barbara* was a win for the challengers of the EO, by a lopsided margin—probably 7-2."), <https://davidlat.substack.com/p/donald-trump-v-barbara-birthright-citizenship-oral-argument>; Adam Liptak, *In Birthright Case, Trump's Likely Loss May Not End the Fight*, N.Y. TIMES (Apr. 2, 2026) ("[T]he court was likely to reject Mr. Trump's order to end the promise of citizenship to nearly all babies born in the United States—probably by a lopsided vote."), <https://www.nytimes.com/2026/04/02/us/politics/birthright-citizenship-trump-supreme-court.html>.

¹⁴ *Barbara*, 146 S. Ct. at 2469. (Kavanaugh, J., concurring in part and dissenting in part).

¹⁵ *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

The opinion first tied the early American understanding of citizenship as based on soil, rather than blood, to the English understanding of the same. "A foreign mother could enter the British Isles, give birth, and leave with her child the very next day, and the child would remain a British subject. Why? Because the child owed an implied allegiance to the sovereign who protected him at his birth—no matter how 'momentary and uncertain' his presence in the King's realms."¹⁶ That understanding of *jus soli*, in Chief Justice Roberts's telling, came undone with the Supreme Court's "odious" decision in *Dred Scott v. Sandford*, which excluded any person descended from slaves from the definition of "citizen."¹⁷ For those individuals, "blood, not soil, was made the rule."¹⁸

The opinion then walks through how the Reconstruction Congress sought to right this wrong. And in doing so, it fashioned a citizenship rule intended not only to overrule *Dred Scott*, but also to be expansive and unquestionable, protecting all individuals born on U.S. soil for whom no extraterritorial fiction applied: "This time . . . the goal was even grander—to put the 'great question of citizenship' 'beyond the legislative power' altogether, to settle the issue once and for all."¹⁹

Those who were present in the United States only temporarily were included in this rule. "Just like *jus soli*, a sovereign's jurisdiction made no exception for those only temporarily present within the sovereign's territory. Instead, nearly everyone within the territorial boundaries of the United States was 'amenable to' the Nation's jurisdiction."²⁰

That understanding of the Fourteenth Amendment's broad scope was confirmed three decades later by the Supreme Court case of *United States v. Wong Kim Ark*. Rejecting government arguments that the common-law doctrine of England had never been the doctrine of the United States, the Court held that all individuals born in the United States, outside of the well-defined exclusions were citizens at

¹⁶ *Barbara*, 146 S. Ct. at 2446.

¹⁷ *Id.* at 2447–08.

¹⁸ *Id.*

¹⁹ *Id.* at 2448–09.

²⁰ *Id.* at 2450.

birth.²¹ “Not surprisingly, then,” Chief Justice Roberts wrote, “in the 128 years since, we have repeatedly understood the rule of *Wong Kim Ark* to guarantee citizenship to all children born in the United States and subject to its power.”²²

One focus of the majority opinion is the heap of evidence it cites in support of its analysis, and its pointed critique of the principal dissent’s lack of the same. At various points, Chief Justice Roberts notes that the dissent is relying on a “‘funeral oration’ for President Lincoln,”²³ an “intermediate appellate court” decision that was not followed by the higher court,²⁴ a “single state-court case about citizenship in the Republic of Texas,” a “proposed (but never adopted)” New York model code, and a “treatise that discussed the subject only in terms of ‘the principles of natural reason,’ which it expressly distinguished from [t]he common law.”²⁵

The majority opinion also pointedly critiques the dissenters’ understanding of *Wong Kim Ark*. Each of the three major dissents from the majority’s constitutional holding lays out a different reason why the longstanding understanding of the binding precedent should be revised, distinguished, or ignored.

The principal dissent, authored by Justice Clarence Thomas and joined by Justice Neil Gorsuch, grounds its overall analysis in the concept of “domicile,” language that appears nowhere in the Fourteenth Amendment and, as Chief Justice Roberts points out, is legally distinct from “national citizenship” being “subject to the jurisdiction” of the United States.²⁶ And many of the broadest claims in the dissent rest on citation to no authority at all. Justice Thomas states without citation, for example, that “America viewed its people as the people who built their lives here”²⁷ and “[c]itizens were not the people who were temporarily passing through a territory or who happened to be born within it.”²⁸

²¹ *Id.* at 2452.

