

THE BIRTHRIGHT CITIZENSHIP DEBATE REVISITED

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In February 2026, one of us observed in this journal that the executive order on birthright citizenship had been met with overwhelming skepticism from the legal profession. “Many insisted that there was not even a genuine debate to be had.”¹ But as the litigation progressed, the “overwrought rhetoric” that initially greeted the order gave way to a “sober acknowledgement” that the government presented a credible legal case.² In a similar way, some commentators confidently predicted that, in *Trump v. Barbara*,³ the Supreme Court would unanimously reject the government’s argument.⁴ As it turned out, only a bare majority of the Court concluded that the “children born of parents unlawfully or temporarily present in the United States” are born “subject to the jurisdiction” of the United States.⁵ Four Justices rejected the facial constitutional challenge to the order because, in their view, the Fourteenth Amendment does not guarantee birthright citizenship to all children born to aliens unlawfully or temporarily present.⁶ Following the close decision in *Barbara*, the originalist argument of the dissenters—that the Fourteenth Amendment confers a more limited right to birthright citizenship than the doctrine now suggests—appears more credible and serious than it did before. For that reason, instead of persuading “the contending sides of a national controversy” to accept “a common mandate rooted in the Constitution,”⁷ the decision will likely intensify an

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¹ Steven J. Menashi, *The Birthright Citizenship Debate*, 49 HARV. J.L. & PUB. POL’Y 301, 301 (2026).

² *Id.* at 301–02.

³ 146 S. Ct. 2438 (2026).

⁴ See DIVIDED ARGUMENT: *Backup Backup Backup Backup Argument*, at 3:03 (Apple Podcasts, Apr. 6, 2026) (statement of William Baude) (“[I]t wouldn’t be inconceivable for it to be 8-1 or 9-0 for the challengers.”); see also Akhil Reed Amar & Steven Calabresi, *What the Constitution Really Says About Birthright Citizenship*, TIME (Oct. 31, 2018), <https://perma.cc/DR54-S5EJ> (predicting that, because “constitutional birthright citizenship does not depend on the immigration status of one’s biological parents,” an effort to depart from that view “would likely be unanimously laughed out of court”).

⁵ 146 S. Ct. at 2450.

⁶ See *id.* at 2471 (Kavanaugh, J., concurring in the judgment and dissenting in part); *id.* at 2474 (Thomas, J., dissenting); *id.* at 2524 (Alito, J., dissenting); *id.* at 2546 (Gorsuch, J., dissenting).

⁷ *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 867 (1992), *overruled by Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

ongoing debate. Contrary to what some have suggested, that will make the originalist arguments more rather than less important.

The February essay also identified three “other questions that deserve attention,”⁸ which we revisit in this essay in reverse order. First, “what is the effect of the statutory enactment of the language of the Citizenship Clause?”⁹ Second, “how does the requirement that birth or naturalization occur ‘in the United States’ affect aliens detained at the border but released into the country pending a hearing?”¹⁰ Third, how does constitutional birthright citizenship interact with “the availability of dual citizenship?”¹¹ Revisiting the role of originalism and these three questions in the wake of *Barbara* provides a guide to forthcoming debates.

I

Some observers have argued that the dissenting opinions in *Barbara* represent a retreat from originalism.¹² One has even said that the decision represents “the end of originalism.”¹³ The idea is that the dissenters regarded the scope of the Citizenship Clause not to be “frozen to particular historical categories” but adaptable “by applying enduring legal principles to new situations” —and that approach purportedly requires originalists “to articulate the very principles of political morality they insist are absent from their decision-making.”¹⁴

It is true that the dissenters did not regard the historical exceptions to the Citizenship Clause—the children of ambassadors, foreign soldiers, and tribal Indians, along with those born on foreign ships—as a closed set. Instead, as one of us has explained, the dissenters “derived a legal rule from the constitutional language (‘subject to the jurisdiction’), and applied that rule to a different class of people (those unlawfully or temporarily present).”¹⁵ But that is what originalism requires. The dissenters “recognized that the constitutional text was fixed” but also “appreciated that, though the

⁸ Menashi, *supra* note 1, at 311.

⁹ *Id.* at 313.

¹⁰ *Id.* at 312.

¹¹ *Id.* at 311.

