

UNIVERSITY OF HOUSTON LAW CENTER

SUPREME COURT UPDATE · AUGUST 2026

The Immigration Trilogy

from the 2025 Supreme Court Term

TRUMP v. BARBARA **MULLIN v. DOE**

Birthright citizenship

Temporary Protected Status

MULLIN v. AL OTRO LADO

Asylum at the border

Seth J. Chandler

Law Foundation Professor of Law
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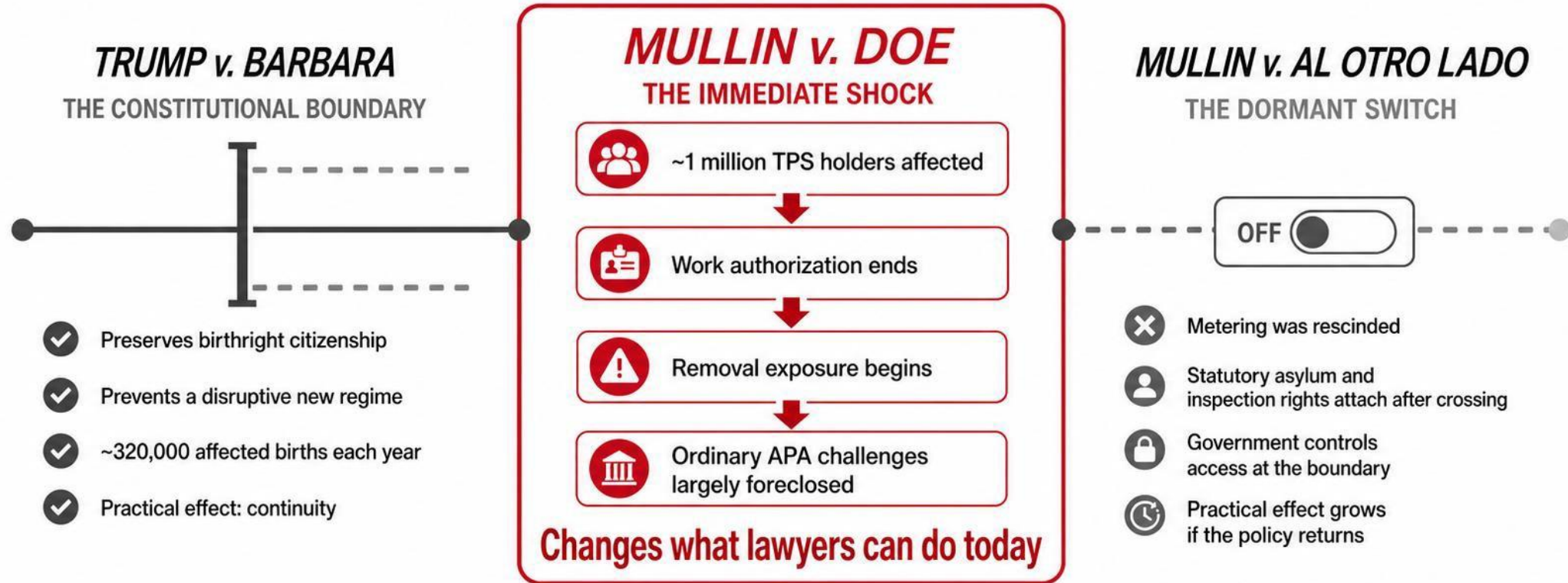


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FURTHER ANALYSIS

legaled.ai

Three Cases, Three Kinds of Importance



**BIGGEST CONSTITUTIONAL
RULE: BARBARA**



**BIGGEST PRACTICAL
EFFECT TODAY: DOE**



**SLEEPER CASE:
AL OTRO LADO**

TRUMP v. BARBARA

Birthright citizenship and Executive Order 14160

No. 25–365 · 609 U. S. ____ · Certiorari before judgment to the First Circuit

Argued April 1, 2026 · Decided June 30, 2026

Held (5–4 on the Constitution; 6–3 on the judgment): children born in the United States to parents unlawfully or temporarily present are citizens at birth. Executive Order 14160 is facially unconstitutional; the classwide injunction is affirmed.

This hour: Trump v. Barbara (11 slides) · Mullin v. Doe (8) · Mullin v. Al Otro Lado (6)

FOURTEENTH AMENDMENT SECTION 1

All 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.

TITLE III—NATIONALITY AND NATURALIZATION

CHAPTER 1—NATIONALITY AT BIRTH AND BY COLLECTIVE
NATURALIZATION

NATIONALS AND CITIZENS OF THE UNITED STATES AT BIRTH

SEC. 301. (a) The following shall be nationals and citizens of the United States at birth:

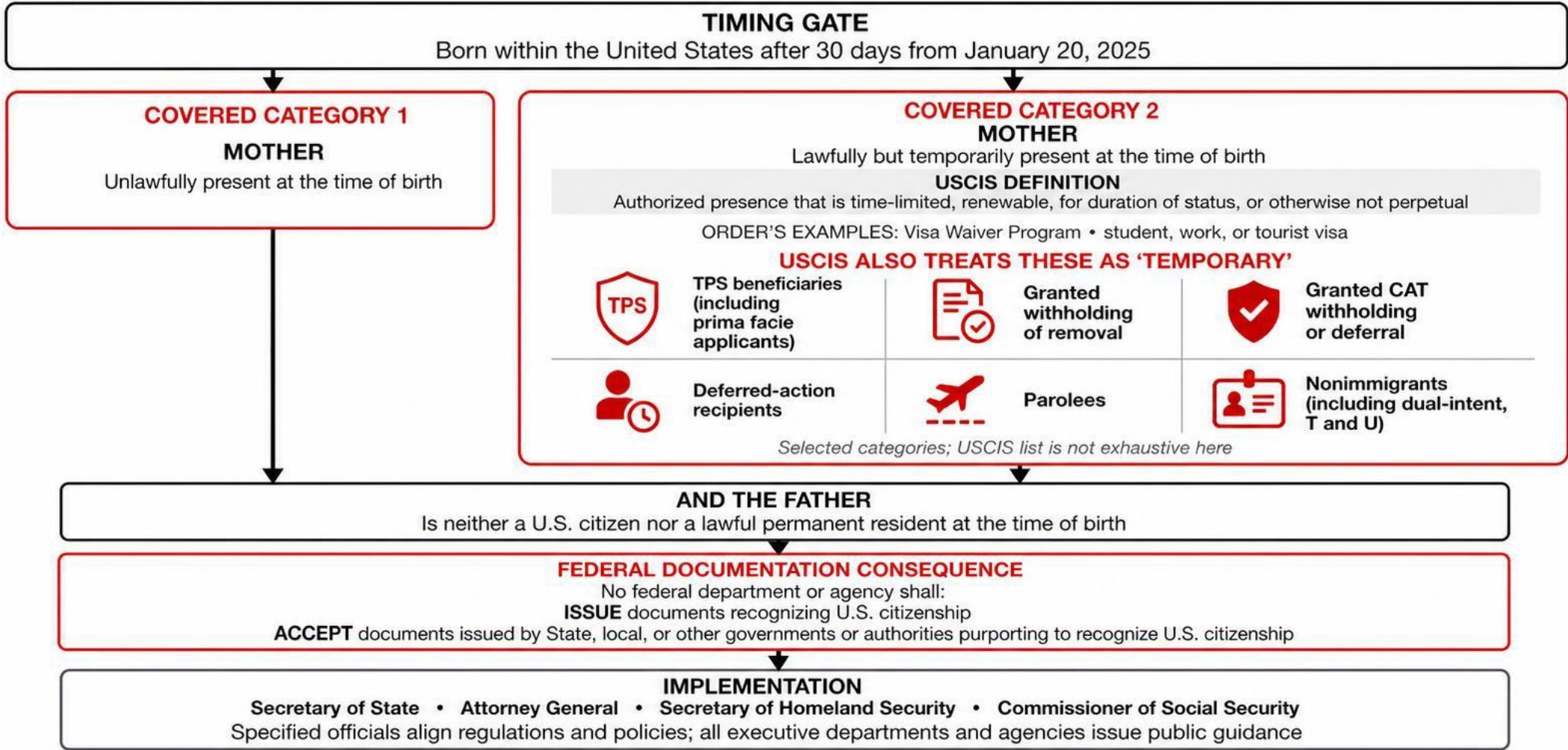
(1) a person born in the United States, and subject to the jurisdiction thereof;

