A Win That Isn't

Trump v. Barbara as a Case Study of Constitutional Rot

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09.04.2026 doi: 10.59704/81ac26cea3f48a66

Last week, the U.S. government asked the Supreme Court to bless its attempt to put the country's citizenship attribution rule into the service of its anti-immigrant agenda. At issue was the constitutionality and legality of the President's Executive Order 14160. It seeks to deny citizenship to children born to non-citizen mothers who are undocumented or lawfully but temporarily present and non-citizen fathers who do not possess a green card. After Wednesday's oral argument, there is broad consensus that the Court is unlikely to do so. That will be a win for the rule of law and the Constitution's commitment to equal citizenship. But it is also a Pyrrhic victory. The government's argument in *Trump v. Barbara* relied on two strategies that have proven successful in turning the Administration's political ideology into constitutional fact in other contexts. If they fail to carry the day in this case, it will have less to do with the Court's principled commitment to the spirit and text of the 14th Amendment, or the rule of law as an ideal of modern political governance. Instead, it reflects the case's strategic value to the Court's own political agenda.

Jurisdiction as Allegiance and Domicile

The 14th Amendment states that all persons born in the United States and "subject to the jurisdiction thereof" are to be citizens of the United States. Until recently, there was consensus that this language conferred citizenship to almost any child born within the country's territory, with a small set of exceptions: the children of ambassadors, soldiers of invading armies or born on foreign ships in U.S. waters, and Native Americans who maintain tribal relations. The government contends this consensus rests on a grave misunderstanding. "Jurisdiction," it argued, does not mean merely "being subject to the laws and authority of the United States." It really means "political" jurisdiction, and individuals must owe primary as well as direct and immediate, not merely temporary or partial, "allegiance" to the United States to be subject thereto [p.11].

Importantly, only domiciled individuals can possess such allegiance. Domicile, Solicitor General Sauer told the Court, is a "high-level concept [p.24]." It reflects not merely the fact of territorial residence, nor the individual's intent to become a member of the political community. These are, to be sure, sometimes dispositive, the SG admitted [*Id.* p.24]. But they are irrelevant when the individual resides in violation of immigration law, or even if their residence is lawful but merely temporary in the eyes of the government. Such individuals lack the legal capacity to establish domicile. Because in the eyes of the government this deficiency in legal capacity is hereditary, the children of such adults cannot be U.S. citizens at birth, because per the 14th Amendment only individuals born 'subject to the jurisdiction thereof' acquire citizenship at birth.

Two Strategies for Constitutional Erosion

The government's attempt to poke a hole into the 14th Amendment's near categorical rule rested on two distinct strategies that have been successful in convincing the Court to reshape the Constitution's framework in other contexts.

The first is that of originalist reinterpretation: the government's argument that jurisdiction really meant 'political' jurisdiction and that 'political' jurisdiction depended on 'allegiance' invoked the mantle of original public meaning originalism; a method of constitutional interpretation that suggests we should construe a text's meaning based on how a competent reader would have understood the language at the time it was

adopted. Accordingly, the government argued that its theory of the 14th Amendment's jurisdictional requirement was consistent with the meaning of the term jurisdiction as it was understood at the time the Amendment was drafted. Originalism has moved from a fringe method of constitutional interpretation to one of the Court's preferred ones in a little less than 50 years. Its methodological emphasis on history (and tradition) to determine the Constitution's meaning was key, *inter alia,* to the Court's decision to roll back reproductive rights, expand the scope of the Second Amendment, and declare nation-wide injunctions unlawful for being beyond the scope of federal judicial authority.

The second was a method familiar to scholars of immigration law: the detachment of constitutional protection from the individual's *de facto* subjection to the laws and authority of the U.S, and its attachment instead to a legally constructed status or concept whose scope and applicability it is for the government to determine. The government's attempt to create an allegiance and domicile-based exception to the 14th Amendment's rule rested on this move. It sought to turn the territorial fact of jurisdiction into a question of legal capacity—a capacity that was based on the individual's immigration status, which is, of course, for the government to determine. This method—the substitution of territorial fact with a legal fiction—to determine the Constitution's applicability has been key to the erosion of constitutional protections in the context of immigration enforcement agenda: it has underpinned, e.g., its decision to deny due process and habeas review to non-citizens in removal proceedings who were arrested on U.S. soil, and to permit racial profiling in immigration enforcement efforts, even if this occurs on the streets of Los Angeles, affecting non-citizens and citizens alike, rather than at the cartographic border.