¹² See, e.g., ADVISORY OPINIONS: *It's the End of the Term*, at 16:13 (Apple Podcasts, June 30, 2026) (statement of David French) (describing Justice Thomas's dissent as an example of the “de-emphasis of text in the originalist project”); Ian Millhiser, *The Supreme Court Can No Longer Explain Itself*, VOX (July 3, 2026, 6:45 AM), <https://perma.cc/THQ4-K79G> (arguing that opinions of the Supreme Court are “increasingly illegible to people—even lawyers—who do not share the Republican justices’ values”).

¹³ Jeremy Christiansen, *Trump v. Barbara and the End of Originalism*, SUBSTACK: THE NEW DIGEST (July 1, 2026), <https://perma.cc/9EGN-ZRF4>.

¹⁴ *Id.*

¹⁵ Elias Neibart, *Originalism and the ‘Barbara’ Dissenters*, CIVITAS OUTLOOK (July 14, 2026), <https://perma.cc/SL3E-25D3>.

fixed text could not change, *the legal rule the fixed text created* can—and must—apply to circumstances and facts unforeseen at the time of ratification.”¹⁶ That is how the Court regularly approaches the Fourth and Second Amendments.¹⁷ In fact, “[o]ne familiar feature of legal rules is that the same rule can produce changing outcomes over time.”¹⁸ “The distinction between unchanging rules and changing outcomes is the *pons asinorum* of constitutional law,” and “failing to understand it leaves one unable to follow the most elementary constitutional arguments.”¹⁹ “This is ordinary stuff of ordinary law.”²⁰

In this way, the dissenters engaged more thoroughly with the originalist arguments. Unlike the majority, the dissenters grappled with the fact that “the Citizenship Clause does not reference” the categories historically excluded from birthright citizenship, so under the Clause “[t]he exclusion results from the application of a broader principle.”²¹ The dissenters sought to identify the principle while the majority recognized four fixed historically excluded categories.²² But when the constitutional text invokes a principle rather than four specific categories, it would seem more consistent with the original meaning to apply the principle.

Nevertheless, it is important that both the majority and the dissenters recognized originalism as the “standard of legal rightness.”²³ Under that standard, the decision is “falsifiable.”²⁴ Already, the availability of an historical standard has made the revisionist argument persuasive enough that the attitude of the legal culture has moved from skepticism to engagement. The availability of that standard also means that the decision

¹⁶ *Id.*

¹⁷ See, e.g., *Chatrie v. United States*, 146 S. Ct. 2193, 2222 (2026) (Gorsuch, J., concurring in the judgment); *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (Scalia, J.).

¹⁸ Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 817, 852 (2015).

¹⁹ William Baude & Stephen E. Sachs, *The “Common-Good” Manifesto*, 136 HARV. L. REV. 861, 880 (2023) (reviewing ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM* (2022)).

²⁰ *Id.*

²¹ Menashi, *supra* note 1, at 309; see also Transcript of Oral Argument at 127–28, *Trump v. Barbara*, 146 S. Ct. 2438 (2026) (questions of Justice Barrett) (asking whether “there may be other sorts of people who are present here to whom this ‘subject to the jurisdiction’ [principle applies] in the same way,” such that “new carveouts could exist by analogy” and “the principle still apply”).

²² Justice Kavanaugh explained that the “only proposed unifying principle for the four exceptions” offered by the plaintiffs or the majority was “what they call the ‘fiction of extraterritoriality.’” *Trump v. Barbara*, 146 S. Ct. 2438, 2474 n.6 (2026) (Kavanaugh, J., concurring in the judgment and dissenting in part). But neither was it “clear what the ‘fiction of extraterritoriality’ means here” nor did that concept “support treating the four exceptions as a permanently closed set” because the same fiction could “also apply to those in the United States unlawfully or temporarily.” *Id.*

²³ Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 798 (2022).

