

THE ROAD NOT TAKEN IN *TRUMP V. BARBARA*

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It is a “well-established principle” that the Supreme Court “will not decide a constitutional question if there is some other ground upon which to dispose of the case.”¹ This principle was nowhere to be found in Chief Justice Roberts’s opinion for the Court in *Trump v. Barbara*.² It may be the Court’s “usual practice” to resolve cases on statutory grounds so as to “avoid the unnecessary resolution of constitutional questions.”³ In *Barbara*, however, the statutory question received no attention in the Chief Justice’s opinion.⁴ Nor did it attract meaningful engagement from any of the dissents.⁵ Justice Kavanaugh was the only Justice to take the statutory arguments seriously, and he found them dispositive.⁶

Resolving *Barbara* on statutory grounds would have allowed the Court to avoid the larger Constitutional question. It might also have provided a basis for broader agreement among the Justices. While there is a heated debate as to the original public meaning of the Fourteenth Amendment’s Citizenship Clause,⁷ the meaning of Section 1401 at the time it was adopted is more readily resolved. It is well-established—if not universally observed—that the Court should “interpret statutory terms to ‘mean what they conveyed to reasonable people at the time they were written.’”⁸ As the Court reaffirmed in *Loper Bright Enterprises v. Raimondo*, “every statute’s meaning is fixed at the time of enactment.”⁹

I. THE MEANING OF SECTION 1401

Under 8 U.S.C. § 1401, any “person born in the United States, and subject to the jurisdiction thereof,” is a citizen of the United States.¹⁰ This language was enacted in 1940¹¹ and again in 1952.¹² While this language mirrors that of the Fourteenth Amendment, it was adopted at a time when government practice and legal precedent were understood to adopt the conventional view of birthright citizenship. The Supreme Court’s 1898 decision in *United States v. Wong Kim Ark* was then understood to provide for birthright citizenship to all born on U.S. soil, save for a few well-

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¹ See *Bond v. United States*, 572 U.S. 844, 855 (2014) (quoting *Escambia Cty. v. McMillan*, 466 U.S. 48, 51 (1984)); see also *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

² *Trump v. Barbara*, 146 S. Ct. 2438 (2026).

³ See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009).

⁴ The Chief Justice’s opinion mentions the Immigration and Nationality Act (INA) when describing plaintiffs’ claims, but never cites the statute.

⁵ The statutory provisions are not mentioned by either Justice Alito or Justice Gorsuch in dissent. Justice Thomas devoted three-quarters of a page (in a 91-page dissent) to the idea that Congress must speak clearly if it wishes to depart from a prior understanding of legal text, but made no effort to see whether Section 1401 (and its 1940 predecessor) satisfied that test. See *Barbara*, 146 S. Ct. at 2523 (Thomas, J., dissenting).

⁶ *Barbara*, 146 S. Ct. at 2469–71 (Kavanaugh, J., concurring in the judgment and dissenting in part).

⁷ See, e.g., Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L.J. 405 (2020) (defending the traditional interpretation); Keith E. Whittington, *By Birth Alone: The Original Meaning of Birthright Citizenship and Subject to the Jurisdiction of the United States*, 49 HARV. J.L. & PUB. POL’Y 460 (2026) (same); Michael D. Ramsey, *Birthright Citizenship Re-Examined*, 102 NOTRE DAME L. REV. (forthcoming 2026) (same); James A. Heilpern & Keith E. Whittington, “Subject to the Jurisdiction” as Legal Text, 49 HARV. J.L. & PUB. POL’Y PER CURIAM No. 8 (2026) (same); see also Ilan Wurman, *Jurisdiction and Citizenship*, 49 HARV. J.L. & PUB. POL’Y 315 (2026) (contesting the traditional interpretation); Kurt T. Lash, *Prima Facie Citizenship: Birth, Allegiance, and the Fourteenth Amendment’s Citizenship Clause*, 101 NOTRE DAME L. REV. (forthcoming 2026) (same).