²² *Id.* at 2452–03.

²³ *Id.* at 2453–04.

²⁴ *Id.* at 2454 n.3.

²⁵ *Id.* at 2454–05.

²⁶ *Id.* at 2454–66.

²⁷ *Id.* at 2478 (Thomas, J., dissenting).

²⁸ *Id.* at 2477.

Just as the dissent reads “domicile” into the Fourteenth Amendment, it similarly reads into *Wong Kim Ark* a requirement that the parents be domiciled in the United States, based on the Court’s several mentions of the plaintiff’s parents as “domiciled residents at San Francisco.”²⁹ But it ignores that the Court traced this question through British common law, quoting Lord Chancellor Hatherley’s language that “[t]he question of naturalization and of allegiance is distinct from that of domicile” and noting that even children born to temporary residents obtained British citizenship if they were born on British territory, with narrow exceptions for children of diplomats or children of an invading army.³⁰

And even if Justice Thomas’s reading of *Wong Kim Ark* were correct, its reasoning would exclude only the children of short-term visitors. He does not explain why the children of long-term residents, even if unlawful or technically “temporary,” are also excluded from citizenship; while they may have as strong a claim to being domiciled residents as Wong’s parents, they would also be excluded under the Executive Order.

Justice Samuel Alito’s dissent, which no other Justice joined, makes similar legal arguments emphasizing the domicile of Wong’s parents but casts aspersions on the opinion itself without explicitly calling for its overruling. Noting that the case provides the strongest support for the majority’s position, he argues that its holding is “not controlling,” that the case showed “little respect for precedent,” and that its analysis “aimed to divert as much attention as possible from what [the Fourteenth Amendment] actually [says].”³¹ He then recasts the decision as holding that “people who are lawfully present here, establish the United States as their permanent home, and do everything within their power to become United States citizens can be seen as no longer subject to any foreign power.”³² But that interpretation of the opinion ignores how the decision consistently noted that Wong’s parents were “subjects of the Emperor of China” and had

²⁹ *Id.* at 2498.

³⁰ *Wong Kim Ark*, 169 U.S. at 656.

³¹ *Barbara*, 146 S. Ct. at 2536 (Alito, J., dissenting).

³² *Id.* at 2538–09.

returned to reside in China by the time the decision was issued.³³ And it assumes this revised reading of *Wong Kim Ark*'s holding is correct despite decades of the federal government acting otherwise.

Justice Kavanaugh's concurrence provided the sixth vote for the outcome, perhaps creating a public sense that the revocation of birthright citizenship had been firmly averted,³⁴ but this opinion makes clear how tenuous that result truly is. It argues that the Executive Order is consistent with the Fourteenth Amendment, largely because *Wong Kim Ark*'s exceptions could (and should) be expanded upon to include unlawful and temporary residents.³⁵ Yet, in Justice Kavanaugh's view, the Executive Order is instead precluded by Section 1401 of the Immigration and Nationality Act, which also grants citizenship to "person[s] born in the United States, and subject to the jurisdiction thereof."³⁶ The federal government's longstanding practice of interpreting that provision to grant citizenship to all individuals born on American soil, but for the *Wong Kim Ark* exceptions, meant that a statutory change would be necessary before the Executive Order provisions could take effect.³⁷

On its face, the concurrence created the appearance of a firm result in favor of a continued expansive understanding of birthright citizenship. In practice, it provides a road map to achieving the result the government desires: amending the Immigration and Nationality Act to eradicate citizenship rights for children of unlawful or temporary residents.³⁸ Shortly after the decision, President Trump called on Congress to enact such an amendment, and Speaker of the House

³³ See, e.g., *Wong Kim Ark*, 169 U.S. at 652 ("[Wong Kim Ark's] 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 still enjoying a permanent domicil and residence therein at San Francisco; they continued to reside and remain in the United States until 1890, when they departed for China.").

³⁴ See *supra* notes 1, 2.

³⁵ *Barbara*, 146 S. Ct. at 2472–04 (Kavanaugh, J., concurring in part and dissenting in part).

³⁶ *Id.* at 2469–71.

³⁷ *Id.* at 2470–01.