(2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

8 U.S.C. § 1401
(1952)

How the Birthright-Citizenship Order Operates

USCIS treats major humanitarian protections as “temporary”



Sources: Executive Order 14160, §§1–5, 90 Fed. Reg. 8449–50; USCIS Implementation Plan IP-2025-0001 (July 25, 2025).

“Subject to the Jurisdiction Thereof” — Two Theories

Theories

Soil Reading (plaintiffs)

- “Jurisdiction” = the Nation's ordinary regulatory and judicial power over persons in its territory
- Nearly everyone born on U.S. soil qualifies — unlawfully present parents are fully subject to U.S. law
- Exceptions are historical and narrow: foreign ministers, hostile occupying forces, tribal members

Allegiance / Domicile Reading (Government)

- “Jurisdiction” = complete, undivided allegiance — a mutual social-contract bond
- Children of parents owing allegiance elsewhere (unlawfully or temporarily present) inherit the parents' status
- Domicile of the parents becomes the operative test at birth

~320,000

births per year to unauthorized-immigrant mothers (2023 est.)

The Doctrinal Arc, 1608–1898

Calvin's Case (1608)

Common-law jus soli: birth within the sovereign's protection makes a subject — protection begets allegiance

Dred Scott (1857)

Denies citizenship by descent and caste — the decision the Fourteenth Amendment was written to bury

Civil Rights Act of 1866

First statutory rule: citizens are all born here “not subject to any foreign power,” excluding tribal members

Fourteenth Amendment (1868)

Constitutionalizes birthright citizenship so no Congress or President can repeal it

Elk v. Wilkins (1884)

Tribal members excluded — born within a separate sovereignty owing immediate allegiance to it

Wong Kim Ark (1898)

U.S.-born child of Chinese parents (ineligible to naturalize) is a citizen — the governing precedent ever since

Trump v. Barbara: Citizenship Vote Map

Does the Constitution or the current statute require citizenship?

	CONSTITUTIONALLY REQUIRED <i>Fourteenth Amendment</i>	STATUTORILY REQUIRED <i>8 U.S.C. §1401(a)</i>
CHILDREN OF TEMPORARY VISITORS	5 REQUIRE 4 DO NOT	6 REQUIRE 3 OPPOSE IN THE JUDGMENT
CHILDREN OF LONG-TERM UNLAWFULLY PRESENT PARENTS	5 REQUIRE 2 DO NOT 2 RESERVED — THOMAS + GORSUCH	6 REQUIRE 2 RESERVED — THOMAS + GORSUCH 1 NOT SEPARATELY ANALYZED — ALITO

THE 'ISH' MATTERS: reserved questions are not votes against citizenship.

Temporary-visitor counts are clean. Long-term counts depend on domicile; Alito does not separately address §1401(a).

Chief Justice Roberts's Theory of 14th Amendment Citizenship

GENERAL RULE

Birth in the United States + ordinary U.S. territorial authority = Citizenship

RECOGNIZED EXCEPTIONS

U.S. territorial authority displaced or ceded

Children of accredited diplomats

Birth on a foreign public ship

Birth during hostile occupation

Historical tribal-sovereignty relationship **ELK**

Not subject to U.S. jurisdiction
No constitutional birthright citizenship

Elk v. Wilkins

Majority: special historical exception
Dissenters: example of a broader allegiance rule

NOT EXCEPTIONS

U.S. territorial authority remains complete

Parents temporarily present

Parents unlawfully present

Foreign nationality or allegiance

Subject to U.S. jurisdiction
Constitutional birthright citizenship

Common law

Fourteenth Amendment

Wong Kim Ark

Trump v. Barbara

The rule turns on U.S. territorial authority—not the parents' immigration status.

Roberts majority

Justice Kavanaugh's Theory of 14th Amendment Citizenship

1 CONSTITUTION

Fixed principles, flexible application to new circumstances

New or unanticipated?

Significant illegal immigration
Modern temporary travel

Relevant similarity to
historical exceptions?

Parents are foreign—not
U.S.—citizens



New exceptions may be
constitutional

Executive Order passes
the Fourteenth Amendment

THE ELK PROBLEM

Why exclude children of
tribal American Indians
but include children of
unlawfully or temporarily
present foreign citizens?

Kavanaugh: the closed set
lacks a persuasive
unifying theory

2 CURRENT STATUTE — 8 U.S.C. §1401(a)

Congress adopted *Wong Kim Ark*'s language
and existing closed set



No new exceptions
in the statute

3 EXECUTIVE POWER

The President must follow the statute
Congress enacted

Executive Order
adds new
exceptions



Congress has not
enacted them



Executive Order
cannot take effect

Congress may amend §1401(a). The President may not do it alone.

Kavanaugh opinion

Justice Jackson's Two-Level Concurrence

SHARED RESULT

Jackson, Sotomayor, and Kagan joined the Roberts majority

1 CASE-SPECIFIC ARGUMENT

Jackson + Sotomayor — Introduction and Part I

Thomas: The Fourteenth Amendment chiefly secured citizenship for freedmen who already belonged here



Historical response: Reconstruction chose universal language as an anticaste remedy