⁸ *Bostock v. Clayton County*, 590 U.S. 644, 685 (2020) (Alito, J., dissenting) (quoting A. SCALIA & B. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 16 (2012)); see also *George v. McDonough*, 596 U.S. 740, 752 (2022) (“[t]he real question is ... what was the prevailing understanding of this term of art under the law that Congress looked to when codifying it.” (quotation marks omitted)).

⁹ 603 U.S. 369, 400 (2024).

¹⁰ 8 U.S.C. § 1401(a).

¹¹ Nationality Act of 1940, Pub. L. No. 76-853, 54 Stat. 1137, 1138.

¹² Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101–1537).

established exceptions,¹³ as the Court itself recognized in subsequent opinions.¹⁴ Even if this understanding was in error—either because *Wong Kim Ark* was wrongly decided or misunderstood—it was the basis upon which Section 1401 was adopted.

When Congress enacted the Nationality Act of 1940, the Department of State had a long practice of recognizing the citizenship of a child born on U.S. soil “even if his parents were at the time aliens, provided they were not, by reason of diplomatic character or otherwise, exempted from the jurisdiction of its laws.”¹⁵ Those who drafted the 1940 Act likewise viewed the language adopted as “a statement of the common law rule” under which “it is the fact of birth within the territory and jurisdiction, and not the domicile of the parents, which determines the nationality of the child.”¹⁶

If there were any doubt as to the understanding of the language enacted in 1940, the consistent and conspicuous practice of the federal government administering and enforcing this language over the subsequent decade should remove all doubt.¹⁷ Among other things, the executive branch repeatedly sought the suspension of deportation of non-citizen parents of children born in the United States, recognizing the children’s citizenship and entitlement to remain in the United States.¹⁸ The Supreme Court also took notice and accepted claims that children born on U.S. soil to unlawfully present foreigners were citizens by birth.¹⁹

While some are drawn to interpretations of the Fourteenth Amendment that would preclude granting birthright citizenship to the children born in the United States to those who lack allegiance to the United States, that was not the federal government’s practice in the mid-twentieth century. Throughout World War II, children born to Japanese citizens were recognized as citizens, even if their parents were considered enemy aliens.²⁰ It may well be that the public meaning of “subject to the jurisdiction” of the United States did not reach the children of those who lacked allegiance to or failed to establish domicile in the United States in 1868, but that was not the public understanding of the executive and legislative branches in the mid-twentieth century—and it was demonstrably not the understanding upon which Congress reenacted the relevant language in 1952.²¹

Justice Thomas, the only dissenter to even acknowledge the statutory argument, offers the cursory claim that Section 1401 must have the same meaning as the Constitutional provision.²² While intuitive—and sometimes correct—it is well understood that the same language may mean different things at different times.²³ This is simply the consequence of recognizing that language must be understood within the “appropriate social and linguistic context.”²⁴

¹³ 169 U.S. 649, 693 (1898).

¹⁴ See, e.g., *Morrison v. California*, 291 U.S. 82, 85 (1934) (“[a] person of the Japanese race is a citizen of the United States if he was born within the United States.” (citing *Wong Kim Ark*)).

¹⁵ See U.S. DEP’T OF STATE, REGULATIONS PRESCRIBED FOR THE USE OF THE CONSULAR SERVICE ¶ 137 (1896); see also U.S. DEP’T OF STATE, REGULATIONS GOVERNING THE CONSULAR SERVICE OF THE UNITED STATES ¶ 137 (1926); 22 C.F.R. § 79.137 (1938).

¹⁶ See H. COMM. ON IMMIGR. & NATURALIZATION, 76TH CONG., NATIONALITY LAWS OF THE UNITED STATES: MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, pt. 1, at 7 (Comm. Print 1938).

¹⁷ See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394 (2024) (“interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute’s meaning”); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (noting the relevance of “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress”).

¹⁸ See Brief of Citizenship Law Scholars as Amici Curiae Supporting Respondents at 24–27, *Trump v. Barbara*, 146 S. Ct. 2438 (2026) (No. 25-365). Of note, these requests for suspension of deportation were reviewed by Congress and subject to legislative veto. See *id.* at 24.