³⁸ See *id.* at 2471 ("Unless and until Congress enacts such legislation [amending Section 1401], the Executive Order contravenes the federal statute.").

Mike Johnson noted that he was “disappointed” in the decision and “we’ll have to deal with it as Congress.”³⁹

In sum, the four Justices who dissented from the Court’s constitutional holding create constitutional complexity where there previously was longstanding certainty. They do so with evidence that provides a façade of support but falls apart upon closer examination. And they have now cracked open the door to a future in which the federal government can roll back rights for hundreds of thousands, if not millions, of people who were previously, unquestionably, citizens.

The majority opinion ends on a hopeful note, but the dissents render its rhetoric fragile: “Citizenship, then as now, was the right to have rights—to freely participate in our community. The Framers of the Fourteenth Amendment extended that promise to ‘every free-born person in this land.’ We keep that promise today.”⁴⁰ One wonders for how long.

II. *Stare Decisis* in the Face of Changes of Heart, Changes in Court Personnel, and Persistent Dissent

In considering the durability of *Trump v. Barbara*, it is instructive to examine instances when the Court has reversed itself in a short period of time. These reversals have involved changes of heart, changes in Court personnel in the face of persistent dissent, or both.⁴¹ The following three accounts are instructive.

Account 1

Two of the quickest reversals by the Court took place during the Court’s October 1936 Term when it reversed course on two

³⁹ Allan Smith, *After His Supreme Court Loss, Trump Calls on Congress to Pass a Law Banning Birthright Citizenship*, NBC NEWS (June 30, 2026), <https://www.nbcnews.com/politics/supreme-court/supreme-court-loss-trump-congress-birthright-citizenship-rcna352418>; Sarah Davis, *Speaker Johnson: Birthright Citizenship Ruling Subjects U.S. to “Serious Challenges,”* THE HILL (June 30, 2026), <https://thehill.com/homenews/house/5947594-mike-johnson-supreme-court-birthright-citizenship-ruling/>

⁴⁰ *Barbara*, 146 S. Ct. at 2458.

⁴¹ Persistent dissent becomes the pathway for a Court to reverse itself because the dissenter(s) persist in dissenting rather than following what the Court has decided. See Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 GA. ST. U. L. REV. 381, 395 (2007) (describing persistent dissent as a ubiquitous phenomenon).

longstanding constitutional doctrines: substantive due process (liberty to contract) and the Commerce Clause as limits to government power. In the first major reversal, *West Coast Hotel Co. v. Parrish*,⁴² decided on March 29, 1937, the Court reversed course on substantive due process and liberty of contract as a limit on the power of state governments to set a minimum wage paid by private employers. In doing so, it reached the opposite of what it had concluded just 301 days earlier in *Morehead v. New York ex rel. Tipaldo*.⁴³ In the second, *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,⁴⁴ decided on April 12, 1937, the Court rejected the “local production” rationale it had (re)endorsed 329 days earlier in *Carter v. Carter Coal Co.*,⁴⁵ whereby the federal government has no authority under the Commerce Clause to regulate prices, minimum wages, maximum hours, and bargaining rights for employees in the coal industry because these matters pertained only to “local production” prior to items entering into the stream of commerce.⁴⁶ These two reversals, occurring within one year, marked a sea change in the Court’s approach to substantive due process (liberty of contract) and the federal government’s power under the Commerce Clause.

The Justices who decided *West Coast Hotel* and *NLRB* during the October Term 1936 were the very same ones who had decided *Tipaldo* and *Carter*. All of the cases were 5-4. The only difference was that Justice Owen L. Roberts, in the majority in *Tipaldo* and *Carter*, switched sides to make the new majority in *West Coast Hotel* and *NLRB*. Justice Roberts’s change of heart became known as the “switch in time that saved nine,”⁴⁷ where the context for his switch was President

⁴² *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

⁴³ *Morehead v. People of State of New York ex rel. Tipaldo*, 298 U.S. 587 (1936). Some might argue that *West Coast Hotel* didn’t directly overrule *Tipaldo*, which the Court merely distinguished, and that the overruling didn’t take place until *Olsen v. Nebraska ex rel. Western Reference & Bond Ass’n*, 313 U.S. 236 (1941). This is a quibble.

