

Testimony of Kansas Attorney General Kris W. Kobach
House Committee on the Judiciary
Subcommittee on the Constitution and Limited Government
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Introduction

It is an honor to present this testimony on the subject of birthright citizenship—one of the most important of all constitutional questions. I offer this testimony as a representative of the 25 attorneys general who submitted the amicus brief supporting the Department of Justice position in *Trump v. Barbara*, 146 S. Ct. 2438 (2026). I also offer this testimony as a former professor of constitutional law at the University of Missouri—Kansas City School of Law, where I taught for 15 years.

The U.S. Supreme Court’s recent 5-4 decision in *Trump v. Barbara*, 146 S. Ct. 2438 (2026), incorrectly held that children born to parents unlawfully or temporarily present in the United States are, by birth, citizens of the United States under the Fourteenth Amendment’s Citizenship Clause. That Clause provides “[a]ll 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*.” U.S. Const. amend. XIV, § 1 (emphasis added). The majority opinion authored by Justice Roberts effectively read the decisive words “subject to the jurisdiction thereof” out of the Fourteenth Amendment, limiting it to rare situations such as those involving foreign ministers.

The Dissent

I begin my analysis not with the majority opinion, but with Justice Thomas’s dissenting opinion, which at 91 pages is the second longest supreme court dissent ever written (excluding appendices).¹ It also dwarfs the majority opinion of the Court, which is only 26 pages long. Justice Thomas’s opus is as thorough an analysis of the subject as anyone has ever written, and the majority opinion does not even come close to addressing all of the indicia of original intent offered by Justice Thomas. Therefore, it is

¹ First place goes to Justice James Moore Wayne’s dissenting opinion in *United States v. Castillero*, 67 U.S. 17 (1863) which was 160 pages long. Benjamin H. Barton, *The 107 Longest Supreme Court Cases*, 104 N.C. LAW REV. 433, 481 (2026). I count slip opinion pages for *Barbara*, because the U.S. Report pages have not yet been published at the time of this testimony. Justice Samuel Alito’s opinion in *Bostock* (2020), which is listed by Barton as the second-longest dissent, doesn’t even come close, because although the slip opinion was 107 pages long, only 54 pages comprised the opinion. The rest of the pages were appendices.

appropriate to begin with the more well-constructed edifice, and then turn to the opposing arguments.

The issue at the heart of the case was the meaning of the phrase “and subject to the jurisdiction thereof” in the Citizenship Clause. Those words must be given meaning. The Citizenship Clause does not say simply that all persons born in the United States are citizens. Thus the case had to turn on the meaning of that limiting phrase.

Justice Thomas’s description of the original intent of the Citizenship Clause is based on an investigation of five factors: (1) the text, (2) the stated intentions of the congressional drafters of the Citizenship Clause, (3) the Civil Rights Act of 1866, upon which it was based, (4) the practice of the U.S. government in implementing the Clause in the first six decades after it was adopted, and (5) the holdings of three important Supreme Court decisions prior to *Barbara*.

Justice Thomas first turned to the text itself, which is where all constitutional interpretation should begin. “All persons born ... in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” As Justice Thomas explained, the meaning of “subject to the jurisdiction thereof” was quite clear to Congress in 1867: a person is “subject to the jurisdiction of the government of his domicile.” *Barbara*, 146 S. Ct. at 2475 (Thomas, J., dissenting). Domicile is a legal word for home, meaning permanent residence. *Id.* at 2477. A person is not “domiciled in a place simply because he was temporarily present or born there.” *Id.* at 2479. Thus, children born in the United States to parents illegally or temporarily present in the United States are not “subject to the jurisdiction” of the United States; they are subject to the jurisdiction of their home country. Accordingly, they are not entitled to birthright citizenship.

An additional textual clue is found in the second half of the Citizenship Clause: “are citizens of the United States and of the State wherein they reside.” To be entitled to state citizenship, a person must “reside” therein. And one can only reside in a place where he has legal domicile. As Justice Thomas pointed out, “the domicile rule aligns national citizenship with the longstanding rule for state citizenship.” *Id.* at 2514. This was alignment already well established. As Justice Story wrote, “Every citizen of a state” was “ipso facto a citizen of the United States.” 3 J. Story, *Commentaries on the Constitution of the United States* 565 (1833). To ignore the domicile requirement is to write the state citizenship clause out of the Fourteenth Amendment. The majority opinion neglected this argument entirely.

