



Please sign up here to receive our daily newsletter, SCOTUStoday.

BROTHERS IN LAW

Birthright citizenship: an empirical analysis of supposedly originalist briefs

By Akhil and Vikram Amar & Amad Ross
on Mar 4, 2026



(Celal Gunes/Anadolu via Getty Images)

Brothers in Law is a recurring series by brothers Akhil and Vikram Amar, with special emphasis on measuring what the Supreme Court says against what the Constitution itself says. For more content from Akhil and Vikram, please see Akhil’s free weekly podcast, “America’s Constitution,” Vikram’s regular columns on *Justia*, and Akhil’s new book, *Born Equal: Remaking America’s Constitution, 1840-1920*.

More brief-writers than ever are claiming to be “originalists.” Indeed, in the birthright citizenship case, *Trump v. Barbara*, 33 of the 65 friend-of-the-court and party briefs on the merits – more than half – feature the word *originalism* or a close cognate (e.g., *originalists* or *original meaning* or *original understanding*) at least once. Alas, only a few of the self-proclaimed originalist briefs epitomize the best form of originalism – as readers shall soon see, thanks to the significant data compiled and analyzed by Akhil and Vik’s co-author Amad Ross later in this column.

Originalism at its best focuses on the Constitution’s text, its enactment-and-amendment history, and on its overall structure.

Consider first the text of the key clause at issue in *Barbara*: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.” Surely faithful originalists should attend to what the words say and what they do not say. The Trump administration – by basing one’s entitlement to citizenship on the status of his or her parents –

Recent Posts

[VIEW ALL](#)



Birthright citizenship: an empiric analysis of supposedly originalist briefs

March 4, 2026

[READ MORE](#)



Archives

Select Month ▾

essentially reads into the amendment the words *parent*, *parental domicile*, *parental allegiance*, *mother*, and *father*. But these words are not in the amendment. The amendment's text focuses entirely on the child – the one who is “born.” Some, but only some, of the self-described originalist briefs give this key textual point the enormous weight it deserves. Yet no brief other than Akhil's strongly highlights the elephantine problems of adjudication and implementation that words such as *parent*, *parental domicile*, *parental allegiance*, *mother*, or *father* would have entailed in the 1860s had these words been part of the amendment – problems nowhere discussed in any detail by the amendment's enactors and ratifiers.

Next, consider the amendment's enactment history. The amendment built on crucial rulings by the Lincoln administration in 1862-64. But most briefs contain not a single reference to Lincoln! And the amendment was surely at its core about former slaves and their children, yet most briefs contain no or only a few references to slaves.

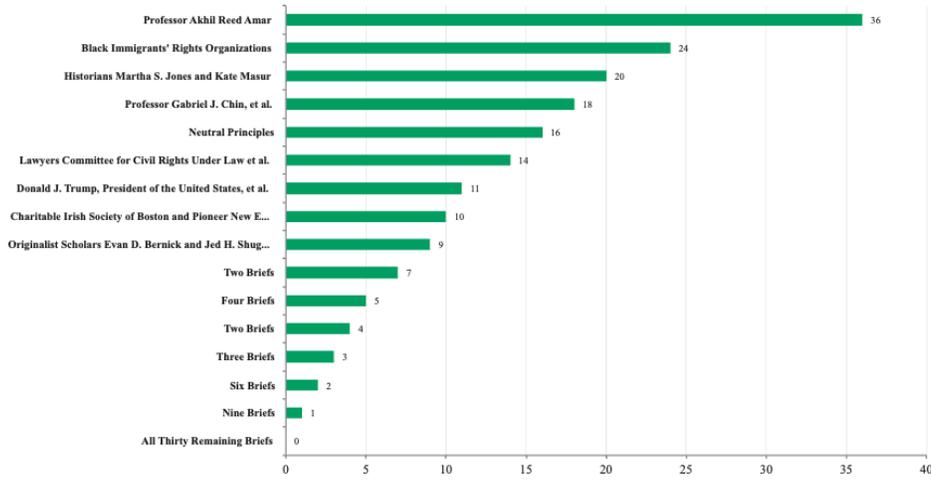
Much of the amendment emerged from a closed-door Republican party caucus in Congress. The ultimate congressional vote was essentially party-line, with virtually all Republicans on one side and all Democrats on the other. Many of the ratification votes in state legislatures were also party-line votes with little substantive discussion in public. A great deal of the most important public conversation occurred during the congressional campaign of 1866, when the amendment functioned as the Republican Party platform, and Democrat President Andrew Johnson led an unprecedented national campaign against the amendment in his ill-fated continental road trip known as the “swing around the circle.”