⁴⁴ *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

⁴⁵ *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

⁴⁶ A similar quibble exists whereby *NLRB* didn’t explicitly overrule *Carter*, with Chief Justice Hughes saying simply that *Carter* and similar cases were “not controlling here,” *N.L.R.B.*, 301 U.S. at 41, and *Westlaw* has only a “yellow flag” for *Carter* and does not indicate that *NLRB* overruled *Carter*.

⁴⁷ See John Q. Barrett, *Attribution Time: Cal Tinney’s 1937 Quip, “A Switch in Time’ll Save Nine,”* 73 OKLA. L. REV. 229 (2021).

Franklin Delano Roosevelt's court-packing plan.⁴⁸ Whether this switch actually saved the nine-person Court remains debated. But the narrative, nevertheless, feeds hopes that Justices may be responsive to political pressure, whether in the form of direct pressure by the President or more attenuated in the form of being responsive to electoral politics when a President may be seen as enjoying a broad democratic mandate.

Account 2

Another quick reversal took place in 329 days, when the Court in *Murdock v. Pennsylvania*⁴⁹ overruled *Jones v. City of Opelika*.⁵⁰ However, this speedy overruling is best understood in the context of the Court's flag salute cases, *Minersville School District v. Gobitis*,⁵¹ which was reversed three years and 11 days later by *West Virginia State Board of Education v. Barnette*.⁵² All four cases involved Jehovah's Witnesses and the confluence of First Amendment free speech and free exercise rights. *Gobitis* was decided 8-1 and *Opelika*, 5-4; then going the other way, *Murdock*, 5-4 and *Barnette*, 6-3. The sequence, chronologically, is *Gobitis* (June 3, 1940), *Opelika* (June 8, 1942), *Murdock* (May 3, 1943), and *Barnette* (June 14, 1943).

Unlike what happened in the October Term 1936—when a single decisive Justice changed his view—the shift from 8-1 in 1940 to 6-3 the other way in 1943 involved both changes of heart and changes in Court personnel. Justice Felix Frankfurter's opinion in *Gobitis* was

⁴⁸ There is sharp debate as to whether Justice Roberts was influenced by Roosevelt's announcement of his court-packing plan on February 5, 1937, including that "[v]irtually all historians agree that [*West Coast Hotel*] had been decided prior to Roosevelt's unveiling of the court-packing plan." Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69, 71 (2010); see also AHR Forum: *The Debate over the Constitutional Revolution of 1937*, 110 AM. HIST. REV. 1046 (2005) (contributions by Alan Brinkley, Laura Kalman, William E. Leuchtenburg, and G. Edward White).

⁴⁹ *Murdock v. Com. of Pennsylvania*, 319 U.S. 105 (1943). Another quibble is that *Murdock* didn't expressly overrule *Opelika*. Instead, the argument goes, the Court had granted rehearings in two of the cases accompanying *Opelika* and because of *Murdock*, ended up vacating its previous decision. See *Jones v. City of Opelika*, 319 U.S. 103 (1943) (vacating its earlier opinion).

⁵⁰ *Jones v. City of Opelika*, 316 U.S. 584 (1942), *vacated*, *Jones v. City of Opelika*, 319 U.S. 103 (1943) (per curiam) (*Opelika II*).

⁵¹ *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940).

⁵² *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

joined by Chief Justice Charles Evans Hughes and Justices James Clark McReynolds, Owen L. Roberts, Hugo L. Black, Stanley Reed, William O. Douglas, and Frank Murphy. The sole dissenter was Justice Harlan Fiske Stone.

Three years later, seven of these Justices were still on the Court. Yet the 8-1 majority flipped to 6-3. Three Justices in the *Gobitis* majority—Black, Douglas, and Murphy—had a change of heart. This evolution first took place in 1942 in *Opelika* in a case involving a challenge by a Jehovah's Witness to a local ordinance requiring a license to sell printed matter. Justices Black, Douglas, and Murphy wrote a separate dissent in which they expressed that, though they joined the *Gobitis* majority, *Gobitis* had been wrongly decided. But even with them joining Justice Stone, who had dissented in *Gobitis*, that only makes four Justices for this position.