²⁴ Elias Neibart, *Textualism: Standard and Procedure—A Response to Re on the Snail Hypo*, YALE J. REG.: NOTICE & COMMENT (June 10, 2026), <https://perma.cc/6XT9-F73P>.

could be reconsidered if litigants and scholars are able to show that it relied on “faulty historical analysis.”²⁵

II

Congress has codified the language of the Citizenship Clause in a statute.²⁶ Before *Barbara*, the First Circuit said that in construing the statute, “a court ought to focus on ‘what the unusual phrase “subject to the jurisdiction thereof” was understood to mean when § 1401(a) became law in 1952’ and when Congress first enacted that language in a statute ‘in the Nationality Act of 1940.’”²⁷ Some commentators expected the Supreme Court to resolve *Barbara* on that statutory ground rather than reach the constitutional question.²⁸ The holding would have been that Congress in 1940 or 1952 understood the language of the Citizenship Clause to confer birthright citizenship on the children of illegal aliens and temporary visitors, so that is the meaning of the statute even if it was not necessarily how the Citizenship Clause was originally understood. As it turned out, only one Justice was interested in that statutory resolution.²⁹ Since *Barbara*, commentators have sought to explain why the Court “opined on the constitutional scope of birthright citizenship when a statutory holding would have sufficed,” suggesting that the decision signals a new “zeal for maximalism.”³⁰

To the contrary, the lack of interest in the statutory argument reflects a healthy respect for statutory text and a commitment to refined textualist methods. Regardless of how the Citizenship Clause was understood in 1940 or 1952,³¹ Congress transplanted the exact language of the Clause into the U.S. Code. Understanding the language in the Code

²⁵ *Dobbs*, 597 U.S. at 241.

²⁶ See 8 U.S.C. § 1401(a) (providing that “a person born in the United States, and subject to the jurisdiction thereof,” shall be a national and citizen at birth).

²⁷ Menashi, *supra* note 1, at 313 (quoting *Doe v. Trump*, 157 F.4th 36, 60 (1st Cir. 2025)).

²⁸ See, e.g., Ed Whelan, *Will Birthright-Citizenship Case Be Decided on Statutory Grounds?*, NAT’L REV. (Mar. 24, 2026), <https://perma.cc/RDK4-GXE7> (“My guess is that the Chief will be part of a supermajority of the Court that rules that the EO violates section 1401(a) and that declines to address the constitutional question.”); Jonathan H. Adler, *Supreme Court Justly Skeptical of Trump Administration’s Anti-Birthright Citizenship Executive Order*, CIVITAS OUTLOOK (Apr. 7, 2026), <https://perma.cc/SL34-VD8S> (arguing that “[t]he easiest way for the Court to reject the Administration’s position does not require reaching the underlying constitutional question” because “[w]hen enacted in 1940 and again in 1952,” the “language” in § 1401(a) “was understood to adopt the conventional understanding of birthright citizenship”).

²⁹ See *Trump v. Barbara*, 146 S. Ct. 2438, 2470 (2026) (Kavanaugh, J., concurring in the judgment and dissenting in part).

³⁰ Richard M. Re, *Extremism in Defense of Stability is No Vice*, SUBSTACK: DIVIDED ARGUMENT (July 9, 2026), <https://perma.cc/DJX9-RWLL>.

³¹ But cf. Menashi, *supra* note 1, at 313–14 (suggesting that it would be surprising “if those congressional enactments which sought to restrict the possibility of dual nationality simultaneously liberalized the circumstances under which the children of alien parents received American citizenship”).

to diverge from the language in the Clause would conflict with basic interpretive principles. For one, “[i]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.”³² For another, as Justice Thomas noted, § 1401(a) merely “codified the existing law by enacting the Citizenship Clause’s text,” and it is well established that “[a] codification of existing law does not change the law unless it does so clearly.”³³

The important point is that a legislature will often draft a legal text that incorporates or cross-references other bodies of law or legal rules. The Seventh Amendment, for example, addresses “suits at *common law*,”³⁴ and “[s]tatutes typically assume that the *law of equity* already exists, or even cross-reference it explicitly.”³⁵ A rule of civil procedure provides that “[f]or a claim that arises under federal law,” a federal court may exercise personal jurisdiction if doing so “is consistent with *the United States Constitution and laws*.”³⁶ These are references to real things—bodies of law and legal rules—that already exist outside the text. “[W]hen a textual provision incorporates a preexisting rule by reference, there’s often little doubt about its sense or linguistic meaning. The real action centers on the reference.”³⁷ When we see that a statute incorporates an external rule, “[s]o long as the external rule being incorporated isn’t contradicted by something else in the text, it comes in pure.”³⁸