Chinese and Romani children confirm a rule extending beyond freedmen

CONCLUSION

Birthright citizenship cannot depend on ancestry or parental desirability

JUSTICE KAGAN

Joined no part of the concurrence

Rested on the Roberts majority opinion

Jackson concurrence

2 BROADER CONSTITUTIONAL PROJECT

Jackson alone — Part II

Fourteenth Amendment = anti-subordination, not merely colorblindness



Challenges the reasoning of *SFFA* and *Callais*



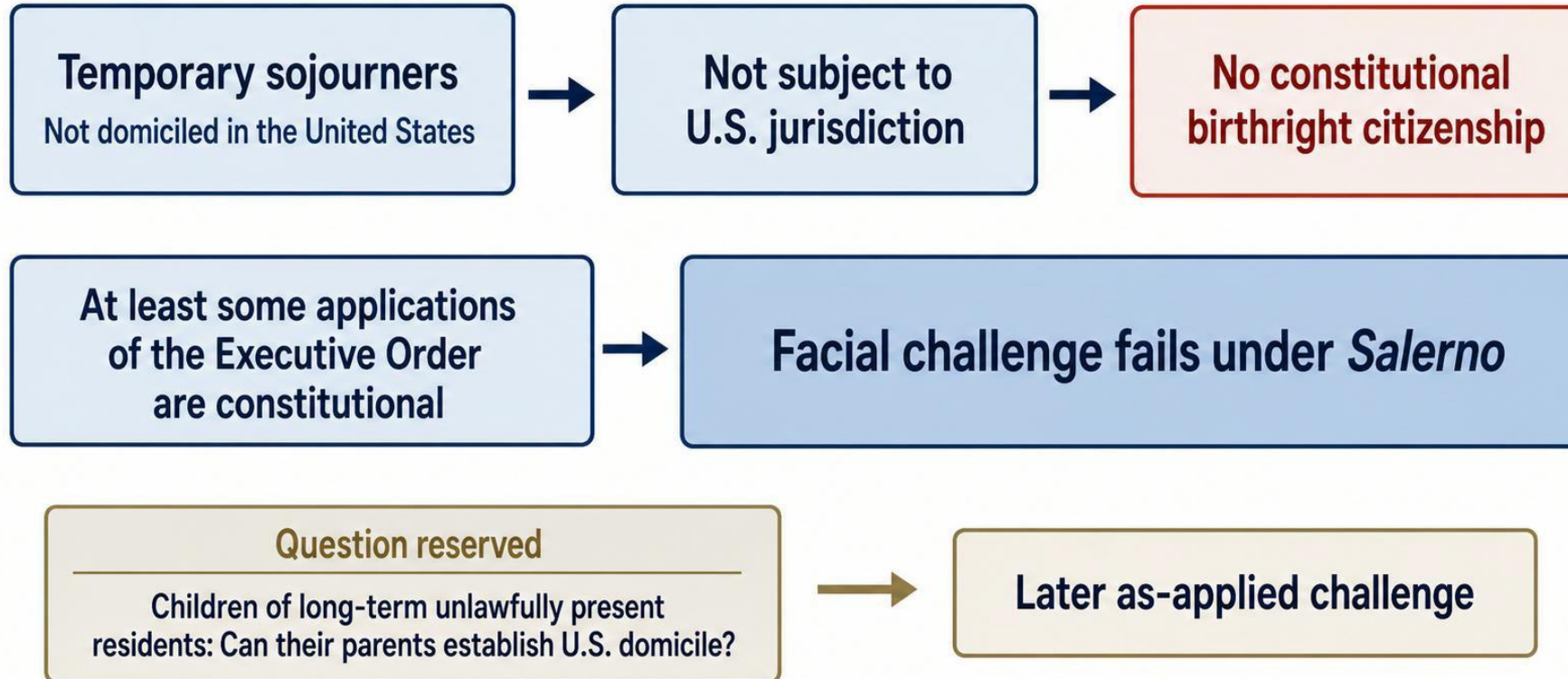
Preserves an alternative constitutional theory

Relevant as a critique of interpretive consistency—not as a test for "subject to the jurisdiction"

Necessary to the judgment? No. Function: answer Thomas and preserve an alternative theory of the Fourteenth Amendment.

Justice Thomas's Theory of 14th Amendment Citizenship

91 pages!

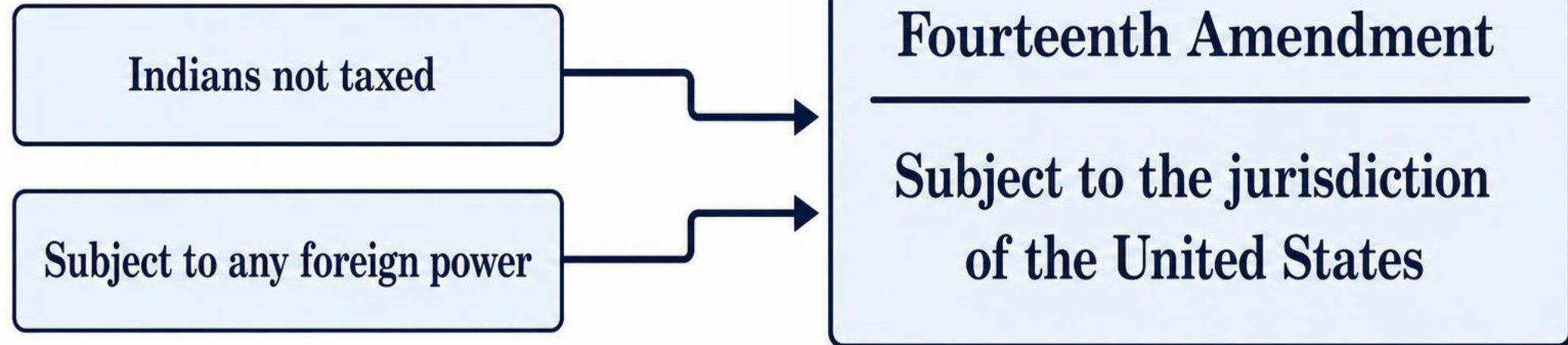


Thomas's interpretation

Justice Alito's Theory of 14th Amendment Citizenship

Civil Rights Act of 1866

Two exceptions to citizenship by birth



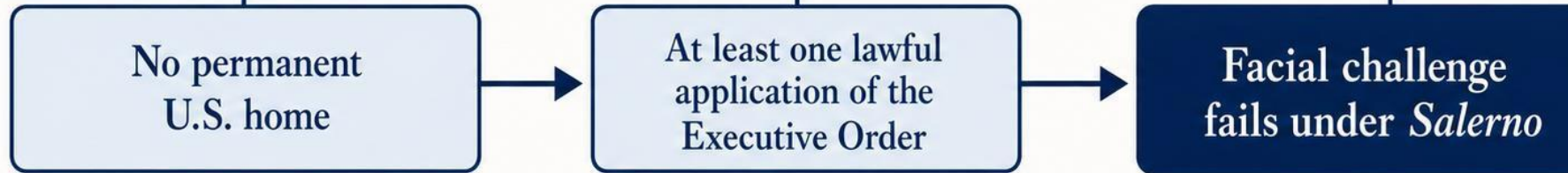
Subject to any foreign power → Not subject to U.S. jurisdiction → No birthright citizenship

Alito's interpretation

Justice Gorsuch's Theory of 14th Amendment Citizenship

Joins Thomas: Citizenship turns on domicile

TEMPORARY VISITORS



A facial challenge asks whether the order is invalid in every application.

LONG-TERM UNLAWFULLY PRESENT PARENTS



Facial survival does not establish validity across the board.

Gorsuch signals sympathy; he does not decide the issue.

AUGUST 6, 2026

THE CITIZENSHIP AGENDA RETURNS

After *Trump v. Barbara*, President Trump signed two new executive orders seeking to preserve parts of his birthright-citizenship program.



NEWS GALLERY LIVESTREAM ELECTION INTEGRITY SAVE AMERICA TRUMP ACCOUNTS RATEPAYER PROTECTION CONTACT

FACT SHEETS

Fact Sheet: President Donald J. Trump Ends Birth Tourism and Protects the Meaning and Value of American Citizenship

The White House | August 6, 2026

SAFEGUARDING AMERICAN CITIZENSHIP AND ENDING BIRTH TOURISM: Today, President Donald J. Trump signed two Executive Orders to continue to protect the meaning and value of American citizenship after *Trump v. Barbara*.

- The first Executive Order non-exhaustively identifies certain categories of children of aliens who are not entitled to birthright citizenship consistent with historical exceptions to birthright citizenship recognized by the Supreme Court in *Barbara*.
- The second Executive Order delegates presidential authorities to the Secretary of State and Secretary of Homeland Security and directs them to halt the practice of birth tourism.