Law in the Service of Political Ideology

Both strategies are likely to fail in *Trump v. Barbara.* The Court was not persuaded by the originalist argument [e.g. 25-6]. The historical evidence the government relied on to support its revisionist jurisdiction-as-allegiance theory was, at best, ambiguous, and at worst a highly selective deployment of sources whose exclusionary and racist vision of citizenship the 14th Amendment was designed precisely to repudiate. Nor was it persuaded by the domicile-based exception to the 14th Amendment's general rule. The government heavily relied on the Court's own 1898 decision in *Wong Kim Ark*, a case whose controlling rule of decision was precisely to affirm the categorical nature of America's *ius soli* rule, irrespective of the parents' immigration status (and allegiance.) Wong's parents, while resident and domiciled in the United States, were subjects of the Emperor of China. Nor was the domicile concept, which collapsed under examination into little more than "whatever immigration status the government deems sufficient for the 14th Amendment to apply," easily retrofitted with the extra-territoriality principle that underpinned the rule's other recognized exceptions [81].

The oral argument laid bare what everyone already knew: there simply is no coherent legal argument that supports the government's reinterpretation of the 14th Amendment's citizenship clause. For the Court to deem the Executive Order constitutional it would have to simultaneously embrace an invented conceptual distinction, rely on an internally incoherent mishmash of methods of constitutional interpretation to rewrite the meaning of clear constitutional text, override more than a century of its own settled precedent, and potentially cause administrative havoc — all in the name of a theory whose origin and content its own lawyer could not explain coherently. Constitutional law may be a way of doing politics. But it is not *just* politics. It has its own tools, methods, and discipline—and these yield real constraints. They may be nowhere near as clear or hard as many would like them to be. But they nonetheless exist. Wednesday's argument showed what happens when a political actor wants to weaponize the law to turn their ideological views into national policy but treats the law's own discipline as utterly irrelevant.

The government's choice to litigate this case despite the violence to constitutional text, history, and legal discipline it required is telling. It reflects the fact

that the Court has done its own fair share to blur the line between law and politics. If the administration loses, it shows that this line is still there. On its face, this is a win for the rule of law and the Constitution's commitment to equal citizenship. But it would be a mistake to take this as evidence that the constitutional system remains in good health. If the Court rules as it is expected to, this won't be because of a principled commitment to the constitutional text and values at stake. It is more likely evidence of the case's strategic value to the Court's own legitimacy.

Birthright Citizenship is Different

Birthright citizenship is different to many of the administration's other political agenda items that have made it to the Court: it is neither key to religious culture wars, as reproductive rights were, nor is it central to the Court's own political project of constructing a strong, and legally unaccountable, system of executive-led political rule. To be sure, a substantive win on birthright would further aggrandize the Presidency, granting it the power to rewrite the Constitution with the stroke of a pen. But it does not have the same structural significance to the Court's project of rebalancing the separation of powers in not just the President's favor but also its own. *Trump v. Barbara's* value lies instead in the opportunity it provides to bolster the Court's standing and legitimacy, because of its high expressive value and signaling function.

The 14th Amendment's citizenship attribution rule is not merely part of but structurally foundational and constitutive of the bright side of American exceptionalism. The SG told the Court that the U.S. is exceptional in its approach to birthright citizenship. This is factually false: ius soli, including as a categorical rule, is common throughout South America. Several countries within Europe—a continent the SG invoked as a general comparator, despite the diversity of its countries and their respective citizenship regimes [pp. 38-9] — also possess strong ius soli traditions, though these have also come under political pressure in response to —surprise, surprise—right-wing fears about increased immigration and the polity's purity.

But the SG was right to say that the American ius soli rule *is* exceptional in some way. Citizenship laws are uniquely potent and highly expressive tools at the disposal of governments to determine the character and identity of the polity they are tasked with governing. They set the outer limit for how much the law may be put in service of exclusionary political ideology. America's ius soli rule is exceptional in taking this tool largely out of the hands of the democratic majority of the day, by attaching citizenship solely and immediately to the fact of territorial birth. Importantly, it did so at a time when the country's legal elite itself was deeply divided over what structural purpose its citizenship laws should serve: should they reflect the nativist and racial ideology of white supremacy that licensed the system of slavery? Or should they repudiate America's original sin and instead embrace the egalitarianism of its liberal republican ideological commitments? The 14th Amendment chose the latter, thereby turning the country's citizenship attribution rule into a silent yet uniquely potent engine of America's (flawed) attempt at multi-racial liberal democracy. This egalitarian ethos made America's citizenship regime exceptional at the time it was designed (and arguably still today), at least vis-à-vis those that emerged from Europe's former empires, constitutional monarchies, fascist dictatorships, and religiously defined nation-states.