In *Barbara*, everyone could see that Congress incorporated the Citizenship Clause into the Nationality Act. Once that is acknowledged, the congressional drafters’ “opinions” about the Citizenship Clause—“their unenacted hopes and dreams—become irrelevant”; the Act incorporated the Citizenship Clause as it actually was, “not as anyone might have imagined [it] to be.”³⁹ It is by now conventional to say that a court must apply the original public meaning of a text rather than the original *expected applications* or the *intended results* of its drafters. “Because we are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended, the sole object of the interpretative enterprise is to determine what a law *says*.”⁴⁰ To have interpreted the statutory incorporation of the Citizenship Clause to reflect the meaning not of the

³² *Id.* at 313 n.61 (quoting *Hall v. Hall*, 584 U.S. 59, 73 (2018), in turn quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947)).

³³ *Barbara*, 146 S. Ct. at 2522–23 (Thomas, J., dissenting) (citing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 257 (2012)).

³⁴ U.S. CONST. amend. VII (emphasis added).

³⁵ Samuel L. Bray, *How Equity Changes*, 2025 SUP. CT. REV. 83, 92 (2026) (footnote omitted).

³⁶ Fed. R. Civ. P. 4(k)(2) (emphasis added).

³⁷ Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1825–26 (2012).

³⁸ *Id.* at 1826.

³⁹ *Id.*

⁴⁰ *Lawson v. FMR LLC*, 571 U.S. 429, 459–60 (2014) (Scalia, J., concurring in principal part and concurring in the judgment).

Clause—but instead of the statutory drafters’ opinions or expectations about how the Clause should be interpreted—would have departed from this basic textualist premise. It is unsurprising, and encouraging, that the Court did not do that.

III

The *Barbara* Court decided that historical exceptions to the rule of birthright citizenship followed from “a fiction of extraterritoriality” but that no such fiction applies to “parents unlawfully or temporarily present in the United States.”⁴¹ An unanswered question is how “the requirement that birth or naturalization occur ‘in the United States’ affect[s] aliens detained at the border but released into the country pending a hearing.”⁴² In *Barbara*, it was undisputed that the “in the United States” requirement was met. So “[t]he question then arises as to how the Citizenship Clause would apply to the child of ‘an alien who is detained shortly after unlawful entry’ or who arrived at a port of entry and is then paroled into the country pending a determination of admissibility.”⁴³

Pursuant to what has become known as the entry fiction doctrine, the Supreme Court “has long considered such temporary arrangements as not affecting an alien’s status; he is treated as if stopped at the border.”⁴⁴ In 1958, the Supreme Court said that “[f]or over a half century this Court has held that the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States.”⁴⁵ The Court explained that “the granting of temporary parole” does not “effect[] a change in the alien’s legal status.”⁴⁶ That conclusion followed both from prior cases in which the Court addressed “the legal status of excluded aliens on parole” and from the fact that “Congress specifically provided that parole ‘shall not be regarded as an admission of the alien,’ and that after the return to custody the alien’s case ‘shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.’”⁴⁷ In short, “[t]he parole of aliens seeking admission is simply a device through which needless confinement is avoided

⁴¹ *Trump v. Barbara*, 146 S. Ct. 2438, 2445, 2450 (2026).

⁴² *Menashi*, *supra* note 1, at 312 (quoting U.S. CONST. amend. XIV).

⁴³ *Id.* at 312–13 (quoting *DHS v. Thuraissigiam*, 591 U.S. 103, 140 (2020)).

⁴⁴ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953) (citing *Nishimura Ekiu v. United States*, 142 U.S. 651, 661–62 (1892); *United States v. Ju Toy*, 198 U.S. 253, 263 (1905); *Kaplan v. Tod*, 267 U.S. 228, 230 (1925)).

⁴⁵ *Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958).