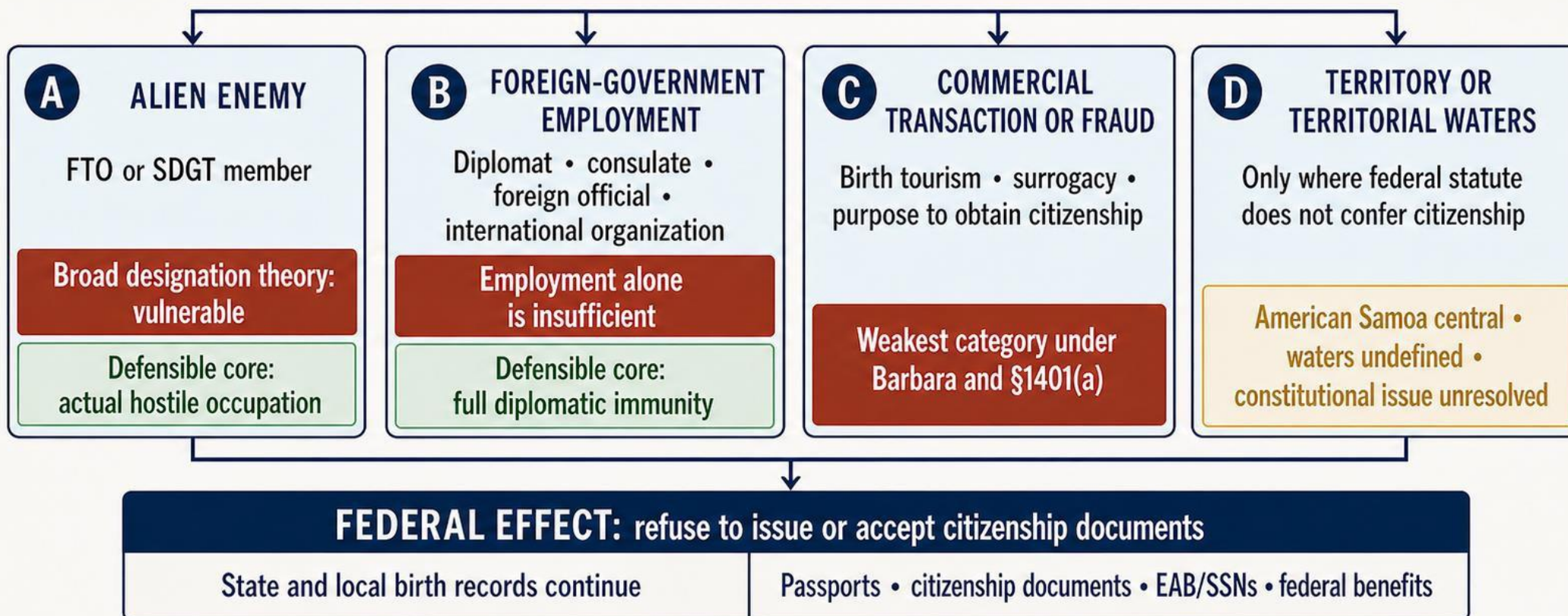
NEW
EXECUTIVE
ORDERS



1 | The August 6, 2026 Citizenship Order

ASSESSMENT KEY: **GREEN** = TRUMP LIKELY PREVAILS • **RUST** = TRUMP LIKELY LOSES • **GOLD** = UNRESOLVED

THRESHOLD: NEITHER PARENT IS A U.S. CITIZEN

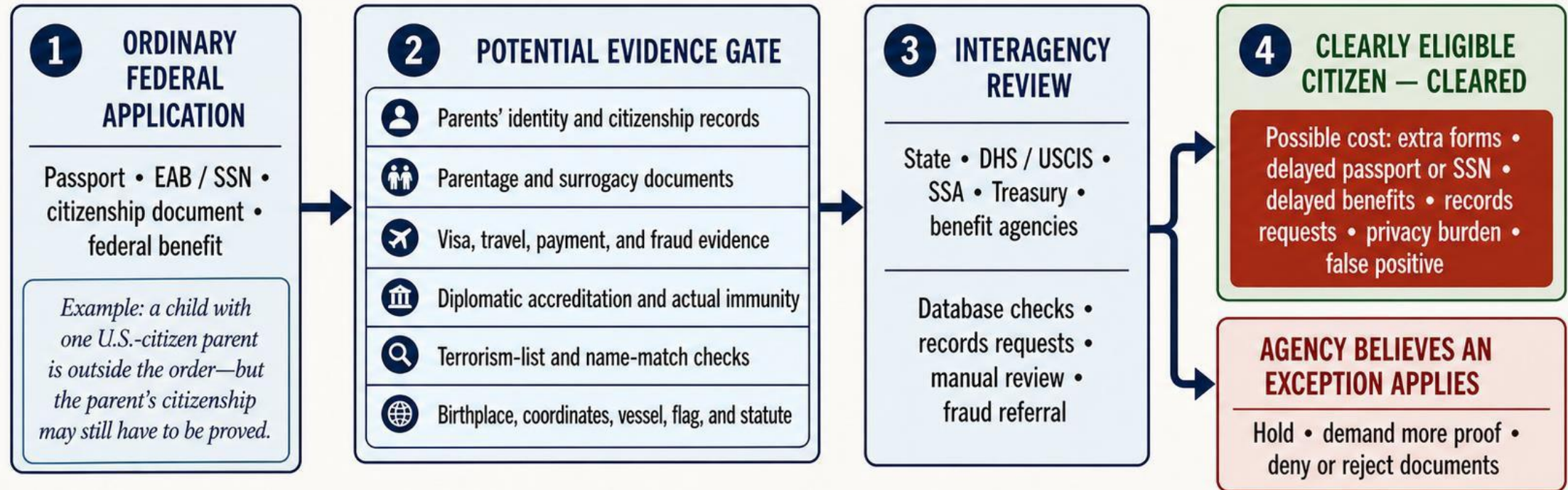


Assessment of Trump's position under Barbara and current federal statutes

2 | The Administrative Burden of Finding the Exceptions

Even if constitutional, the order may require broad screening to identify a narrow covered group

GUIDANCE MUST ANSWER: WHO IS SCREENED? • WHEN? • WHAT PROOF? • WHO BEARS THE BURDEN?



EVEN IF THE MERITS SURVIVE: notice • standard of proof • error correction • appeal • privacy • delay

The order itself supplies no standard of proof, no new investigative authority, and no express protection for previously recognized citizens.

3 | The Long-Term Domicile Fault Line

The uncertainty concerns two dissenters' future votes—not the present holding

CONTROLLING LAW — BARBARA MAJORITY (5): U.S.-born children of unlawfully or temporarily present parents are citizens.

	MAJORITY FIVE Roberts • Sotomayor • Kagan • Barrett • Jackson	ALITO + KAVANAUGH	THOMAS + GORSUCH
TEMPORARY VISITORS	Citizenship constitutionally required	Constitution permits exclusion	No U.S. domicile → no constitutional citizenship
LONG-TERM UNLAWFULLY PRESENT PARENTS	Citizenship constitutionally required	Constitution permits exclusion	QUESTION RESERVED Have the parents made the United States their permanent home? THOMAS — does not decide GORSUCH — “harbor[s] doubts” “If not domiciled here, then where?”

Temporary-visitor application is lawful on their view



Facial challenge fails under *Salerno*

Long-term permanent-home facts



Later as-applied challenge

Barbara controls now. Thomas and Gorsuch leave the long-term question open on their own theory.

4 | What Must Change for Trump to Prevail?