Changes in Court personnel would lead to the two additional votes to overturn *Gobitis*. Justice McReynolds was succeeded by Justice James F. Byrnes, who served for only 16 months before being succeeded by Justice Wiley Rutledge. When Chief Justice Hughes left the Court, Justice Stone was elevated to be chief, and Robert Jackson took Stone's now-vacated associate justice seat. Rutledge and Jackson were part of the majority in *Barnette* that expressly overruled *Gobitis*.

The overruling of *Gobitis* is also a story of the role that persistent dissent plays. Stone, dissenting in *Gobitis*, never felt compelled by *stare decisis* to alter his views on the issue. When Black, Douglas, and Murphy changed their views and joined in Stone's dissenting position in *Opelika*, they did not, the following year in *Murdock*, feel bound by *Opelika*. With a new Justice, Rutledge, they now had the majority, which they built on in *Barnette* when the issue squarely decided 8-1 in *Gobitis*—the constitutionality of flag salute requirements in public schools—went the other way, 6-3 in *Barnette*.

Account 3

In 1995, the Court, in *Adarand Constructors, Inc. v. Peña*,⁵³ overruled what it had decided just five years before in *Metro Broadcasting, Inc. v. Federal Communications Commission*.⁵⁴ The Court had previously held that intermediate, rather than strict, scrutiny applied, and that

⁵³ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

⁵⁴ *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990).

“benign race-conscious measures mandated by Congress—even if those measures are not ‘remedial’ in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.”⁵⁵

Both *Metro Broadcasting* and *Adarand* were 5-4 decisions. The reversal did not involve a change of heart. Instead, the four dissenters in *Metro Broadcasting* became the new majority in *Adarand* when they were joined by Justice Thomas, who succeeded Justice Thurgood Marshall, who had been in the majority in *Metro Broadcasting*.⁵⁶ This was not the only personnel change. Four Justices in the *Metro Broadcasting* majority were no longer on the Court by the time *Adarand* was decided. Justice William Brennan was succeeded by Justice David Souter; Justice Byron White was succeeded by Justice Ruth Bader Ginsburg; Justice Harry Blackmun was succeeded by Justice Stephen Breyer. These changes had no impact as each of these successor Justices joined Justice John Paul Stevens in dissent in *Adarand*. The key change was Thomas for Marshall.

Accounts 1 and 3 show that 5-4 decisions can be quickly flipped. In Account 1, all it took was a change of heart. In Account 3, all it took was one key personnel change along with the persistent dissent of Justices who did not feel bound to follow recently decided precedent in which they had been in the dissent. This begs the question—what precisely does *stare decisis* demand of Justices?

The Weak Command of Stare Decisis, For Better and For Worse

During the confirmation process, especially in the modern era, nominees to become Justices are typically asked about precedent and *stare decisis*. Recent confirmation hearings have produced new terms, “precedent on precedent” and “super precedent,” as Senators try to ascertain nominees’ views about certain cases. Typically, nominees to become a Justice express that precedent is foundational to our system of the rule of law because it contributes to determinacy, stability,

⁵⁵ *Id.* at 564–65.

⁵⁶ Compare *Metro Broad., Inc.*, 497 U.S. at 550, with *Adarand Constructors, Inc.*, 515 U.S. at 202–03.

and fairness, all while saying that precedent is not an “inexorable command.”

There is a voluminous literature on precedent and *stare decisis*. In this Article, we draw primarily from two works by Frederick Schauer on precedent. The first is titled, simply, *Precedent*;⁵⁷ the other is provocatively titled, *Has Precedent Ever Really Mattered in the Supreme Court?*⁵⁸ Though Supreme Court opinions are replete with citations to precedent that provides authority for propositions in each particular opinion, research by political scientists “provides very strong support for the view that, at least in the Supreme Court, there exists no strong norm of *stare decisis*.”⁵⁹ Perhaps more startling, Schauer observes that “the [empirical] research is most consistent with the proposition that the cases in which the Justices actually *follow* precedent are rare, and the cases in which following precedent is dispositive are rarer still.”⁶⁰ “Follow” here is used in the strong sense in which a justice rules in accord with precedent because it is authoritative as precedent, even when the justice continues to disagree with the precedent. It is extremely rare that a justice issues a strong dissent and then later joins the majority, not because they have had a change of heart but because they acknowledge the precedent as authoritative or binding upon them.⁶¹ Much more common is persistent dissent.

