BROTHERS IN LAW

Birthright citizenship: oral argument highlights

By Akhil and Vikram Amar
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Over the last two months, we have laid out in detail our ideas about the key issues in the birthright citizenship case, *Trump v. Barbara*. Today, we compare our arguments and analysis to what the justices asked and said at oral argument on April 1. As it turned out, virtually every justice asked or said at least one thing – and several justices asked or said several things – that accord with our arguments and analysis.

We make no claim, of course, that our writings in February and March directly or indirectly influenced any justice in any way. Perhaps many of our ideas were generally in the air prior to oral argument. Perhaps we have been channeling the justices, not vice versa. Many other explanations are also imaginable.

What follows are some of the overlaps between our pre-argument writings and the justices' utterances from the bench, in order of seniority.

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1. As recorded at pages 33-34 of the oral argument **transcript**, Chief Justice John Roberts asked Solicitor General D. John Sauer a two-part question about "birth tourism." First: "Do you have any information about how common that is or how significant a problem it is?" When Sauer responded with a whopping estimate of how common this is, the chief justice moved in for the kill: "Having said all that, you do agree that that has no impact on the legal analysis before us?" When Sauer tried to push back, reminding the chief that "we're in a new world now," the chief administered the coup de grace: "Well, it's a new world. It's the same Constitution."

Compare this telling exchange with Akhil's Feb. 23 amicus brief, filed by Vik as counsel of record, at **pages 19-20**: "[M]odern immigration skeptics . . . dislike so-called 'birth tourism' . . . but . . . the words 'subject to the jurisdiction' simply have nothing to do with the policy concerns of modern immigration skeptics."

2. Pages 5-6 of the **transcript** record Justice Clarence Thomas inviting General Sauer to "start with Dred Scott" and its relationship to the citizenship clause and also inviting Sauer to explain the relationship between state and national citizenship in the 14th Amendment.

These were two promising lines of inquiry. Akhil's brief at **pages 12-15** explained how the Lincoln administration responded directly to *Dred Scott* with important pronouncements and policies in 1862-65 that formed the backdrop of the 14th Amendment drafted and ratified by Lincoln's allies in 1866-68.

In response to Thomas, Sauer said nothing about the Lincoln administration. (Indeed, at no point in the oral argument did he even once mention **President Abraham Lincoln**.) Sauer also reiterated his absurd claim, which featured prominently in his mid-March reply brief at **pages 8-9**, that because the 14th Amendment uses the word "reside" in connection with state citizenship, therefore national citizenship likewise turns on residence/domicile. As we have explained in **prior** posts, this is **gobbledygook**. A hypothetical child born in the White House who lives her entire life in Washinton, D.C. is surely a birthright citizen of the United States, even if she never resides in or becomes a citizen of any state.

Although no other justice pressed Sauer hard on this precise piece of gobbledygook, Justice Amy Coney Barrett did later (at page 66 of the **transcript**) raise several questions about American-born foundlings of unknown parentage – babies who might well be born and live their entire lives separate from the domicile of their biological parents, as might also occur in orphan situations, as we discussed in our posts of **March 16** and **March 23**. Our key argument here – one that Barrett seemed interested in exploring – is multi-pronged: (a) the national citizenship words of the 14th Amendment (and also those of a landmark **1952 statute**) focus on the baby, not the parent; (b) these words say nothing about residence or domicile as such; (c) in any event, a baby's domicile is not always the same as the parents; and (d) the baby's parents may themselves not always share a common domicile. Foundling hypotheticals and orphan hypotheticals powerfully illustrate these crucial truths.

3. At pages 105-06 of the **transcript**, Justice Samuel Alito asked ACLU attorney Cecillia Wang a clever technical question that led her into a trap: "[W]ould you agree that the citizenship test in the Fourteenth Amendment is the same as the test in the 1866 Civil Rights Act?"