Thus, the best brand of originalism should pay heed to what leading Republicans said about the birthright citizenship clause in this campaign and pay special attention to how these Republicans at every turn emphasized to ordinary voters that the phrase “subject to the jurisdiction” essentially meant “**under the flag**.” As noted in our [last column](#), a very fine friend-of-the-court brief by leading scholars filed by the Constitutional Accountability Center features a particularly nice passage from the 1866 election campaign, a passage about native-born foundlings who would surely be made citizens by the 14th Amendment even if their parents were unknown. Yet almost none of the other *Barbara* briefs even mentions the 1866 general-election conversation, and only Akhil's friend-of-the-court brief, supplemented by a [Brothers-in-Law SCOTUSblog column](#) first posted on February 23, focuses in a sustained way on the 1866 campaign speeches and the crucial “under the flag” trope.

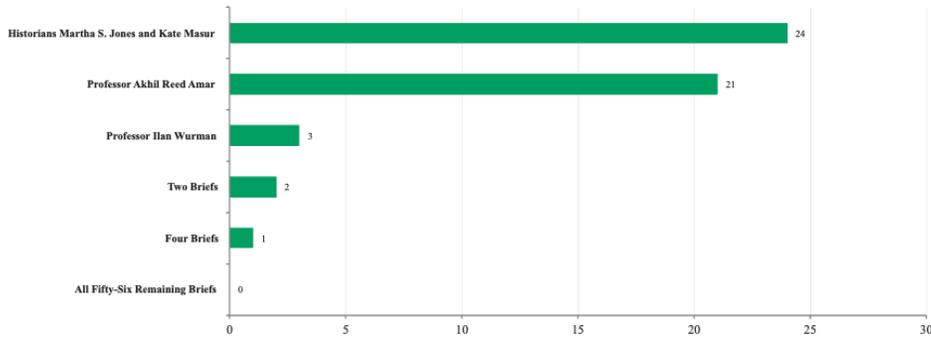
Consider finally constitutional structure. The clause focused on soil, not blood, and in this respect tightly intertwined with the 13th Amendment's repudiation of hereditary slavery and the 15th Amendment's cognate rejection of blood-based rules for voting. Several fine briefs do highlight the ways in which the Trump administration aims to make the Constitution, at the margins, more hereditary and more caste-like. Akhil's brief additionally emphasizes that fuzzy rules about parental domicile and parental allegiance would have undermined the Lincolnian Republicans' aim to enable southern Blacks to vote with no ifs, ands, or buts.

As promised above, here are some eye-opening data compiled by Amad:

