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# Birthright citizenship: A note on foundlings and comments on four complementary amicus briefs

By Akhil and Vikram Amar  
on Mar 2, 2026



(Celal Gunes/Anadolu via Getty Images)

Foundlings – babies born of unknown parentage – loomed large in the imagination of mid-19th century Americans, who dutifully read their Bibles and thought about baby Moses in a basket. Americans in the Civil War era also read novels both comic and dramatic, featuring eponymous foundlings such as Henry Fielding’s delightful Tom Jones and Charles Dickens’ virtuous Oliver Twist.

It is thus fitting and proper that several of the best briefs in the pending birthright-citizenship case, *Trump v. Barbara*, contain interesting discussions of foundlings, who featured prominently in conversations about a Civil War amendment – the 14th – that pivoted on the word “born.” Foundlings also featured prominently in a landmark 20th-century statute that aimed to build on 14th Amendment concepts of birthright citizenship.

In what follows we shall quote extensively from four notable *Barbara* briefs that highlight foundlings. Each brief illuminates a slightly different aspect of the foundling question. Together, these four briefs show that the foundling issue alone – above and beyond all other aspects of *Barbara* – is a sufficient basis on which to reject the Trump administration’s outlandish claim that, with small exceptions, a birthright citizen must be able to point to a citizen parent or a permanent-resident parent.

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When the 14th Amendment was pending, its advocates powerfully reminded their fellow Americans that birthright citizenship would attach equally to all babies born on American soil and under the American flag, whether these babies' parents were Black or white, married or unmarried, Jewish or Gentile, slave or free, citizen or non-citizen, residents or sojourners – or, indeed, known or unknown. A baby in a basket on a church doorstep would be born an equal citizen, no different in law than a baby born to the president and first lady in the White House.

Indeed, this is exactly how Indiana's acting governor Conrad Baker – himself a college-educated minister's son, and doubtless familiar with Moses, Jones, and Twist – explained the 14th Amendment in a prominent speech delivered in Evansville during the summer of 1866, when the amendment was pending before the nation. A "foundling ... at your doorstep" who "may never know who gave him birth," Baker intoned, was "just as much an American citizen as the Chief Magistrate of the nation."

This moving passage appears prominently in a very fine friend-of-the-court brief filed last week by the Constitutional Accountability Center on behalf of a distinguished cadre of scholars: UCLA's Ahilan Arulanantham and Hiroshi Motomura; the University of Michigan's Sam Erman; the University of Virginia's Amanda Frost; Stanford's Lucas Guttentag; the University of San Diego's Michael D. Ramsey; George Mason-Scalia Law School's Ilya Somin; and University of California-Berkley's Leti Volpp.

Another powerful foundling passage – perhaps the single best passage in another very fine *Barbara* brief – appears in an amicus filing by Yale's Keith Whittington:

If a newborn infant an hour removed from its mother's womb were left at a fire station, the state would not ask for the immigration status of the parent before protecting the child. If a neighbor reported that a newborn infant was being neglected or abused in the house next door, the state would not require the parent's immigration status before extending protection to the child. If a mother were to die in childbirth, the state would not question the immigration status of the mother before undertaking protection for the child. The child in these circumstances is within the jurisdiction of the United States regardless of the immigration status of the parent, and because the child is within the jurisdiction of the United States the government owes the child a duty of protection. That is the natural duty of a sovereign in actual possession of a territory. Under the common law embodied in the Fourteenth Amendment, the correlative to a state fulfilling that duty is birthright citizenship.