Second, the statements of the members of Congress who drafted the Citizenship Clause were quite clear. As Senator Howard, one of the principal proponents of the Clause, explained: to be a “citizen” meant to “not a subject of a foreign power.” *Id.* at 2489. He also stated, “[T]he word ‘jurisdiction,’ as here employed, ought to be construed so as to imply a full and complete jurisdiction”—“the same jurisdiction in extent and quality as applies to every citizen of the United States now.” *Id.* Senator Trumbull expressed the same intent. “What do we mean by ‘subject to the jurisdiction of the United States?’ Not owing allegiance to anybody else. That is what it means.” *Id.*

The Citizenship Clause was intended to overturn the Supreme Court’s decision in *Dred Scott v. Sanford*, 60 U.S. 393 (1857), which denied citizenship to African Americans. The Clause’s purpose was to guarantee citizenship to persons born *and domiciled* in the United States regardless of race. Nothing in its history suggests that it was intended to grant citizenship to the children of individuals illegally or temporarily present in the country. The majority opinion’s interpretation of the Clause gave it a meaning that “the Reconstruction Congress never contemplated and that cannot find support in its text.” *Barbara*, 146 S. Ct. at 2524 (Thomas, J., dissenting).

Third, the Citizenship Clause must be understood in light of the Civil Rights Act of 1866, which was passed by Congress during the same session as the Citizenship Clause. *Id.* at 2489. These legislative acts share a common purpose and should be interpreted harmoniously. Indeed, a principal motivation behind the Fourteenth Amendment was to constitutionalize the Civil Rights Act of 1866 in case a future Democrat Congress attempted to repeal it or a future Supreme Court held that Congress lacked the authority to enact the Civil Rights Act. The Civil Rights Act excluded individuals “subject to any foreign power” from its citizenship guarantee. *Id.* at 2465. When Senator Trumbull introduced the Civil Rights Act’s citizenship provision, he explained that this language excluded “persons temporarily resident” in the United States, whom “we would have no right to make citizens.” *Id.* at 2487 (quoting Cong. Globe, 39th Cong., 1st Sess., at 572). “The Citizenship Clause, which the same Congress passed shortly after the Civil Rights Act, was understood to have the same meaning” with its use of the phrase “subject to the jurisdiction thereof.” *Id.* at 2475. Rep. Bingham, who was the principal sponsor of both the Civil Rights Act and the Citizenship Clause in the House of Representatives, explained that the Act granted citizenship only to children “of parents not owing allegiance to any foreign sovereignty.” *Id.* at 2487.

Fourth, in the six decades following ratification of the Fourteenth Amendment, the “Executive Branch, Congress, courts, States, lawyers, scholars, and commentators” all generally shared the understanding that the Clause excluded the children of temporary visitors. *Id.* at 2491. Just two years after ratification of the Fourteenth Amendment, Congress passed the Enforcement Act of 1870 to implement the Clause, and that Act “expressly excluded the children of temporary foreign visitors, who were subject to the power of the foreign countries in which they were domiciled.” *Id.* at 2493. If the *Barbara* majority opinion were correct, “then the Reconstruction Congress would have violated its own Citizenship Clause in an Act designed to enforce it.” *Id.* Clearly, this cannot be correct. The executive branch as well repeatedly interpreted the Citizenship Clause in individual cases to only confer citizenship on the children of persons permanently residing in the United States. Slip op. at 32-35 (Thomas, J., dissenting).