This inquiry was similar to a query from our last post, on **March 31**: "Is the birthright-citizenship clause of the 1866 Civil Rights Act identical in every respect to its counterpart 14th Amendment clause, as **some on [President Donald Trump's] side** have claimed?" In our March 31 post, we urged Wang to avoid this snare as follows: "Probably not. Some have invoked comments by individual lawmakers claiming that the two are identical – but read the text!" Wang chose a different path. She initially took Alito's bait and said that the two enactments were essentially identical in meaning even if not in text. This led her directly into the trap, as became apparent in Alito's follow-up: If the two enactments are indeed identical, said Alito, then why not focus on the 1866 language? And that language, as we have elaborated **on several occasions** – especially on **March 16** – is arguably less favorable to babies of alien parents whose home countries might try to assert dual-citizen jus-sanguinis authority over American-born infants.

Fortunately for Wang, Justice Brett Kavanaugh nimbly sidestepped this inter-textual trap, as he

made clear in exchanges with both Sauer (at **pages 53-54**) and, later, Wang (at **pages 119-21**): "Those texts are on their face different." This is precisely what we hoped for and predicted in our **March 31 post**: "In ***Snyder v. United States***, per Justice Kavanaugh, [the court made clear] that amended language may well signal amended meaning."

4. At **page 40**, Justice Sonia Sotomayor invoked the 1957 ***Hintopoulos*** case by name, just as we hoped at least one justice would. In our **March 27 post**, we stressed that the *Hintopoulos* court expressly asserted (rather than merely assumed, arguendo) that the child of illegal aliens at the center of that case was "*of course*, an American citizen by birth." In her *Hintopoulos* exchange with Sauer, Justice Sotomayor went easier on him than we would have liked. But she scored big when she said: "You asked us to concentrate only on the prospective nature of the citizens order, but the logic of your position, if accepted, is that the next president – this president or the next president or a Congress or someone else could decide that it shouldn't be prospective." Compare this to our **March 30 post**: "Is Trump free tomorrow to make his order retroactive?"

5. Justice Elena Kagan also asked Sauer some excellent questions. Though she does not always play the textualist in constitutional cases, as distinct from statutory disputes, at pages 17-18 of the **transcript** she went straight for the textual jugular: "[W]here does this principle come from, allegiance, domicile? . . . [T]he text of the clause, I think, does not support you" – that is, Sauer.

Exactly! Here is what Akhil's Feb. 23 brief says at **page 8**: "The text said nothing about parents—or their allegiance or their domicile, for that matter."

Later on in the oral argument Kagan once again hit pay dirt when she asked Sauer the following at transcript pages **43-44**: "What do you think it should take to accept [your revisionist] story in terms of the . . . magnitude of the evidence that we would need to see in order to accept this revisionist theory and in order to change what I think people have thought the rule was for more than a century?"

Compare our analysis on **March 30**: "Isn't the onus on [Sauer] – as the party asking [the court] to revise 150 years of executive practice and judicial precedent and to go far beyond the text – to produce compelling evidence that [Sauer's] view, with its contrived parental rules, is the correct one?"

6. Justice Neil Gorsuch also aimed for the textual and contextual jugular, if a bit more gently, at page 24 of the oral argument **transcript**: "And just to circle back to Justice Kagan's point, it's striking that in none of the debates do we have parents discussed. We – have the – child's citizenship, and the focus of the clause is on the child, not on the parents. And you don't see domicile mentioned in – the debates. . . . The absence is striking." Compare this quiet dagger to Akhil's brief at **page 8** – "The text focuses on the baby, not the parents" – and to our **March 23 post** on what we called *the parent trap*: "The text of the 14th Amendment ... focuses entirely on the baby – on the person born, not the persons giving birth."

Consider also Gorsuch's questions at transcript **page 23**: "Whose domicile . . . matters? . . . [I]s it the husband? Is it the wife? What if they're unmarried?" As we asked in our **Parent Trap post**: "*Which parent?* If just one, which one counts? The mother? The father? Either one? . . . *Who's the daddy?* Is lawful husband [A] the father, or secret adulterous paramour [B]?"

7. As we have already noted in our discussion of Alito, Justice Kavanaugh highlighted linguistic differences between the Civil Rights Act of 1866 and the 14th Amendment. We were also heartened by his incisive observations at **pages 53-56** about landmark 20th century statutes on birthright citizenship: " By the time of the 1940 and 1952 congressional actions where Congress repeats 'subject to the jurisdiction thereof,' given *Wong Kim Ark* [the Supreme Court's 1898 decision reaffirming birthright citizenship], one might have expected Congress to use a different phrase if it wanted to try to disagree with *Wong Kim Ark* on what the scope of birthright citizenship or the scope of citizenship should be. And yet Congress repeats that same language, knowing what the interpretation had been. . . . [T]here's [also] Executive Branch interpretations."