And here is yet another powerful foundling passage in yet another powerful *Barbara* brief – this one filed by University of Minnesota's Linus Chan, Wayne State University's Jonathan Weisberg, and private lawyers Douglas Jensen and Michael Bass at Sher Tremonte, LLP, on behalf of leading congressional amici curiae including, among countless others, Senators Michael Bennet, Cory Booker, Mark Kelly, Amy Klobuchar, Patty Murray, Adam Schiff, Chuck Schumer, Elizabeth Warren, and Sheldon Whitehouse; and Representatives Maggie Goodlander, Eleanor Holmes, Norton, Nancy Pelosi, and Jamie Raskin:

The irrelevance of parentage to the citizenship of children born in the United States is further demonstrated by the 1940 Nationality Act's "foundling" provision. Section 201(f) of the Act, as enacted, conferred citizenship on a "child of unknown parentage found in the United States, until shown not to have been born in the United States." Nationality Act of 1940 § 201(f). That provision is still in force with minor changes, see 8 U.S.C. § 1401(f). Under this provision, the foundling child was "presumed to have been born in the United States." 1940 House Hearings, at 57 (State Department Assistant Solicitor Flournoy); Revision and Codification, at 13. The presumption was rebutted if the child was "shown not to have been born in the United States." Nationality Act of 1940 § 201(f). That was because birth in the United States established U.S. citizenship. Notably, the provision did not say "until shown not to have been born in the United States or to have been born to parents in the United States only temporarily or without authorization." Compare, e.g., Nationality Act of 22 June 1913 [Germany] § 4 ("A child found in

the territory of a federal State (a foundling) shall be deemed to be a child of a citizen of that State until the contrary is proved” (emphasis added)).

Oh, and in case anyone missed it: In Akhil’s amicus brief, filed last Monday by Counsel of Record Vik prior to and without knowledge of any of the above-quoted briefs, the foundling issue also appears prominently:

Parentage opens a Pandora’s box, and implicates devilish questions not always defined by uniform federal law operating in other contexts. Who are a baby’s parents? What if a mother is married to one man, but another man is the biological progenitor? What if there are disputes about biological parentage? What if a baby’s biological father is unknown? What about foundlings? In today’s world, what about a baby born from Woman A’s egg and Man B’s sperm, who issues from the womb of Woman C and is also claimed by Humans D, E, and F (A’s, B’s, and C’s respective lawful spouses)?

Note how each of these four excerpts emphasizes something the other three excerpts do not, quite. The Constitutional Accountability Center nicely draws our eye to how the 14th Amendment was understood by ordinary Americans in the 1866 ratification process as a powerful promise of birth-equality. Whittington links the foundling issue to common-law concepts of *government protection and citizen allegiance* that helped lay the foundation for the 14th Amendment’s first sentence. The congressional brief adds that, above and beyond the 14th Amendment, the plain letter and spirit of a landmark twentieth-century statute still on the books guarantees birthright citizenship to native-born babies, regardless of parentage. It also folds in a subtle and elegant comparative point: Early 20th-century German law focused on blood, not soil, essentially denying the citizenship of German-born ethnic Turks. America on the cusp of World War II pointedly rejected this approach – and hooray for us! Last but (we hope) not least, Akhil’s brief stresses that a parentage rule would have raised all sorts of questions in the 1860s that never arose in debates over the amendment, *precisely because the amendment was in fact not about parents. It was about the baby.*

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Today’s column is our second on *Trump v. Barbara*. Our first, co-authored with Samarth Desai, ran last Monday – the same day that Vik filed Akhil’s brief. We will be running many more *Barbara* columns in the run-up to oral argument on April 1.

Our next column, which will run later this week, will be co-authored by Amad Ross. In it, we will examine the *Barbara* briefs from a different angle: Which ones best compiled and analyzed the originalist evidence surrounding the 14th Amendment’s birthright citizenship clause? In particular, which briefs best focused on the amendment’s precise words, on the Lincoln administration’s precipitating citizenship policies, on the looming background issues of slavery and Black rights, on the crucial election of 1866 that determined the amendment’s fate, and on the adjoining 13th and 15th Amendments? Stay tuned.

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Cases: [Trump v. Barbara \(Birthright Citizenship\)](#)

**Recommended Citation:** Akhil and Vikram Amar, *Birthright citizenship: A note on foundlings and comments on four complementary amicus briefs*, SCOTUSblog (Mar. 2, 2026, 5:49 PM), <https://www.scotusblog.com/2026/03/birthright-citizenship-a-note-on-foundlings-and-comments-on-four-complementary-amicus-briefs/>

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