For the order's broad new exclusions—not its narrow, historically recognized cores

NO NEW VOTES NEEDED FOR NARROW CORES: full diplomatic immunity • actual hostile occupation • existing American Samoa statutory regime

CONSTITUTION — BARBARA

Temporary visitors: 5–4 for citizenship

Long-term unlawful presence: 5 require • 2 permit exclusion • 2 reserved

CURRENT STATUTE — §1401(a)

Six Justices support the judgment blocking the Executive Order

Kavanaugh: Constitution permits exclusion, but the statute does not

ROUTE 1: COURT-ONLY PATH

1

Thomas + Gorsuch resolve the long-term domicile question against citizenship

2

Kavanaugh changes his statutory position

3

One Justice from the Barbara majority changes on both Constitution and statute

Minimum plausible movement: two current blockers change, while Thomas and Gorsuch join the exclusion.

ROUTE 2: CONGRESS + COURT PATH

1

Congress amends §1401(a) to authorize new exceptions

Temporary visitors: one Barbara-majority Justice changes constitutionally

Long-term unlawful presence: Thomas + Gorsuch reject citizenship, and one majority Justice changes

Legislation removes the statutory barrier; it cannot remove the constitutional barrier.

THE EXECUTIVE ORDER ALONE CANNOT CHANGE §1401(a) OR OVERRULE BARBARA.

Vote arithmetic assumes the remaining Justices keep their stated positions.

MULLIN v. DOE

Temporary Protected Status and the limits of judicial review

No. 25–1083 (with Trump v. Miot, No. 25–1084) · 609 U. S. ____

Certiorari before judgment (2d Cir. & D.C. Cir.) · Argued April 29, 2026 · Decided June 25, 2026

Held: 8 U.S.C. §1254a(b)(5)(A) bars judicial review of all non-constitutional challenges to TPS designations, extensions, and terminations — procedural claims included — and the Haitian plaintiffs' equal protection claim is unlikely to succeed. Interim relief reversed.

Alito, J. (Court except Part III–A) · Thomas, J., concurring · Kagan, J., dissenting (Sotomayor, Jackson)

The TPS Statute (8 U.S.C. §1254a)

There is no judicial review of any determination of the [Secretary] with respect to the designation, or termination or extension of a designation, of a foreign state under this subsection."

—§1254a(b)(5)(A) —the provision that decides the case

- 1990: Congress codifies ad hoc “Extended Voluntary Departure” practice into TPS
- Designation is discretionary —the Secretary “may designate” on any of three findings: ongoing armed conflict; environmental disaster; “extraordinary and temporary conditions”
- Review is mandatory —every designation reviewed at least each 18 months; the Secretary “shall” consult with appropriate agencies and “shall determine” whether conditions persist; inaction = automatic 6-month extension
- Termination takes effect no earlier than 60 days after Federal Register notice
- Benefits while designated: protection from removal plus work authorization

“Temporary” in Name Only — Then All at Once

Once

- Designations persisted for decades: Somalia since 1991; Nicaragua and Honduras over 25 years; Haiti's 2010 earthquake designation extended for 16 years
- Syria: designated 2012 under the “extraordinary and temporary conditions” prong (Assad repression); terminated September 2025 citing the regime's fall, normalized relations, and revoked sanctions (90 Fed. Reg. 45402)
- Haiti: designated 2010; terminated November 2025, citing areas “suitable to return to” and the national interest, despite conceded gang violence (90 Fed. Reg. 54739)
- Second Trump administration record: every designation reviewed has been terminated — 13 of 13 — from Nepal and Burma to Venezuela and Haiti

13 / 13

designations terminated on review

~340,000

Haitian TPS holders

~1 million

TPS holders, 13 countries

Two Districts, Two Theories, One Grant

Below

- S.D.N.Y. (Syrian nationals): APA claims; §705 order order postponing the termination; Second Circuit Circuit denies a stay
- D.D.C. (Haitian nationals): APA claims plus equal protection — termination motivated by race; interim relief; divided D.C. Circuit denies a stay
- SG seeks stays and certiorari before judgment; Court grants, consolidates, defers the stay applications

Questions the Court answered

- Does §1254a(b)(5)(A) bar procedural APA challenges — failure to consult, arbitrary-and-capricious review — or only attacks on the bottom-line call?
- What does an equal protection challenger need at the interim-relief stage, and did these statements suffice?
- May a court reject a claim on the merits without first resolving jurisdiction? (Part III–A)

Holding I: The Review Bar Swallows Everything

- “Determination” bears either ordinary sense — the discrete decision, or the whole process producing it — and the bar applies under both
- “With respect to” has a “broadening effect” (Patel v. Garland): antecedent steps — consultation, review of conditions — are covered matters
- Merger: preliminary steps merge into the final determination (cf. Hawkes); “challengers cannot avoid a judicial-review bar by creative pleading or clever lawyering”
- “This text is clear, and its plain meaning is very broad” — clear text overcomes the presumption of reviewability
- Reserved: whether the bar reaches constitutional claims (assumed not, and the Government did not argue it)
- Part III–A (plurality of four — Alito, Roberts, Thomas, Kavanaugh): at the interim-relief stage a court may deny relief on the merits without resolving jurisdiction; Gorsuch and Barrett declined to join

Holding II: Equal Protection — and the Dissent

The majority

- Assumes Arlington Heights (not Trump v. Hawaii deference) supplies the standard
- “None of the cited statements ... was overtly racial,” and each expressed policy views resting on race-neutral justifications
- The challengers' own evidence — 13 terminations of racially diverse designations — supplies a “race-neutral explanation”

Kagan, J., dissenting (Sotomayor, Jackson)

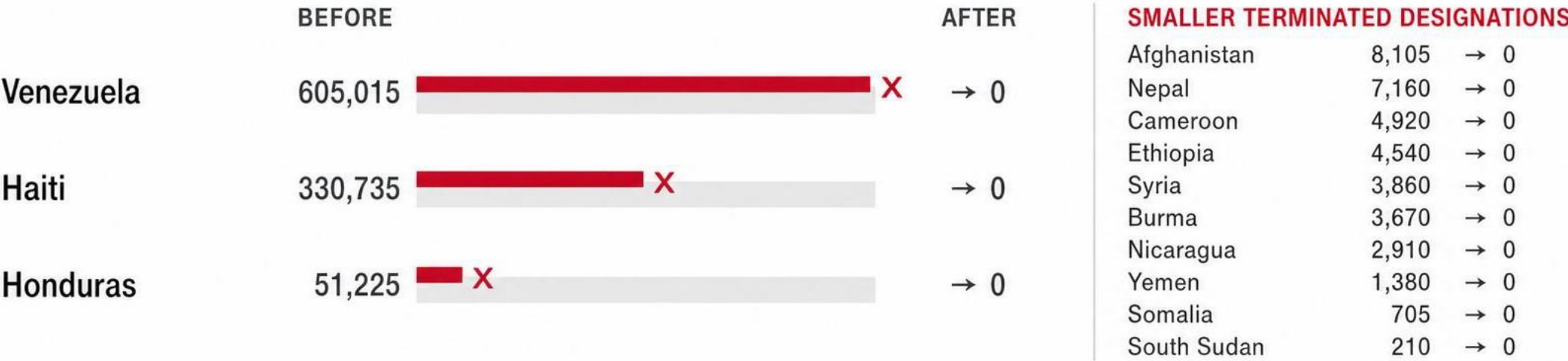
- “In ordinary English, a ‘determination’ means, well, a determination” — not everything the decisionmaker must do beforehand
- The bar covers the substantive call; Congress's mandatory procedures remain enforceable
- “After today, a Secretary can announce to the world that she didn't consult with anyone ... [a]nd the courts will be powerless to intervene.”

The methodological fight — when does the presumption of reviewability yield? — will recur far beyond immigration.