Just so! Here is what we and Jason Mazzone posted on **March 19**: "Against this broad backdrop of public practice and public discourse, Congress in 1952 re-enacted verbatim the key clause of the

1940 statute [codifying the citizenship clause of the 14th Amendment], as this clause had been openly applied and discussed in the intervening decade. . . . Even were *Wong Kim Ark* today thought by Sauer and his ilk to be erroneous, Congress plainly thought otherwise in 1952 and plainly legislated on that basis. That act remains in force today, and Trump must obey it. Period."

Apart from Kavanaugh, there was rather little discussion of the 1940 and 1952 Acts at oral argument – a sign, perhaps, that other justices generally agreed with Kavanaugh's statutory analysis. If so – a big if, to be sure – the largest open question post-argument is whether Trump may lose only on the statute or whether he also or instead may lose under the Constitution.

8. Justice Barrett asked one powerful question after another. In a series of questions to attorney Wang about "how the exceptions fit within the general rule," Barrett at pages 97-102 of the **transcript** brilliantly probed whether the standard nonapplications of birthright citizenship – in cases involving Indian tribes and occupying armies, for example – were truly "exceptions" or were instead simply situations that lay beyond the scope of the rule itself, once that rule is properly understood as essentially soil-based. This is *precisely* the argument of Akhil's brief at **pages 1-6 and 16-18**, as powerfully elaborated by our associate Sam Desai on **March 6**.

We were also heartened by Barrett's express invocation at transcript **page 66** of "foundlings" in a way that perfectly meshed with our discussion of the issue in Akhil's brief at **page 9**; and in our **March 2** post, devoted entirely to the foundling issue. Also, here is what we said in in our column of **March 30**: "Is a **foundling** of unknown parentage – a modern Baby Moses, so to speak – denied citizenship under the president's **executive order** on birthright citizenship? . . . *[Cheat sheet: For a related question spotlighting the prevalence of safe-haven (or Baby Moses) laws in all 50 states, see Barrett's oral-argument question in* **Dobbs v. Jackson Women's Health Organization** *at pages 56-57.]*"

In a yet another telling passage, at transcript **page 67**, Barrett zeroed in on the enormous practical problems posed by Sauer's approach. "How would you adjudicate these cases? You're not going to know at the time of birth for some people whether they [the parents] have the intent to stay or not." Compare what we asked on **March 30**, in a passage that built *on* **page 15n.20** of Akhil's brief: "Practically speaking, will newborns' citizenship be in limbo for months and years as parentage and domicile issues are litigated?"

9. Last but not least was Justice Ketanji Brown Jackson. At pages 72-73 of the **transcript**, she too went for the textual jugular: "[W]hy [don't we] see in the 14th Amendment anything about parental allegiance[?] Several of my colleagues have talked about the fact that your view of this turns on what the status of the parents are and not the child, as would the 'born in the United States' view of it. . . . [C]an you help us understand why we wouldn't expect to see a mention of parent in the text of this amendment?"

This has always been one of our central themes. Sauer had no good answer in any of his formal filings, and he had no good answer at oral argument.

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Of course, the real test will come much later in the term. When the justices hand down their written pronouncements in this case, presumably in late June, will their *answers* to the key questions align with ours?

For now, court-watchers should keep in mind that initial questions from the bench do not always predict eventual answers on the page. A poker-faced justice might ask a sharp question of the side she actually favors, hoping for help in how she herself might best parry the question in her final opinion. A kind-hearted justice might go easy on a lawyer with a weak case if the client himself is in the courtroom, especially if the client is a hot-tempered fellow apt to blame the lawyer, unfairly. (Just saying.) Also, a justice might change her mind at any time – later in the oral argument, back in her chambers with her clerks, at the initial post-argument conference with her colleagues, or in the months-long opinion-drafting process.

Thus, we make no detailed public predictions today. But color us cautiously optimistic.

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