⁴⁶ *Id.*

⁴⁷ *Id.* at 188–89. That statutory language continues in effect. See 8 U.S.C. § 1182(d)(5)(A) (“[P]arole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Secretary of Homeland Security, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.”).

while administrative proceedings are conducted. It was never intended to affect an alien's status, and to hold that [an alien's] parole placed her legally 'within the United States' is inconsistent with the congressional mandate, the administrative concept of parole, and the decisions of this Court."⁴⁸

It is now well established that a detained or paroled alien is "'treated,' for constitutional purposes, 'as if stopped at the border.'"⁴⁹ And this "distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law."⁵⁰ At the same time, even historical authorities that conclude that children born to illegal aliens receive citizenship under the Fourteenth Amendment also conclude that children born to detained aliens do not.⁵¹

It would seem to follow, unless the Supreme Court were to reconsider longstanding precedents, that a child born to paroled aliens would not receive automatic citizenship under the Fourteenth Amendment. That is a potentially large population,⁵² so it would complicate the picture *Barbara* drew of a simple territorial rule. At least one commentator has argued that the entry fiction should count among those extraterritorial fictions that *Barbara* recognized as qualifying the category of people *subject to the jurisdiction* of the United States.⁵³

But the entry fiction might implicate the separate requirement that a birth occur *in the United States*. The Supreme Court has said that "[t]he power of [C]ongress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers ... is settled."⁵⁴ And it has said "[t]hat the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. *Jurisdiction* over its own territory to that extent is an incident of every

⁴⁸ *Leng May Ma*, 357 U.S. at 190.

⁴⁹ *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (quoting *Shaughnessy*, 345 U.S. at 213, 215).

⁵⁰ *Id.* (citing *Kaplan*, 267 U.S. at 230; *Leng May Ma*, 357 U.S. at 188–90).

⁵¹ See Menashi, *supra* note 1, at 313 n.58 (quoting CLEMENT LINCOLN BOUVÉ, TREATISE ON THE LAWS GOVERNING THE EXCLUSION AND EXPULSION OF ALIENS 421–25 (1912)); see also BOUVÉ, *supra*, at 426 (concluding that the child of unlawfully resident aliens is a citizen "unless the bare legal prohibition suffices to prevent the parents from acquiring a residence or domicile").

⁵² See Government Accountability Office, GAO-26-107765: Border Security: Additional Information Could Inform Enforcement Decisions for Noncitizens Paroled at the Southwest Border (May 2026), <https://perma.cc/ZQ5M-2YAV> ("From October 2018 through May 2025, U.S. Customs and Border Protection (CBP) granted about 2.4 million paroles—temporary permission for a noncitizen to stay in the U.S.—out of its nearly 10.4 million encounters at the southwest border.").

⁵³ See David Haungs, *Barbara's Entry Fiction Problem*, HARV. J.L. & PUB. POL'Y: PER CURIAM, Summer 2026, at 1 (arguing that "the entry fiction" qualifies as "the kind of extraterritorial fiction that *Barbara* counts").

⁵⁴ *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895) (emphasis added).

independent nation.”⁵⁵ So it may be that the same “power of the United States to govern those within its territory” that makes “nearly everyone within the territorial boundaries of the United States ... amenable to the Nation’s jurisdiction,” as *Barbara* held,⁵⁶ also allows Congress expressly to deny entry to persons encountered at the threshold and to authorize parole for humanitarian reasons on the condition that those paroled not be accorded the rights of entry. If it turns out that Congress lacks that power, then the executive branch might exercise its discretion to grant parole less often.⁵⁷ This question will eventually be addressed.

IV

The majority in *Barbara* did not address “whether the greater availability of dual citizenship affects what it means to be subject to the jurisdiction of the United States or whether the principle should be understood from the perspective of a Congress that did not expect dual citizenship generally to be available.”⁵⁸ For much of American history, the law disfavored dual citizenship.⁵⁹ “For those born into the citizenship of more than one country,” for example, “the State Department previously required the citizen, on reaching majority, to make an election between American citizenship and the citizenship of his parents,” and “Congress codified the actions by which someone could be deemed to have expatriated himself,” such as swearing allegiance to a foreign state or claiming the benefits of the nationality of a foreign state and residing there.⁶⁰

A framework that required a choice between American and foreign citizenship would reduce the attraction of “‘birth tourism’—the practice of traveling here with temporary authorization solely to give birth and obtain citizenship for one’s children, then returning to raise them in another country”—because American citizenship could not be retained as a benefit on top of one’s home-state citizenship.⁶¹ But the Supreme Court, in the 1950s and 60s, “held that the State Department could not ‘require a citizen

⁵⁵ *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889) (emphasis added).