Thirteen Terminations Remove Four-Fifths of TPS

Approved TPS recipients before the Trump actions → legal effect after each termination takes effect

TOTAL TPS
1.298M → 0.273M
-79%



OTHER FOUR COUNTRIES STILL DESIGNATED

273,205 → 273,205

El Salvador 170,125 • Ukraine 101,150 • Sudan 1,790 • Lebanon 140

 = designation terminated  = still designated

Recipients: USCIS data compiled by CRS, Mar. 31, 2025. 'After' shows the legal result of effective termination, not a later USCIS headcount.

Aftermath: The Litigation Architecture Collapses

- The Ninth Circuit's January 2026 ruling that the Venezuela termination exceeded the Secretary's authority (National TPS Alliance v. Noem) — already stayed — is now a dead letter
- Every pending statutory or procedural challenge to a TPS termination is effectively over
- Equal protection survives in theory; in practice the bar is set at overt racial statements or a treated-differently comparator no current record supplies
- Doors left ajar: ultra vires action wholly outside the statute (reserved); constitutional-claim preclusion (reserved — Thomas alone would bar those too)
- Practitioner consensus (AILA; management-side alerts): treat terminations as final and unreviewable; counsel individual clients on other relief

THE IMMIGRATION TRILOGY · THE SUPREME COURT, JUNE 2026

MULLIN v. AL OTRO LADO

LADO

Asylum, “arrival,” and the border line

No. 25–5 · 609 U. S. ____ · Certiorari to the Ninth Circuit

Argued March 24, 2026 · Decided June 25, 2026

Held (6–3): an alien standing in Mexico does not “arriv[e] in the United States” by attempting, and failing, to set foot in this country — arrival means crossing. The INA neither entitles such an alien to apply for asylum nor requires an officer to inspect him.

Alito, J., for the Court · Thomas, J., concurring · Sotomayor, J., dissenting (Kagan, Jackson) · Jackson, J., dissenting

[Case brief ▶](#) · [Edited opinion ▶](#)

The Surplusage Problem

If “arrives in the United States” requires crossing the border, what work remains for that clause?

THE TWO REPEATED FORMULATIONS

ASYLUM “physically present in the United States” **OR** “arrives in the United States” → may apply for asylum

8 U.S.C. § 1158(a)(1) (quoted clauses)

ADMISSION “present in the United States who has not been admitted” **OR** “arrives in the United States” → applicant for admission

8 U.S.C. § 1225(a)(1) (quoted clauses)

MAJORITY: NESTED CATEGORIES



The conceded overlap

Anyone who “arrives in” is already “physically present.”

Majority’s answer:

- “Arrives in” links asylum to the expedited-removal process.
- “Physically present” covers people who apply later.

Some redundancy is acceptable; ordinary meaning controls.

609 U.S. ___, slip op. 11–15 (2026)

SOTOMAYOR DISSENT: SEPARATE CATEGORIES



Each phrase adds a group.

No clause is swallowed by the other.

Under the majority’s reading, “arrives in” adds no person not already covered by “physically present.”

Id., slip op. 16–19 (Sotomayor, J., dissenting)

THE CHOICE

Ordinary meaning of “in” + accepted overlap

or

No surplusage + an at-the-border category

Metering and the Statutes It Tested

The statutes

- §1225(a)(1): an alien who “arrives in the United States” is an applicant for admission and “shall” be inspected
- §1158(a)(1): any alien “who arrives in the United States” may apply for asylum
- Everything turns on when arrival happens — at the line, or across it

The policy and the case

- Spring 2016 surge at southwest ports → November 2016 “metering”: officers stationed at the boundary line capped daily entries, turning back the rest into Mexico
- Policy continued across administrations; rescinded November 2021
- Al Otro Lado's 2017 class action (S.D. Cal.): class certified; summary judgment — turnbacks unlawful; divided Ninth Circuit affirms: arrival includes presenting at the line (“in the process of arriving”)

The Holding: Arrival Means Crossing

- Ordinary meaning: “A person arrives in a destination only when he enters it, and that conclusion does not change because someone or something blocks entry.”
 - The football analogy: you don’t arrive in the end zone until you cross it
- Context confirms: the INA says “attempts to enter” when it means attempts; §1103(a)(10) says “near a land border” when it means proximity; IIRIRA replaced “at a land border or port of entry” with “arrives in”
- Surplusage tolerated: “if forced to choose between an interpretation that entails some redundancy and one that contradicts what words usually mean, we would choose the former”
- Fallback: presumption against extraterritoriality; *Sale v. Haitian Centers Council* forecloses the non-refoulement argument



Two Dissents, Two Objections

Sotomayor, J. (Kagan, Jackson) — the merits

“The Court's illogical interpretation is driven almost entirely by a fixation on a single word: ‘in.’”

— Sotomayor, J., dissenting, slip op. at 2

- Context, statutory history, and decades of Executive practice treated presentation at the line as arrival
- The reading hands the Government unilateral power to shut off statutory asylum access by blocking the doorway

Jackson, J. (solo) — justiciability

“ Today, the Court issues an advisory opinion on the lawfulness of metering— a policy that has not been for almost five years and that the Government has concrete plans to reinstate.”

— Jackson, J., dissenting, slip op. at 1

- Would have dismissed — the Court reached out to bless a defunct policy

Mandatory Law-But No Judicial Remedy?

MULLIN v. DOE

LEGACY ONE

CONGRESS COMMANDS

SECRETARY ACTS

REVIEW BAR

IMMIGRATION AND NATIONALITY ACT

8 U.S.C. § 1254a

The Secretary **shall** designate, terminate, or extend TPS when the statutory conditions are met.

- STATUTE



TPS DECISION

DESIGNATE • TERMINATE • EXTEND
TEMPORARY PROTECTED STATUS

0

STATUTORY CRITERIA

0

RECORD & DETERMINATION

A

NONCONSTITUTIONAL ERROR
POSSIBLE



50-year designation

coin flip



FORMALLY: The statutory duty remains.



PRACTICALLY: Nonconstitutional violations may lack a judicial remedy.

Legal obligation survives. Judicial enforcement may not.

“There is no judicial review of any determination ... with respect to” TPS designation, termination, or extension.”
8 U.S.C. § 1254a(b)(5)(A); *Mullin v. Doe*, slip op. 12-18 (2026)

Did Mullin Collapse *Arlington Heights*'s Two Stages?

*strong, race-neutral
explanation*

1 • PLAINTIFF'S BURDEN

**Was race a
motivating factor?**

Not the sole, dominant, or primary factor.



2 • GOVERNMENT'S BURDEN

**Would the same decision
have resulted without race?**

*A race-neutral cause may
defeat liability here.*

**CLAIM
FAILS**

Arlington Heights recognizes a 'both/and' world-not an 'either/or' inquiry.

Formal rule unchanged? Effective evidentiary threshold raised?