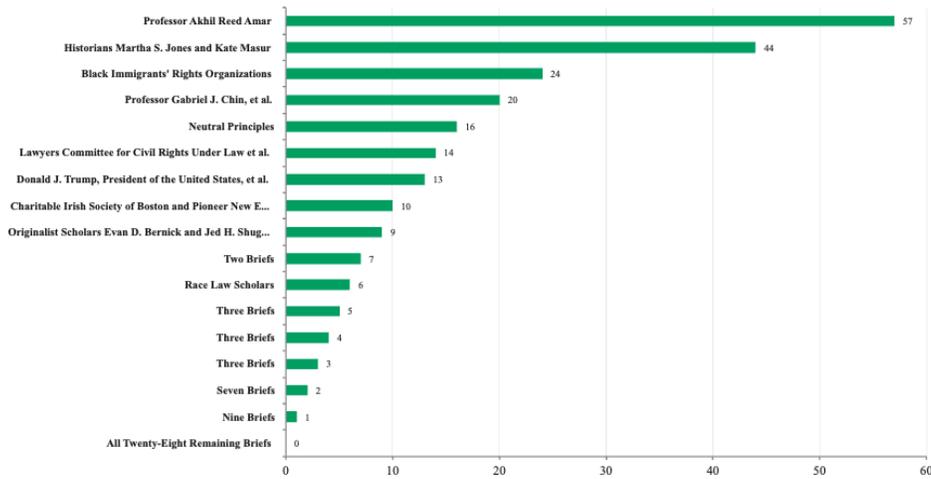
Mentions of Slavery in Merits Briefs



Mentions of Lincoln in Merits Briefs



Combined Mentions of Lincoln and Slavery in Merits Briefs



Filing Party	Date Filed	Side Supported	Originalism Count	Lincoln Count	Slavery Count
Donald J. Trump, President of the United States, et al.	Jan 20 2026	Petitioner	5	2	11
Article III Project	Jan 23 2026	Petitioner	5	0	7
Center for Renewing America	Jan 23 2026	Petitioner	2	0	0
Senator Eric Schmitt, et al.	Jan 23 2026	Petitioner	1	0	1
Honorable Edwin Meese III	Jan 27 2026	Petitioner	23	0	2
Tennessee, et al.	Jan 27 2026	Petitioner	7	0	4
Professor Richard A. Epstein	Jan 27 2026	Petitioner	5	0	2
Professor Ian Wurman	Jan 27 2026	Petitioner	3	3	0
Kirkwood Institute, Inc., et al.	Jan 27 2026	Petitioner	3	1	0
Claremont Institute's Center for Constitutional Jurisprudence	Jan 27 2026	Petitioner	3	0	1
Former National Security Official Joshua Steinman	Jan 27 2026	Petitioner	1	0	0
Coolidge Reagan Foundation	Jan 27 2026	Petitioner	1	0	3
America's Future, et al.	Jan 27 2026	Petitioner	1	0	2
America First Policy Institute	Jan 27 2026	Petitioner	1	0	0
Federation for American Immigration Reform	Jan 27 2026	Petitioner	0	0	0
Claudia Tenney, et al.	Jan 27 2026	Petitioner	0	0	1
Michael T. Morley, et al.	Jan 27 2026	Neither Party	0	0	0
Christian Family Coalition of Florida (CFC), Inc.	Jan 27 2026	Petitioner	0	0	1
Senator Ted Cruz, et al.	Jan 28 2026	Petitioner	2	0	0
William T. Dickson	Jan 28 2026	Petitioner	0	0	4
Professor Gerard N. Magliocca	Feb 03 2026	Respondent	1	0	0
Citizenship Law Scholars	Feb 18 2026	Respondent	0	0	0
David Boyle	Feb 18 2026	Respondent	0	0	1
respondents Barbara, et al.	Feb 19 2026	Respondent	9	0	2
Members of Congress	Feb 19 2026	Respondent	0	0	0
Professor Akhil Reed Amar	Feb 23 2026	Respondent	4	21	36
Professor Gabriel J. Chin, et al.	Feb 24 2026	Respondent	1	2	18
19 Labor Organizations	Feb 24 2026	Respondent	0	0	0
Chinese American Legal Defense Alliance	Feb 25 2026	Respondent	3	0	2
National Asian Pacific American Bar Association, et al.	Feb 25 2026	Respondent	0	0	2
Professor Amanda L. Tyler	Feb 25 2026	Respondent	0	0	0
Cato Institute	Feb 26 2026	Respondent	41	0	0
Professor Keith Whittington	Feb 26 2026	Respondent	23	1	3
Originalist Scholars Evan D. Bernick and Jed H. Shugerman	Feb 26 2026	Respondent	21	0	9
Neutral Principles	Feb 26 2026	Respondent	14	0	16
New Jersey et al.	Feb 26 2026	Respondent	5	0	1
Lawyers Committee for Civil Rights Under Law et al.	Feb 26 2026	Respondent	4	0	14
Scholars of Constitutional Law and Immigration	Feb 26 2026	Respondent	3	0	5
Charitable Irish Society of Boston and Pioneer New England Legal Foundation	Feb 26 2026	Respondent	2	0	10
Current and Former Elected Officials and Judges from U.S. Territories	Feb 26 2026	Respondent	2	0	0
Race Law Scholars	Feb 26 2026	Respondent	2	1	5
The Fred T. Korematsu Center for Law and Equality et al.	Feb 26 2026	Respondent	1	0	0
Latino Justice PRLDEF, Afro-Latino Forum, Hispanic Federation, et al.	Feb 26 2026	Respondent	1	0	0
Tyler Anbinder, Garrett Epps and Aviam Soifer	Feb 26 2026	Respondent	0	0	1
Reprive US Inc. et al.	Feb 26 2026	Respondent	0	0	5
Secure Families Initiative et al.	Feb 26 2026	Respondent	0	1	1
Historians Martha S. Jones and Kate Masur	Feb 26 2026	Respondent	0	24	20
Federal Indian Law Scholars Gregory Ablavsky and Bethany Berger	Feb 26 2026	Respondent	0	0	0
South Asian American Justice Collaborative et al.	Feb 26 2026	Respondent	0	0	5
Black Immigrants' Rights Organizations	Feb 26 2026	Respondent	0	0	24
Corey J. Biazzo, Esq. and Kevin Song	Feb 26 2026	Respondent	0	0	0
Professor Eric L. Muller	Feb 26 2026	Respondent	0	0	0
U.S. Conference of Catholic Bishops & Catholic Legal Immigration Network	Feb 26 2026	Respondent	0	0	3
CASA, The League of United Latin American Citizens, et al.	Feb 26 2026	Respondent	0	0	0
The Emory Civil Rights Society	Feb 26 2026	Respondent	0	0	0
The Aoki Center for Critical Race and Nation Studies et al.	Feb 26 2026	Respondent	0	0	7
American Bar Association	Feb 26 2026	Respondent	0	0	1
Faith-Based Organizations	Feb 26 2026	Respondent	0	0	0
Local Governments and Local Government Leaders	Feb 26 2026	Respondent	0	0	0
Global Strategic Litigation Council et al.	Feb 26 2026	Respondent	0	0	0
Project Rousseau	Feb 26 2026	Respondent	0	0	0
Members of Congress	Feb 26 2026	Respondent	0	0	0
First Focus on Children	Feb 26 2026	Respondent	0	0	0
The Society for the Rule of Law et al.	Feb 26 2026	Respondent	0	0	0
Professors Caitlin Patler et al.	Feb 26 2026	Respondent	0	0	0