If this is correct and there is no strong norm of *stare decisis* in Supreme Court adjudication, then an earlier observation by Schauer follows: “When the choice whether to rely on a prior decisionmaker is entirely in the hands of the present decisionmaker, the prior decision does not *constrain* the present decision, and the present decisionmaker violates no norm by disregarding it.”⁶²

⁵⁷ Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987) [hereinafter Schauer, *Precedent*].

⁵⁸ Schauer, *supra* note 41, at 395.

⁵⁹ *Id.* at 392 (citing numerous works by political scientists).

⁶⁰ *Id.* at 393.

⁶¹ See *id.* at 393–94 (discussing the rare instances since the beginning of the Warren Court era when a justice dissents but then later joins the majority even while continuing to express that they believe the precedent was wrongly decided).

⁶² Schauer, *Precedent*, *supra* note 57, at 575.

If this is correct, then why do the Court and nominees to become Justices make so much of precedent? The answer appears wrapped up in stated commitments to fairness, reliability, and predictability, all of which speak to the Court's institutional legitimacy. "It is worthwhile to note that this perspective could explain why the Supreme Court should be constrained by precedent, and, *more cynically, why the Court purports to be constrained by precedent even when it is not.*"⁶³

This is especially the case when you throw originalism into the mix. Justice Amy Coney Barrett's article, written when she was a law professor, and titled *Originalism and Stare Decisis*,⁶⁴ is instructive, especially her characterization of Justice Antonin Scalia's approach to originalism and *stare decisis*. Barrett read Scalia to regard *stare decisis* as providing, in certain instances, a pragmatic exception to originalism.⁶⁵ In this sense, even Scalia did not regard originalism as an absolute command in all instances. But even though *stare decisis* allows for deviations from originalism in certain instances, the critical takeaway is that *stare decisis* remains subservient, and merely an exception, to the generally higher command of originalism.⁶⁶

The key point in the preceding paragraph is "in certain instances." How is an originalist Justice to decide when to adhere to *stare decisis* as a pragmatic exception to originalism's command? Recall, paraphrasing, Schauer: The prior decision does not *constrain* the present decision when the choice whether to rely on a prior decisionmaker is entirely in the hands of the present decisionmaker.

If this is correct, though we escaped a national and constitutional disaster in *Barbara* by the skin of our teeth, little to nothing

⁶³ *Id.* at 600 n.59 (emphasis added).

⁶⁴ Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017).

⁶⁵ *Id.* at 1922.

⁶⁶ Space does not allow us to delve into originalism's democratic legitimacy problem. But briefly, the Constitution draws from democratic legitimacy, the notion that the government's legitimacy and authority draw from "We the People." This begs the question of the democratic legitimacy of original understandings when most people, at this nation's founding and at the ratification of the Reconstruction Amendments, had no franchise.

constrains an originalist Justice from deciding otherwise in the future. All it would take is a change of heart by one of the Justices in the *Barbara* majority or a change in personnel whereby one of those Justices is succeeded by a Justice who holds a different originalist understanding of the Fourteenth Amendment. Sure, the Court has consistently stated that there must be a “special justification” or “strong grounds” to overrule precedent. But whether such a special justification or strong grounds exists lies largely in the unconstrained purview of each Justice. In this sense, *Barbara* does little to tie the hands of future jurists.

The day after the Court issued its decision in *Trump v. Barbara*, Rachel Bovard issued a call to arms to the conservative legal movement:

The model that dismantled *Roe*, which included decades of activism, thought leadership, strategic litigation, and judicial appointments, should now be aimed at Tuesday’s decision. *Trump v. Barbara* must act as a litmus test for every future conservative nominee: Only nominees prepared to reconsider expansive readings of the Citizenship Clause . . . deserve elevation.⁶⁷

It is too soon to tell if her call will be answered, and if so, how quickly the Court might reverse itself. *Barbara* is not on firm ground.

III. The Risks and Costs of Overruling *Barbara*

If the Court were to reverse *Trump v. Barbara*, despite the administration’s claims that the executive order applies only prospectively, nothing would prevent the federal government or state governments from seeking to apply the ruling retroactively. This would take the form of de jure and de facto citizenship stripping.

