Istituto Affari Internazionali

Trump v. Birthright Citizenship: Another Mark on the US Legal System

by Matteo Bursi

In the early months of his second term, US President Donald Trump issued a significant number of executive orders in an attempt to quickly fulfil his campaign promises on restricting migration rules. One of these, Executive Order 14160,[1] aims to revoke the *jus soli* right to citizenship to children born of undocumented immigrants and or those temporarily present on US territory.

The executive order immediately raised constitutionality concerns, given that it is in apparent contrast with a proviso (the Citizenship Clause) of the Fourteenth Amendment that establishes birthright citizenship for whoever is born in US territory, and was challenged in federal courts. Several judges identified a violation of the clause and issued universal injunctions that rendered the executive order ineffective *erga omnes* (that is, nationwide). However, the White House's legal team impugned the validity of universal injunctions before the Supreme Court, which decided to limit the effects of these rulings.

In its *Trump v. CASA* ruling, the Court held that the increasing use of universal injunctions is incompatible with the American legal system and that such rulings should only apply to the plaintiffs in the case.[2] While the decision did not endorse Trump's executive order, it is nonetheless a massive political victory for the president and, perhaps more importantly, highlights the growing influence of the so-called originalist theory, according to which the Constitution should be interpreted according to the best possible reconstruction of the original meaning of its article, clauses and amendments

[1] White House, *Protecting the Meaning and Value of American Citizenship*, 20 January 2025, https://www.whitehouse.gov/presidential-actions/2025/01/protecting-the-meaning-and-value-of-american-citizenship.

[2] Supreme Court of the United States, *Trump, President of the United States, et al. v. CASA, Inc., et al.*, decided on 27 June 2025, https://www.supremecourt.gov/docket/docketfiles/html/public/24A884.html.

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at the time they were enacted. It also highlighted, once again, the unusual level of conflict among the nine justices.

The battle against jus soli (and universal injunction)

Jus soli was introduced in the United States in 1868, with the Fourteenth Amendment, and is considered a direct result of the Civil War and a milestone in the slow and gradual emancipation of the African-American population. Thanks to this provision, the ignominious exclusion determined by the *Dred Scott v. Sandford* ruling – according to which "a negro whose ancestors were imported into [the US] and sold as slaves" could not be an American citizen – was repealed. With Executive Order 14160, issued on 20 January 2025, Trump sought to drastically limit this long-standing legal provision by excluding newborns whose parents are in the United States illegally or temporarily. This order sparked a wave of lawsuits, resulting in various federal courts condemning the executive action and issuing universal injunctions.

In response, the Solicitor General, the Administration's main lawyer in federal litigations, brought the matter before the Supreme Court. Interestingly, the executive branch asked the Court to rule on the constitutionality not of the order – which is contested almost universally amongst legal and constitutional experts – but rather of universal injunctions.

Universal injunctions are court orders that require the government to act in a certain way even toward individuals who were not plaintiffs in the case; in this sense, they give federal courts broad authority to limit executive actions nationwide. For much of US history, such rulings did not exist: they only began to appear in the second half of the 20th century and gained prominence in the 21st. In recent years, their legitimacy has been increasingly questioned, as they are not part of the traditional judicial toolkit derived from the Judiciary Act of 1789[3] and because they allow any federal judge to temporarily nullify executive actions, encouraging 'forum shopping', whereby activists and interest groups seek to bring cases before judges they may feel are more sympathetic to their cause.[4]

Trump v. CASA

By a 6–3 majority – reflecting the division between Republican (including Trump's, in three cases), and Democratic appointees – the Supreme Court held that the universal injunctions issued regarding Executive Order 14160 "likely exceed the equitable authority that Congress has granted to federal courts" and therefore cannot have *erga omnes* effect. The majority opinion, written by Justice Amy Coney-Barrett, Trump's last addition to the Court in October 2020, is based on a historical analysis that relies

[3] With the Judiciary Act, the US Congress created the Federal Court System, detailing the principles outlined in Article III of the US Constitution.