These graphics track usage of "originalism," "slavery," and "Lincoln" in the 65 merits briefs submitted thus far in *Trump v. Barbara*. Uses in the Table of Authorities are excluded to avoid double-counting, and cognates include "originalist," "original meaning," "original public meaning" and "original understanding," as well as "slave," "enslavement," and "enslaved."

The results are striking. Many briefs claim the mantle of originalism, but few actually do originalism in its best incarnation. Thirty of the 65 briefs never once mention the people the citizenship clause was most centrally about – slaves and their children. And 56 of the 65 briefs ignore the president whose administration first embraced birthright citizenship as a matter of executive policy – Abraham Lincoln.

Some of the briefs that trumpet originalism the loudest in support of the Trump administration's position say the least about the 14th Amendment's core historical themes. Former Attorney General Edwin Meese III, for example, mentions originalism 23 times in his brief yet mentions slavery only twice – and Lincoln not at all. Senator Ted Cruz's brief purports to recover the original understanding of citizenship at the time the 14th Amendment was drafted – without a word about why the drafters revisited that understanding in the first place.

The divide between the two sides is itself revealing. Of the 20 petitioner-side briefs (that is, in support of the Trump administration), not a single one mentions Lincoln more than three times, and only two mention slavery more than five times. The pattern suggests that the side seeking to narrow birthright citizenship has avoided the historical materials most relevant to understanding the clause's original meaning – an odd posture for self-described originalists.

The near-universal neglect of Lincoln deserves special emphasis. Lincoln's Attorney General, Edward Bates, issued a landmark *opinion* in 1862 holding that free men born in the United States are citizens regardless of race – the first such ruling by any federal officer. Lincoln's administration – led by Secretary of State William Seward and Treasury Secretary (and future Chief Justice) Salmon Chase – repeatedly acted on this principle in the years before the 14th Amendment was drafted. Yet only nine of 65 briefs mention Lincoln at all, and only two – Akhil's and a brief submitted by historians Martha S. Jones and Kate Masur – discuss Lincoln in any depth.

Hmmm.

Today's column is our third on *Trump v. Barbara*. For the first two, see [here](#) and [here](#). We will be running many more *Barbara* columns in *Brothers in Law* in the run-up to oral argument on April 1. Stay tuned.

Posted in [Brothers in Law](#), [Featured](#), [Recurring Columns](#)

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

Recommended Citation: Akhil and Vikram Amar & Amad Ross, *Birthright citizenship: an empirical analysis of supposedly originalist briefs*, SCOTUSblog (Mar. 4, 2026, 10:00 AM), <https://www.scotusblog.com/2026/03/birthright-citizenship-an-empirical-analysis-of-supposedly-originalist-briefs/>

[About Us](#)
[Submissions](#)
[Resources & Policies](#)
[Contact Us](#)
[Privacy Policy](#)
[Advertising](#)

Sign up to receive email updates from **SCOTUSblog** and **The Dispatch**. RSS Feed is also available.