⁵⁶ *Trump v. Barbara*, 146 S. Ct. 2438, 2450 (2026) (internal quotation marks omitted).

⁵⁷ See 8 U.S.C. § 1182(d)(5)(A) (providing that the Secretary of Homeland Security may “in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States”). In a similar way, Congress has allowed alien crewman to “land temporarily” in the United States, but such alien crewmen “shall not be considered to have been admitted.” 8 U.S.C. § 1101(a)(13)(B).

⁵⁸ *Menashi*, *supra* note 1, at 312. But see *Trump v. Barbara*, 146 S. Ct. 2438, 2480 (2026) (Thomas, J., dissenting) (“In the 19th century, dual citizenship was considered highly undesirable, if not a contradiction in terms. ... [T]he United States did not recognize a double allegiance. ... Because each person had one and only one domicile, domicile-based citizenship avoided the problems attendant to dual citizenship.”) (internal quotation marks and alteration omitted).

⁵⁹ See *Barbara*, 146 S. Ct. at 2480–81 (Thomas, J., dissenting).

⁶⁰ *Menashi*, *supra* note 1, at 311.

⁶¹ *Barbara*, 146 S. Ct. at 2501 (Thomas, J., dissenting).

by nativity to elect between dual citizenships upon reaching a majority,”⁶² and “it invalidated the ‘statutory sections providing for involuntary expatriation.’”⁶³ The decision in *Afroyim v. Rusk* overturned a precedent established less than a decade earlier,⁶⁴ and it dramatically limited the power of Congress to regulate citizenship.⁶⁵

That decision, however, rested on admittedly “faulty historical analysis.”⁶⁶ The Court expressly said that “our holding might be unwarranted if it rested entirely or principally upon” the “legislative history of the Fourteenth Amendment and of the expatriation proposals which preceded and followed it.”⁶⁷ But the Court did not rely on that history. It said that “our construction of that Amendment, we believe, comports more nearly” than the alternative “with the principles of liberty and equal justice to all that the entire Fourteenth Amendment was adopted to guarantee.”⁶⁸

That sentence could not be written by a Court primarily concerned with “the text and history of the Citizenship Clause.”⁶⁹ If Congress and the President cannot prevent the receipt of citizenship to children of unlawfully or temporarily present aliens, perhaps Congress or the State Department might respond by reasserting authorities the political branches previously exercised to regulate citizenship. And that might lead to a reconsideration of these precedents that would be consistent with *Barbara*.

* * *

The *Barbara* opinions relied on, and will continue to inspire, careful scholarly attention to the originalist and textualist questions implicated in the case. So the decision may mark not the culmination of the birthright citizenship debate but its starting point.⁷⁰

⁶² Menashi, *supra* note 1, at 312 (quoting *Mandoli v. Acheson*, 344 U.S. 133, 138 (1952)).

⁶³ *Id.* (quoting *Afroyim v. Rusk*, 387 U.S. 253, 255 (1967)).

⁶⁴ See *Perez v. Brownell*, 356 U.S. 44, 62 (1958) (“It cannot be said, then, that Congress acted without warrant when, pursuant to its power to regulate the relations of the United States with foreign countries, it provided that anyone who votes in a foreign election of significance politically in the life of another country shall lose his American citizenship. To deny the power of Congress to enact the legislation challenged here would be to disregard the constitutional allocation of governmental functions that it is this Court’s solemn duty to guard.”).

⁶⁵ See *Afroyim*, 387 U.S. at 267 n.23 (stating that only “naturalization unlawfully procured can be set aside”).

⁶⁶ *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 217 (2022).

⁶⁷ *Afroyim*, 387 U.S. at 267.

⁶⁸ *Id.*; see also *id.* at 269–70 (Harlan, J., dissenting) (“The Court acknowledges that its conclusions might not be warranted by that history alone, and disclaims that the decision today relies, even ‘principally,’ upon it. ... I can find nothing in this extraordinary series of circumventions which permits, still less compels, the imposition of this constitutional constraint[] upon the authority of Congress.”).

⁶⁹ *Trump v. Barbara*, 146 S. Ct. 2438, 2457 (2026).

⁷⁰ Cf. William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 819 (2019) (noting that the originalist “debate in *Heller* ... generated a forest of historical criticism”).