

U.S. Supreme Court narrowly upholds birthright citizenship

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By a narrow margin, the U.S. Supreme Court on Tuesday invalidated President Donald Trump’s executive order issued the afternoon of his second inauguration that would have stripped birthright citizenship from the offspring of parents who are either undocumented or in the United States on temporary visas. The ruling held that the Fourteenth Amendment guarantees citizenship to virtually all persons born in the United States.

The executive order was an authoritarian attack on fundamental democratic principles laid down in the Constitution, in particular, in the three post-Civil War amendments that abolished slavery, ensured citizenship to the former slaves and granted ex-slaves the right to vote. It threatened to strip citizenship from hundreds of thousands of offspring of immigrants, with dire implications extending to the democratic rights of the entire population.

The ruling affirms multiple lower court injunctions against the executive order, including the lead case decided Tuesday, *Trump v. Barbara*, a class action filed in New Hampshire federal court. An earlier injunction against Trump’s executive order, *Trump v. CASA*, resulted in a reactionary decision last year that invalidated nationwide injunctions issued by federal courts.

The decision was the last of the current Supreme Court term, which will adjourn until the first Monday in October. Earlier in the day, the court issued reactionary rulings that allow states to discriminate against transgender children in athletics and allow the funding of political candidates with unlimited amounts of “dark money.”

Chief Justice John Roberts’ majority opinion, joined by Trump-nominated Justice Amy Coney Barrett and the three moderates, Elena Kagan, Sonia Sotomayor and Ketanji Brown Jackson, traced the rule of *jus soli*—citizenship based on “soil,” the place of birth—to principles of British common law arising long before the founding of the United States 250 years ago.

Roberts explained how birthright citizenship was foundational to the new republic that based its sovereignty on the consent of the governed rather than hereditary privilege. “In a Nation of immigrants—an ‘asylum for mankind,’ in Thomas Paine’s words—*jus soli*’s broad scope took on particular importance,” Roberts wrote, citing Paine’s influential 1776

pamphlet *Common Sense*. The “tens of thousands of émigrés from the Old World—Scotch-Irish, French, German, Welsh, and many more, some of whom hoped to stay only a short time, others of whom hoped never to leave ... could be assured that their children would be American citizens by birth alone,” Roberts wrote, adding “nothing is better settled.”

“The common law made no distinction on account of race or color,” Roberts continued, “but the slave states did.” They sought “to deny citizenship to black Americans—and openly rejected the common law to reach that result.

“In the odious decision of *Dred Scott v. Sandford*,” Roberts wrote, with reference to the 1857 decision authored by Chief Justice Roger Taney, “this Court imposed the Southern States’ beliefs onto the Nation,” adding that “for them, blood, not soil, was made the rule.”

According to Roberts, “The Court had overruled the common law, but the people—eventually—would overrule the Court. It took more than a decade—and the addition of names such as Antietam, Gettysburg, and Chancellorsville to our national canon—but [abolitionist Frederick] Douglass’ vision of ‘our common humanity’ would be fulfilled.”

The Citizenship Clause of the Fourteenth Amendment—“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”—ratified three years after the Civil War, ingrained the common law principle into the Constitution, according to Roberts.

Citing the ratification debates, Roberts said that although “the Fourteenth Amendment was intended to repudiate *Dred Scott* ... 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.”

He wrote, “Children born of parents unlawfully or temporarily present in the United States satisfy both elements of the Citizenship Clause,” and therefore “are citizens at birth.”

Roberts cited *United States v. Wong Kim Ark*, decided in 1898, as confirming that “the Fourteenth Amendment was merely ‘declaratory’ of the ‘fundamental rule of citizenship by birth’ that prevailed at common law, a principle ‘in force in all the English Colonies,’ and ‘continued to prevail under the Constitution.’”

Roberts responded forcefully to the dissenters' argument that *Jus soli* was "a remnant of 'the darkness of the middle ages,'" when people belonged to the land on which they were born. He wrote:

That was not the view of the Reconstruction Congress. Where the dissents see feudalism, the Framers of the Fourteenth Amendment saw emancipation. By the time of the Glorious Revolution in 1688, in fact, the tie created by birth was less a "duty" than a "right"—the foundation of the "ancient liberties" of "free-born subjects." ... That is why the colonists demanded the "rights of Englishmen" more than 250 years ago. And that is why abolitionists lauded the "ancient and universal" rule of citizenship by birth alone as "an ordinance of Heaven."

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

Justice Brett Kavanaugh concurred with the five-justice majority but explicitly on the grounds that Trump's executive order violated the 1940 Immigration Act, which tracks the Fourteenth Amendment language verbatim. This technically made the judgment against Trump 6-3, although the vote was 5-4 on the constitutional question.

It is not uncommon for cases to be decided on narrow statutory, rather than broader constitutional, grounds, and justices frequently write separately even though their votes are not required for a majority ruling. Kavanaugh deliberately went further, however, gratuitously distancing himself from the majority's explicit constitutional holding, writing, "I respectfully disagree with its analysis of that highly consequential issue."

Grandstanding for an audience of one, as he did when the Supreme Court struck down Trump's tariffs, Kavanaugh contended, without support from any other justice, "Consistent with the Fourteenth Amendment, Congress could amend [the 1940 immigration act] or otherwise enact new legislation establishing exceptions to birthright citizenship for children born to foreign citizens unlawfully or temporarily in the country."

Despite the fact that any amended or new legislation "establishing exceptions" would be unconstitutional under the majority opinion, which is binding precedent, Trump, taking his cue from Kavanaugh, posted on Truth Social:

The Supreme Court upheld Birthright Citizenship,

which is too bad for our Country, but we can easily make it up in Congress through Legislation, with the support of the President, that has now been determined during this process. No long and unwieldy Constitutional Amendment is necessary! Congress should start TODAY to work on ending expensive and unfair to our Country, Birthright Citizenship. They will have my Complete and Total Support!

Justices Clarence Thomas and Samuel Alito, the most extreme right-wingers, dissented separately, both arguing that the status of the parents, essentially whether they were legally "domiciled" in the United States, should control over the place of birth. Neil Gorsuch joined Thomas's behemoth 91-page dissent and added his own.

Justice Ketanji Brown Jackson issued a lengthy concurrence with Roberts' majority opinion, responding to Thomas's crude assertion that the citizenship clause was meant only for the former slaves and their descendants. "The Reconstruction Amendments were an anticaste, antisubordination reset for the Nation, not a mere spot treatment for the dark stain of slavery," she wrote. She added:

In the aftermath of the Civil War, those who championed the Fourteenth Amendment—both within and beyond Congress—understood the assignment. Their work product used "language that transcended race and region," and thereby "changed and broadened the meaning of freedom for *all* Americans."

The fact that four of the nine justices of the Supreme Court, just one short of a majority, reject the common law and constitutional underpinnings of birthright citizenship, and the ideals of the two American revolutions with which they are intertwined, demonstrates the breakdown of bourgeois democracy.

Protecting the fruits of the American revolutions, which are anchored in the egalitarian principle of birthright citizenship, cannot be left to a bourgeoisie driven by the contradictions of capitalism to embrace increasingly dictatorial forms of rule. Today that historic task must be taken up by the working class under its independent banner.



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