De Jure Citizenship Stripping

History shows that the federal government could engage in affirmative efforts to strip people of citizenship. Following *United States v. Thind*,⁶⁸ when the Court held that South Asians were racially

⁶⁷ Rachel Bovard, *Is Trump v. Barbara the New Roe?*, FIRST THINGS (July 1, 2026), [https://firstthings.com/is-trump-v-barbara-the-new-roe/](https://firstthings.com/is-trump-v-barbara-the-new-ro/).

⁶⁸ *United States v. Bhagat Singh Thind*, 261 U.S. 204 (1923).

ineligible to be naturalized, the U.S. Department of Justice engaged in an affirmative campaign to denaturalize those South Asians who had become naturalized U.S. citizens.⁶⁹ Nearly all of these efforts to strip citizenship from persons who had enjoyed citizenship for between 5 and 16 years were successful. Nothing precludes the federal government from seeking declaratory relief that certain individuals are not citizens, going back generations.

De Facto Citizenship Stripping

However, even if the federal government did nothing to affirmatively strip people of citizenship, there are measures that the federal government and state governments could take to deny the benefits that otherwise flow from citizenship.

The federal government could refuse to renew or issue passports or deny participation in jury service unless a person could provide documentation that demonstrates, to the satisfaction and at the discretion of government officials, that a person is entitled to birthright citizenship. The federal government could deny eligibility for federally funded programs, including perhaps even Social Security if courts were to determine that the person was not lawfully present. Of course, these denials could be challenged, but the barriers to universal and class relief⁷⁰ may result, nevertheless, in de facto citizenship stripping for many birthright citizens.

State governments could rescind or refuse voter registration or deny participation in jury service unless a person could provide documentation that demonstrates, to the satisfaction and at the discretion of government officials, that a person is entitled to birthright citizenship or is a naturalized citizen. State governments could do the same with regard to driver's licenses and state-issued identity cards, eligibility for federally and state-funded programs, and educational programs such as in-state tuition for college and post-graduate programs.

⁶⁹ See Joy Kanwar, *Stories from Negative Spaces: United States v. Thind and the Narratives of (Non)Whiteness*, 74 MERCER L. REV. 801, 841 (2023) (recounting the denaturalization proceedings against over fifty U.S. citizens of South Asian origin).

⁷⁰ See Suzette Malveaux, Response, *Class Actions, Civil Rights, and National Injunctions*, 131 HARV. L. REV. F. 56, 59 (2017) ("Court's contemporary jurisprudence has made it more difficult for litigants challenging discrimination to act collectively.").

Because state governments would likely take different approaches to de facto citizenship stripping, the likely outcome would be patchwork de facto citizenship. For example, a person who enjoyed the benefits that flowed from birthright citizenship in Washington might lose them when they moved to Idaho, if Idaho decided to require more before a person would receive the full set of rights that flowed from citizenship.

Conclusion

We escaped a national and constitutional disaster by the skin of our teeth. But *stare decisis* and precedent, in practice, only weakly command the Court. The durability of *Barbara* turns largely on politics. Because Chief Justice Roberts and Justice Barrett are not likely to have a change of heart, any reversal of *Barbara* will likely turn on what happens to Court personnel. Who will succeed the Justices in the *Barbara* majority? Who will succeed the Justices in the *Barbara* minority?

How should progressives feel about the fact that *Barbara* is vulnerable to being overturned? Should progressives take solace in the adage, what is good for the goose is good for the gander? *Adarand Constructors, Inc. v. Peña*,⁷¹ *Citizens United v. Federal Election Commission*,⁷² and *Shelby County v. Holder*⁷³ were all 5-4. The lesson from *Gobitis* to *Barnette*, flipping from 8-1 to 6-3 the other way, shows that even 6-3 decisions like *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*,⁷⁴ *Trump v. United States*,⁷⁵ or *Louisiana v. Callais*,⁷⁶ can flip. Hope can spring eternal.

Because *stare decisis* and precedent have a weak hold on the Court, what the future holds is largely dependent on electoral politics. For better and for worse.

⁷¹ *Peña*, 515 U.S. at 200.

⁷² *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

⁷³ *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529 (2013).

⁷⁴ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

⁷⁵ *Trump v. United States*, 603 U.S. 593 (2024). Notably, Justice Barrett only concurred in part, making this 6–3 only in part.

⁷⁶ *Louisiana v. Callais*, 146 S. Ct. 1131 (2026).