Fifth and finally, early Supreme Court decisions interpreting the Citizenship Clause confirmed that the phrase “subject to the jurisdiction thereof” “was intended to exclude from its operation children of . . . citizens or subjects of foreign states born within the United States.” *Slaughter-House Cases*, 83 U.S. 36, 73 (1873). The Supreme Court explained that in order to satisfy the Citizenship Clause, a person must be “completely subject” to the United States’s “political jurisdiction” at birth, “owing [it] direct and immediate allegiance.” *Elk v. Wilkins*, 112 U.S. 94, 102 (1884). “The Citizenship Clause thus granted citizenship at birth only to persons who ‘ow[ed] no allegiance to any alien power.’” *Barbara*, 126 S. Ct. at 2494 (Thomas, J., dissenting) (quoting *Elk*, 112 U.S. at 101). And Justice Harlan’s celebrated dissent in *Plessy v. Ferguson* echoed this understanding: the Citizenship Clause “gave citizenship to all born or naturalized in the United States *and residing here*.” 163 U.S. 537, 563 (1896)(emphasis added).

The Majority Opinion

Turning to the relatively short majority opinion, it addressed the five pillars of Justice Thomas’s dissent only in the most superficial manner or in some cases not at all. Instead, the majority opinion relied primarily on the medieval English feudal principle that a person “owed personal service to the lord of the soil.” *Id.* at 2476. But Americans rejected that feudal principle. Indeed, the Supreme Court’s decision was particularly shocking coming just days before the celebration of the 250th Anniversary of the Declaration of Independence, “which emphatically renounced the foundation on which the British rule rested.” *Id.* at 2525 (Alito, J., dissenting). The United States has citizens, not feudal subjects. This was a particular odd aspect of the majority

opinion, since determining the original intent of constitutional clauses relies first and foremost on evidence from the period in which the provision was drafted, not English legal doctrines from centuries earlier and which were rejected during the Founding era.

With respect to the early opinions of the Supreme Court after ratification, instead of following those precedents identified by Justice Thomas, the *Barbara* majority relied on dicta from *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), a later case that arose out the unique circumstances of Chinese immigration in the late Nineteenth Century. But *Wong Kim Ark* repeatedly “emphasized that its holding was limited to persons *domiciled* in the United States.” *Barbara*, 146 S. Ct. at 2476-77 (Thomas, J., dissenting) (emphasis added). “[S]cholars and government officials continued to agree after *Wong Kim Ark* that the Citizenship Clause did not extend to the children of foreign temporary visitors.” *Id.* at 2477

In the 1920s and thereafter, executive practice began to treat the children of temporary visitors and illegal aliens as citizens. *Id.* at 2501. But that much later practice does not change the original meaning of the Citizenship Clause.

Concluding Thoughts

The Supreme Court’s decision makes the United States an outlier in the world. *Id.* at 2545 (Alito, J., dissenting) (observing that “[o]ther than Canada, the United States will be the only affluent nation where birth alone is enough to establish citizenship.”). It also has the unfortunate result of encouraging “birth tourism,” the practice of traveling to the United States solely to give birth and obtain citizenship for one’s children. *Id.* at 2501. The Supreme Court should have followed the original understanding of the Fourteenth Amendment and limited the Citizenship Clause to children born to parents domiciled in the United States.

As Justice Thomas stated in his concluding paragraph, “I am not sure that today’s opinion will stand the test of time.” I agree. All 5-4 decisions are at some risk of reversal. But majority opinions that are as weak as this one are especially so. A future case presenting a narrower question might yield a decision that is consistent with the original understanding of the Citizenship Clause.

I recommend the congressional enactment of a statute similar to the President’s August 6, 2026, executive order denying U.S. citizenship to the

children of parents engaged in the illegal practice of birth tourism. Indeed, one of the post-ratification examples of executive branch practice identified by Justice Thomas offers a close parallel. In 1889, the child of an Irish woman named Mary Deveraux who gave birth in the United States the day after she arrived in the country was denied U.S. citizenship by President Harrison's administration. It would be difficult for the Supreme Court to ignore that case and the nonsensical consequences of an open invitation to birth tourism made permanent by a strained interpretation the Citizenship Clause. However, an executive order is likely not enough to produce a five-justice majority. A statute would stand a much better chance of surviving judicial review, especially with Justice Kavanaugh.

In conclusion, the Citizenship Clause was intended to overturn *Dred Scott* and make clear the citizenship of the newly-freed slaves. It was not intended to place shackles on Congress, making Congress powerless to protect American citizenship and prevent immigration laws from being abused.