Aftermath: On the Ground, Summer 2026

- Syria's TPS ended July 17, 2026; Haiti's ended July 27 — roughly 340,000 Haitians and 6,000+ Syrians lost status and work authorization
- 85% of Haitian holders live in mixed-status households; 18% are raising U.S.-citizen children; workforce concentration in health care, food service, transport, manufacturing
- Employers are the transmission belt: I-9 reverification and separations now, removal operations scaling later
- Venezuela's June 24 earthquakes (5,000+ dead) power a redesignation campaign — 133,000-signature petition delivered in Doral July 24
- Congress: Wasserman Schultz–Salazar discharge petition for the American Dream and Promise Act — after Mullin, relief is executive grace or legislation, not litigation

THE THROUGH-LINE

Three decisions in five days — one Court, two kinds of lines

- Mullin v. Doe: the line against judicial review — TPS policy belongs to the Secretary and Congress, not the courts
- Mullin v. Al Otro Lado: the territorial line — statutory rights begin at the border, not at the doorway
- Trump v. Barbara: the same strictness turned against the Executive — the citizenship line is constitutional and beyond reinterpretation
- Who may remain and who may approach: consolidated in the political branches, largely without judicial check
- Who is a citizen at birth: settled — again — beyond the reach of both political branches
- Watch next: redesignation politics and TPS status bills; port-of-entry policy design; entry-side enforcement litigation after Barbara



2025-26 Supreme Court Developments in Election Law

DAVID FROMKIN – UNIVERSITY OF HOUSTON LAW CENTER

AUGUST 12, 2026

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Agenda

The Voting Rights Act – *Louisiana v. Callais*

Mail-in Ballots – *Watson v. Republican National Committee*

Campaign Finance – *National Republican Senatorial Committee v. Federal Election Commission*

The Voting Rights Act: *Louisiana v. Callais*

Background I: Voting Rights Act (VRA)

In *Shelby County v. Holder* (2013), the Court struck down the preclearance formula for implementing Section 5 of the VRA, which had prohibited “retrogression” in minority voting rights in covered jurisdictions. The Court emphasized that we still have Section 2.

Section 2 of the VRA prohibits the denial or abridgement of the right of any citizen to vote on account of race, color, or membership in a language minority group.

The 1982 amendments to Section 2 responded to *Mobile v. Bolden* by creating a “results test.”

The *Gingles* test governs the application of Section 2 to redistricting. A state must create a minority opportunity district when:

- (1) minority group is sufficiently large and compact to constitute a majority in a single-member district
- (2) minority group is politically cohesive
- (3) majority votes “sufficiently as a bloc to enable it ... usually to defeat the minority’s preferred candidate”

In *Allen v. Milligan* (2023), the Court upheld a routine application of Section 2.

Background II: Racial Gerrymandering

In *Shaw v. Reno* (1993), the Court recognized a cause of action for racial gerrymandering.

- When a racial motive predominates in the construction of a legislative district, strict scrutiny applies.
 - A racial motive does not predominate when the state's primary motive was politics, not race.
- The district can only survive scrutiny if the state has a compelling interest justifying the construction of the district and the construction of the district was narrowly tailored to advance that interest.
 - In the aftermath of *Shaw*, compliance with the VRA was long understood to be a compelling interest.
- *Shaw* limits states' ability to engage in minority-protective redistricting.

In *Cooper v. Harris* (2017), the Court determined that a state engages in racial gerrymandering when it creates a minority opportunity district that is in fact not required by the VRA because the state mistakenly believes the district is required by the VRA. Under these circumstances, the state's racial motive predominated, in the absence of a compelling interest.

Thomas concurrence in *Alexander v. South Carolina NAACP* (2024): "In my view, the Court has no power to decide these types of claims. Drawing political districts is a task for politicians, not federal judges. . . . [P]artisan gerrymandering claims are nonjusticiable. . . . The same logic demonstrates that racial gerrymandering and vote dilution claims are also nonjusticiable."

The Issue

In post-2020 redistricting, Louisiana created a second majority-minority district because it was instructed to do so by a federal court applying *Gingles*, in *Robinson v. Ardoin*.

Plaintiffs nonetheless challenged Louisiana's map as a racial gerrymander.

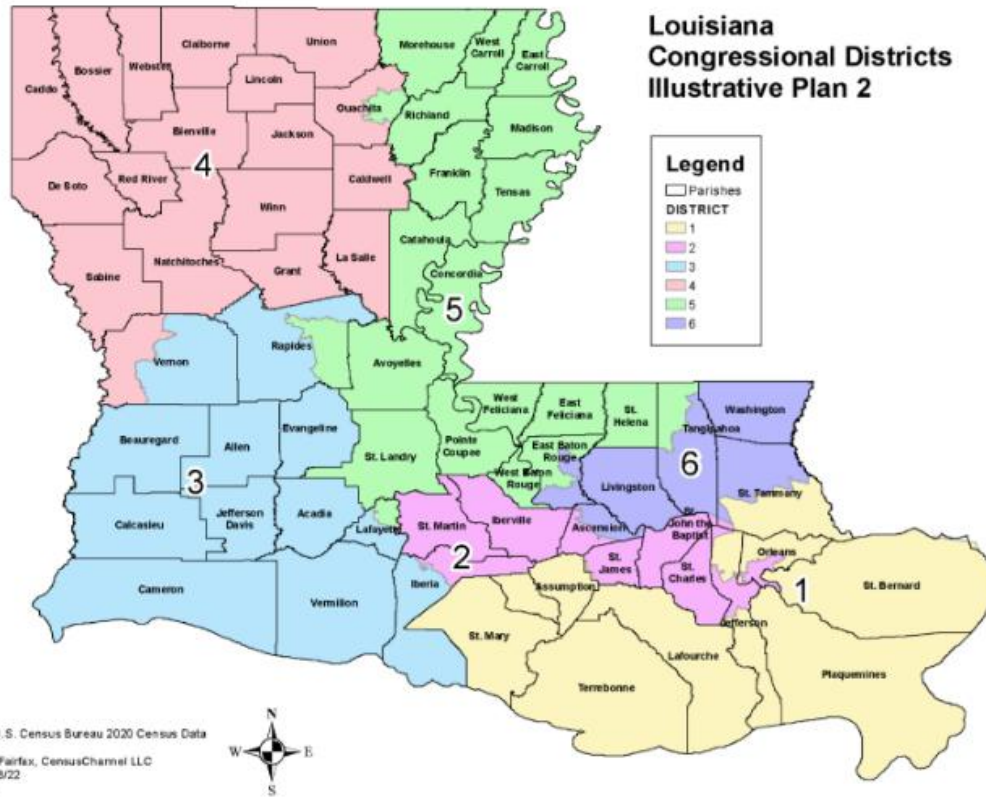
- Louisiana argued that the primary motive behind the map was politics, not race: the goal was to protect incumbents, while complying with *Robinson*.
- But the three-judge district court determined that race predominated. So strict scrutiny applied.

Question in reargument: "Whether the State's intentional creation of a second majority-minority congressional district violates the Fourteenth or Fifteenth Amendments to the U.S. Constitution"