¹⁹ See *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72, 73 (1957) (“the child is, of course, an American citizen by birth”); *id.* at 79 (Douglas, J., dissenting) (“The citizen is a five-year-old boy who was born here”).

²⁰ See Brief of Professor Eric L. Muller as Amicus Curiae Supporting Respondents, *Trump v. Barbara*, 146 S. Ct. 2438 (2026) (No. 25-365).

²¹ It is also relevant that the Fourteenth Amendment provides a “floor” for birthright citizenship, limiting the ability of Congress to foreclose or limit such citizenship to those born “subject to the jurisdiction” of the United States. It does not, however, prevent Congress from extending citizenship more broadly than the Amendment itself would require.

²² *Barbara*, 146 S. Ct. at 2523 (Thomas, J., dissenting) (“By using language that tracked the Citizenship Clause, Congress did not clearly change the law.”); see also Steven Menashi, *The Birthright Citizenship Debate*, 49 HARV. J.L. & PUB. POL’Y 301, 313 (2026) (“It would be surprising to discover that Congress departed from the constitutional standard by enacting the exact constitutional language.”).

²³ Indeed, the same language in a single statute, adopted at different times, may have different meanings. See *Env’tl. Defense v. Duke Energy Corp.*, 549 U.S. 561, 575–76 (2007).

²⁴ *Bostock v. Clayton County*, 590 U.S. 644, 704 (2020) (Alito, J., dissenting) (quoting John F. Manning, *What Divides Textualists From Purposivists?* 106 COLUM. L. REV. 70, 79–80 (2006)).

II. THE VIRTUES OF RESTRAINT

A statutory holding would have preserved the ability of the legislative and executive branches to engage the subject of citizenship. While many believe the Fourteenth Amendment permanently cements the precise bounds of birthright citizenship, it is difficult to argue that Congress has zero ability to affect the Amendment's application on the margin, either by contracting the jurisdiction of the United States or by relying upon its power to enforce the Amendment's provisions under Section Five. If, for instance, the children of foreign diplomats are not entitled to birthright citizenship, might Congress expand the category of foreign officials or agents who qualify? By its terms, the Amendment identifies the consequences of U.S. jurisdiction, but does not dictate its scope or extent.

Deciding *Barbara* on statutory grounds would have invited Congress to do its job by considering and proposing specific modifications to the prevailing rule of citizenship. Such a result would have accorded with other recent Court decisions inviting legislative engagement, such as its decision to overturn deference to agency interpretations of ambiguous statutes²⁵ and refusing to find broad delegations of power without clear statutory language to that effect.²⁶ It also would have saved the Court from having to resolve any constitutional question not implicated by legislative action—action which requires the construction of a greater political coalition than does executive fiat. In *Barbara*, however, the Chief Justice did as much as he could to take Congress out of the picture.

Although he considers himself a student of history, Chief Justice Roberts may not have learned history's lesson here. While fairly (and in my view, accurately) recounting the history of American citizenship, he neglected to consider the history of judicial overreach. On several occasions in our nation's history Justices have sought to settle political contestation through judicial edict, hoping the power of the pen would quell political discord. The controlling majority opinion in *Planned Parenthood v. Casey* called on "the contending sides" of that "national controversy" to heed the Court's opinion.²⁷ Their argument fell on deaf ears, and arguably inflamed the opposition to the Court's abortion jurisprudence. The end result was neither the preservation of an abortion right nor the judicially crafted armistice, but complete judicial repudiation.²⁸ One wonders whether the Court's attempt to calm the growing constitutional debate over birthright citizenship will be any more successful.

²⁵ See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024).

²⁶ See, e.g., *West Virginia v. EPA*, 597 U.S. 697 (2022); *Biden v. Nebraska*, 600 U.S. 477 (2023).

²⁷ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867 (1992) (joint opinion).

²⁸ See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).