[4] Samuel L. Bray, "Multiple Chancellors: Reforming the National Injunction", in *Harvard Law Review*, Vol. 131, No. 2 (December 2017), p. 417-482, https://harvardlawreview.org/?p=5060.

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primarily on the 1999 decision *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*[5] In order to determine which tools federal judges may utilise, it is necessary to identify the ones used "by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act". Since there were no equivalents to universal injunctions at that time, such orders are deemed incompatible with the US legal framework and the effects of lower court decisions must be limited to the actual plaintiffs.

The ruling was not unexpected. Indeed, various Supreme Court's justices had voiced doubts about universal injunctions in prior cases and had explicitly called for clarity on the issue. Notably, the ruling does not endorse the content of Trump's executive order: as clearly stated during oral arguments, the majority justices focused only on the scope of the injunctions, not on the constitutionality of the order.

The three Democratic-appointed justices nonetheless strongly opposed the ruling. In the main dissenting opinion written by Justice Sonia Sotomayor, they criticised the majority's decision to separate the evaluation of the injunctions from the executive order itself, since the clear unconstitutionality of the order, they argued, explains effectively the reason why universal injunctions are justified. Sotomayor and her two other Democratic-appointed justices, Elena Kagan and Ketanji Brown Jackson, expressed concern that banning universal injunctions would create legal asymmetries, where only those with the financial means to sue the government could protect themselves from unconstitutional executive actions. They also challenged the majority's historical interpretation, citing the British *Bill of Peace* as a foundation for American universal injunctions.

The victory of originalism

At present, the full impact of *Trump v. CASA* is hard to assess. Justice Sotomayor went as far as to warn that "no right is safe" under this new legal regime. On the contrary, Justice Brett Kavanaugh (another Trump appointee), in a concurring opinion, predicted minimal change: in his view, the Supreme Court will issue nationwide rulings itself and citizens, in specific situations, will have the possibility to resort to class actions. It is important to note that some organisations have already interpreted the latter instrument as a viable replacement for universal injunctions: a federal court recently approved one, again nullifying Trump's executive order as the judge identified children born in the United States from parents temporarily or irregularly resident in the country as an entire 'class'.[6] In this sense, it remains to be seen how far the Court will allow class actions to develop in the coming months and years, in order to understand the actual impact of *Trump v. CASA*.

[5] Supreme Court of the United States, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, decided on 17 June 1999, https://supreme.justia.com/cases/federal/us/527/308.

[6] Joseph Gedeon, "New Hampshire Judge Blocks Trump's Birthright Citizenship Order", in *The Guardian*, 10 July 2025, https://www.theguardian.com/p/x2y7pn.

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Beyond the issues of citizenship and universal injunctions, the ruling sheds light on the ideological direction of the current Supreme Court. In particular, the decision reaffirms the importance of so-called originalist interpretation among the justices. According to originalism, laws should be interpreted based on the intent of their drafters; therefore, when dealing with norms over two centuries old (like the Judiciary Act), one must reconstruct the logic of lawmakers from that era and apply the law accordingly. Since the 1980s, this doctrine has gained favour especially in conservative circles, who see it as a safeguard against progressive interpretations of the Constitution. Indeed, Republican presidents have increasingly appointed justices who embrace this theory and today five of the nine – Neil Gorsuch (another Trump appointee), Samuel Alito, Clarence Thomas, Kavanaugh and Coney-Barrett – are associated with it.[7]

The ruling and its historical reasoning (drawing on 18th-century British court practices) are emblematic of originalism's influence on the Court. It is also telling that the primary precedent for *Trump v. CASA* – the above-mentioned *Grupo Mexicano de Desarrollo* – was written by Antonin Scalia, arguably the pivotal figure of American originalism. The 1999 ruling itself deeply divided the Court and prompted then Justice Ruth Bader Ginsburg, who wrote a dissenting opinion, to criticise originalism's static view of the law, arguing for a more adaptive interpretation capable of reflecting the inevitable societal changes that occur over the decades and centuries.