By handing the challengers a win, the Court can position itself as the defender of not just the rule of law, but of this ideological commitment to equal citizenship as well. It can do so all while it is actively eroding both. It has been entrenching the unequal citizenship of minorities by rolling back hard-won legal protections of their rights and dignity, whether it be by abolishing reproductive rights, eroding statutory protection of equal political representation for African-Americans, permitting discrimination against individuals on the basis of their sexual identity, or rendering it more difficult for states to ensure that trans youth receive adequate and life-saving therapeutic care. And it has consistently chipped away at the rule of law's commitment to comprehensively subject the exercise of public power to legal process and

values, *inter alia,* by systematically shrinking the applicability of procedural guarantees as the government proclaims to be enforcing immigration law, and by restricting the lower courts' power to issue nationwide injunctions against precisely the kind of unlawful executive action that was at issue in *Trump v. Barbara*.

Constitutional Rot Laid Bare

Worse still, dealing a loss to the government also obscures the Court's own complicity in legitimizing the assault on the Constitution's egalitarian spirit. A less politicized Court would and should have laughed the government out of the room when it appealed the case. After all, the Court decide for itself which cases it hears. If it had ignored the government's request, the lower federal courts would have simply continued to block the executive order from going into effect. But the Court didn't do that. It *chose* to hear the case. In doing so, it lent not just legitimacy to the President's efforts to rewrite the Constitution, and contributed to the shifting Overton window on the appropriateness of the citizenship clause's categorical rule. It also rewarded the cluster of legal academics who were willing to sacrifice methodological discipline and the fiction of scholarly neutrality to produce op-eds and law review articles to legitimate the government's argument. They were all quoted in the government's briefs. Their arguments claimed the mantle of original public meaning originalism. But as rebuttals showed: neither methodology nor history was on their side. Nonetheless, they doubled down.

In the face of such a politicized Court and legal academy, some argue that the lesson we should draw from Trump v. Barbara is to abandon the strategy of litigation as a method of resistance altogether. There is nothing to be gained, and much to be lost. Liberals, by seeking to beat the administration on its own methodological terms, are both legitimizing its methods and the legal actors that design and utilize them to turn anti-constitutional politics into constitutional fact. The critique is legitimate and the problem it identifies is real. But the conclusion it draws is overly broad as well as empirically inaccurate. It ignores that liberal legalism has proven to be a successful strategy of resistance in other countries experiencing democratic backsliding. And if the Court rules as it is expected to, much will, in fact, be gained: every child born to immigrant parents will continue to have U.S. citizenship at birth, and the many privileges, entitlements, and protections against state power this confers. If we have learned anything from the past year, it is how important possession of this status is under the current administration. Trump v. Barbara shows that liberal legalism may be a double-edged sword. But in a system that continues to hash out its political disagreements through the law, it remains a sword nonetheless. To abandon it would be ceding too much power—better to wield it clear-eyed about its risks and in combination with other strategies of resistance.

Death by a Thousand Cuts

Trump v Barbara will likely go down in public consciousness as a tale of successful constitutional resistance in the face of a devious executive-led assault on a core value and achievement of U.S. constitutionalism. This obscures that it should be seen instead as a case study for the mechanics of constitutional erosion. It is yet further evidence that the project of liberal constitutionalism does not end with a declaration of emergency or military coup. Instead, it dies by a "thousand cuts" to its core commitments and values. These are no longer merely inflicted by political actors and branches. Instead, they are inflicted by legal actors who, by virtue of their particular role obligations within a constitutional system, possess a special duty to defend these very commitments.

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SUGGESTED CITATION

Bossow, Anja: A Win That Isn't: Trump v. Barbara as a Case Study of Constitutional Rot, Verfassungsblog, 09.04.2026, doi: 10.59704/81ac26cea3f48a66.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20260410-173552-0.