A divided Court

During their tenures, Justices Ginsburg and Scalia often disagreed sharply. Yet, they always maintained mutual respect and, by their own accounts, a sincere friendship.[8] That spirit of collegiality seems absent in today's Court, following a series of deeply controversial rulings along political lines, from the decision that nullified the 50-year precedent of recognising abortion as a constitutionally guaranteed right to the one establishing absolute immunity from criminal charges for the president regarding actions within his constitutional authority. *Trump v. CASA* starkly illustrates this. Sotomayor's dissent offers harsh criticism of the majority ruling, but the clash between Coney-Barrett (supported by the other five majority justices) and Brown-Jackson is even more pointed. In her opinion, Jackson claims the ruling poses an "existential threat to the rule of law" and accuses the Court of enabling the White House to dismantle key constitutional protections. Coney-Barrett, in turn, mocks Jackson's view of judicial authority, saying it "would make even the most ardent defender of judicial supremacy blush" and that it is "at odds with more than two centuries'

[7] Regarding the relevance assumed by originalism in the Supreme Court, see Jonathan Gienapp, "Why Is the Supreme Court Obsessed with Originalism?", in *Yale University Press Blog*, 21 October 2024, https://yalebooks.yale.edu/?p=115855.

[8] Even a comic opera was devoted to this peculiar relationship: *Scalia/Ginsburg: A (Gentle) Parody of Operatic Proportions*.

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worth of precedent, not to mention the Constitution itself".

Such statements – along with others in the ruling – show a Court deeply divided, mirroring the current polarisation of US politics: a trend particularly troubling in a nation that, more than ever in its recent history, needs solid institutions capable of restoring a sense of mutual respect transcending ideological differences. This condition is a direct consequence of the politicisation of Supreme Court appointments that has taken place in recent years. A politicisation primarily attributable to the Republicans, who – especially with their 2016 decision to not consider Merrick Garland's nomination to the Supreme Court[9] and the activation of the 'nuclear option' to confirm Gorsuch[10] – made clear their intention to shift the centre of gravity of the most fundamental constitutional safeguard institution sharply to the right. Nevertheless, the Democrats, in response to the Grand Old Party's drift, have also made choices that further exacerbated this dynamic: most notably, with President Biden opting for a distinctly progressive profile such as Jackson in 2022, rather than a consensus-builder capable of dialoguing with the Court's conservative wing. Sure, in the previous decades too, political parties tried to appoint ideologically aligned figures to the Court. However, in recent years, this behaviour has significantly radicalised: it is sufficient to compare the Senate confirmation votes received by Roberts and Sotomayor (nominated by Bush and Obama in 2005 and 2009, respectively) with those received by Coney Barrett and Jackson.[11]

Getting out of this situation is not easy, given the persistent polarisation of the US political arena. However, it is reasonable to cultivate at least two hopes. The first is that the passage of time and the enormous weight of the office may lead to a smoothing of tensions among the justices (especially the younger ones). The second is that none of the progressive-leaning justices are to be replaced before the 2026 midterm elections; an event that would further tilt the Court to the right and allow the most anti-democratic President in US history to shape it in a way no-one in recent decades has managed to do.

17 July 2025

[9] Ron Elvig, "What Happened with Merrick Garland in 2016 and Why It Matters Now", in *NPR*, 29 June 2018, https://www.npr.org/2018/06/29/624467256.

[10] The nuclear option is the procedure that allows a simple majority vote to change Senate rules and end a filibuster. Seung Min Kim, Burgess Everett and Elana Schor, "Senate GOP Goes 'Nuclear' on Supreme Court Filibuster", in *Politico*, 6 April 2017, https://www.politico.com/story/2017/04/senate-neil-gorsuch-nuclear-option-236937.

[11] In 2005, Roberts was confirmed with a majority of 78 votes, while, in 2009, Sotomayor received 68 votes in her favour. On the other hand, in 2020, Coney-Barrett received 52 votes and, in 2022, Jackson was confirmed with 53 votes.

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