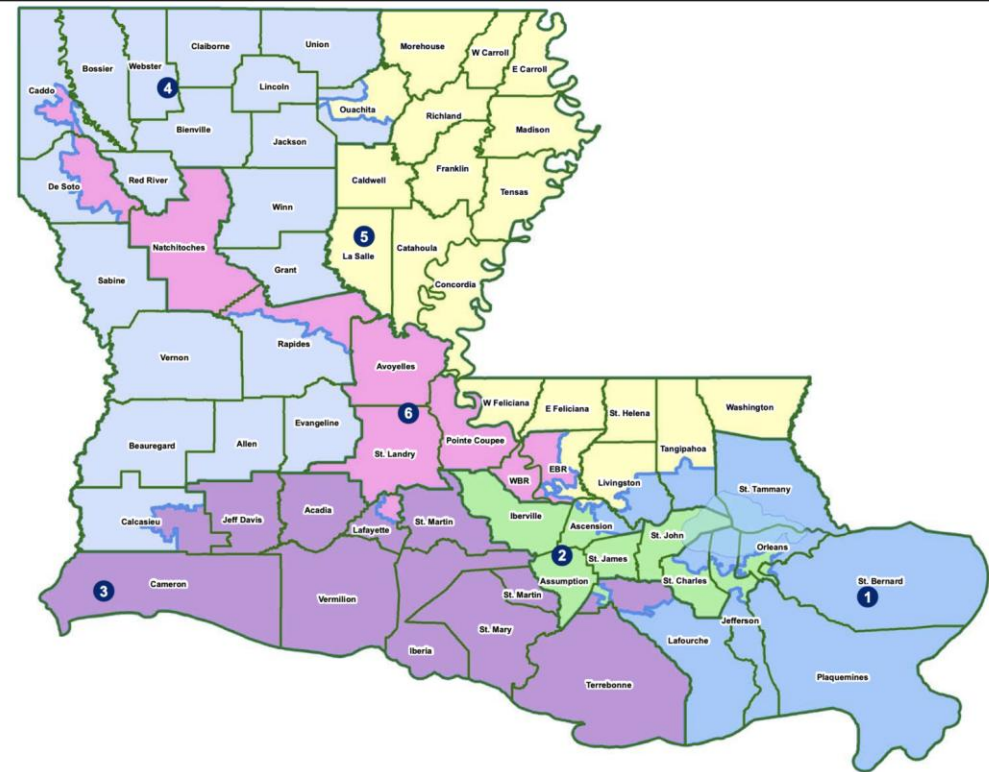
- Or, alternatively put, is districting that would otherwise constitute a racial gerrymander under *Shaw v. Reno* saved by the need to comply with the Voting Rights Act?

Robinson Illustrative Map

605 F. Supp. 3d at 785



2024 Enacted Map



The Court's Analysis

Court has “assumed without deciding” that VRA compliance is a compelling interest—but it is not

Constitutional avoidance: “As the Court has long held, the Fifteenth Amendment bars only state action ‘motivated by a discriminatory purpose.’ So a law that seeks to enforce the Fifteenth Amendment by prohibiting mere disparate impact would fail to enforce a right that the Amendment secures. That is never ‘appropriate,’ because Congress cannot ‘enforce a constitutional right by changing what the right is.’ . . . While that interpretation does not demand a finding of intentional discrimination, it imposes liability only when the circumstances give rise to a strong inference that intentional discrimination occurred.” (slip op. at 23) (citations omitted)

Deference to state legislatures in the redistricting process: The Constitution does not impose districting criteria on States. State “may use traditional districting factors such as ‘compactness, contiguity,’ ‘maintaining the integrity of political subdivisions, preserving the core of existing districts,’ and protecting incumbents. . . . The same is true with respect to the drawing of districts to achieve partisan advantage.” (slip op. at 24) (citations omitted)

“If either politics or race could explain a district’s contours, the plaintiff has not cleared its bar.” (25)

Section 2 after *Callais*

“A plaintiff may carry its disentanglement burden only by offering an alternative map that achieves all the State’s objectives—including partisan advantage and any of the State’s other political goals—at least as well as the State’s map.” (slip op. at 25)

- So, after *Callais*, plaintiffs in a Section 2 case must show that the creation of an additional minority opportunity district does not interfere with any of the State’s political objectives.
- “If the State’s aims in drawing a map include a target partisan distribution of voters, a specific margin of victory for certain incumbents, or any other goal not prohibited by the Constitution, the plaintiffs’ illustrative maps must achieve these goals just as well.” (slip op. at 29)

A remedial district cannot be constructed “by using race.” (slip op. at 29)

“[S]imply pointing to inter-party racial polarization proves nothing, because ‘a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact.’” (slip op. at 30)

Plaintiffs must produce “evidence that has more than a remote bearing on what the Fifteenth Amendment prohibits: present-day intentional racial discrimination regarding voting.” (slip op. at 30)

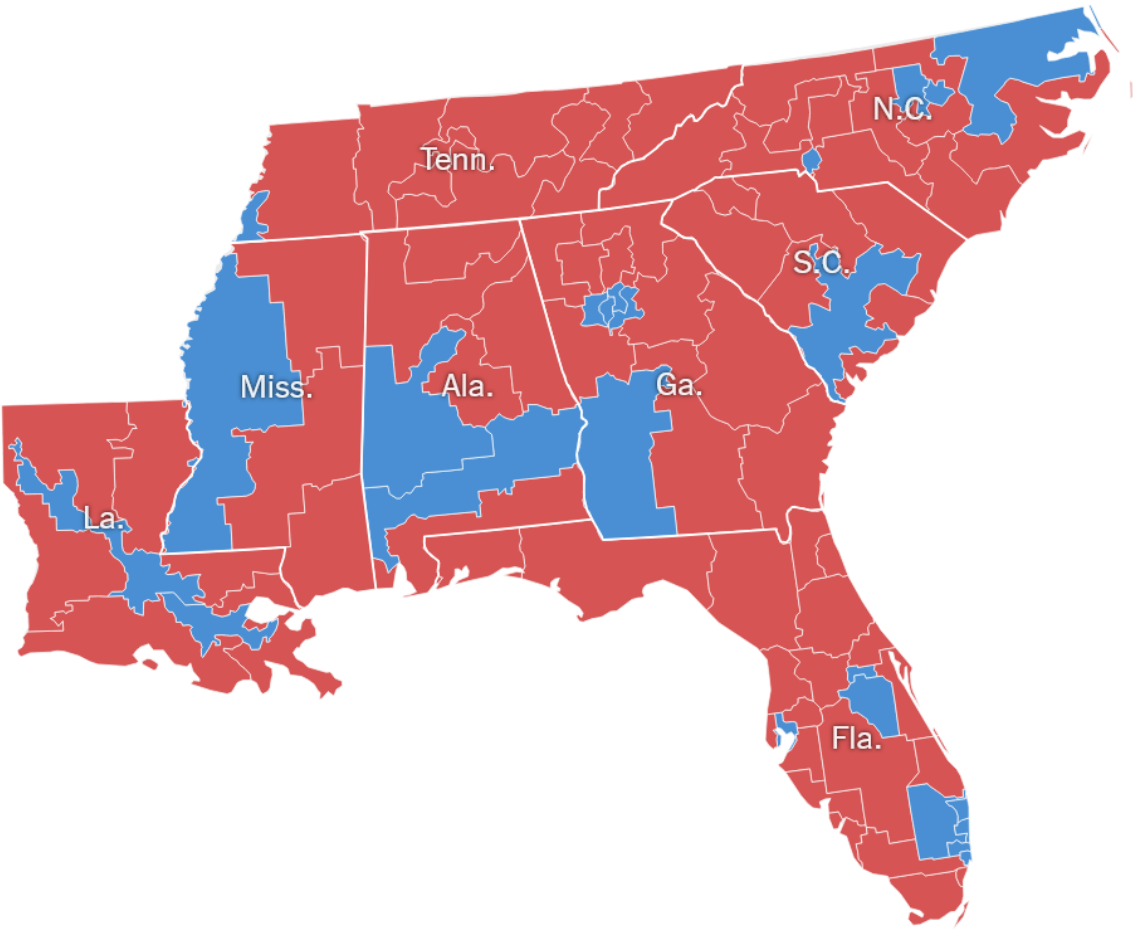
- Resemblance to historical discrimination may no longer support an inference of intentional discrimination, because “vast social change has occurred throughout the country and particularly in the South, where many §2 suits arise.” (slip op. at 26)

Even though the architects of the modern Section 2 explicitly chose a *results test* rather than an *intent test*, the Court has effectively restored an intent test.

The Supreme Court Case That Could Hand the House to Republicans

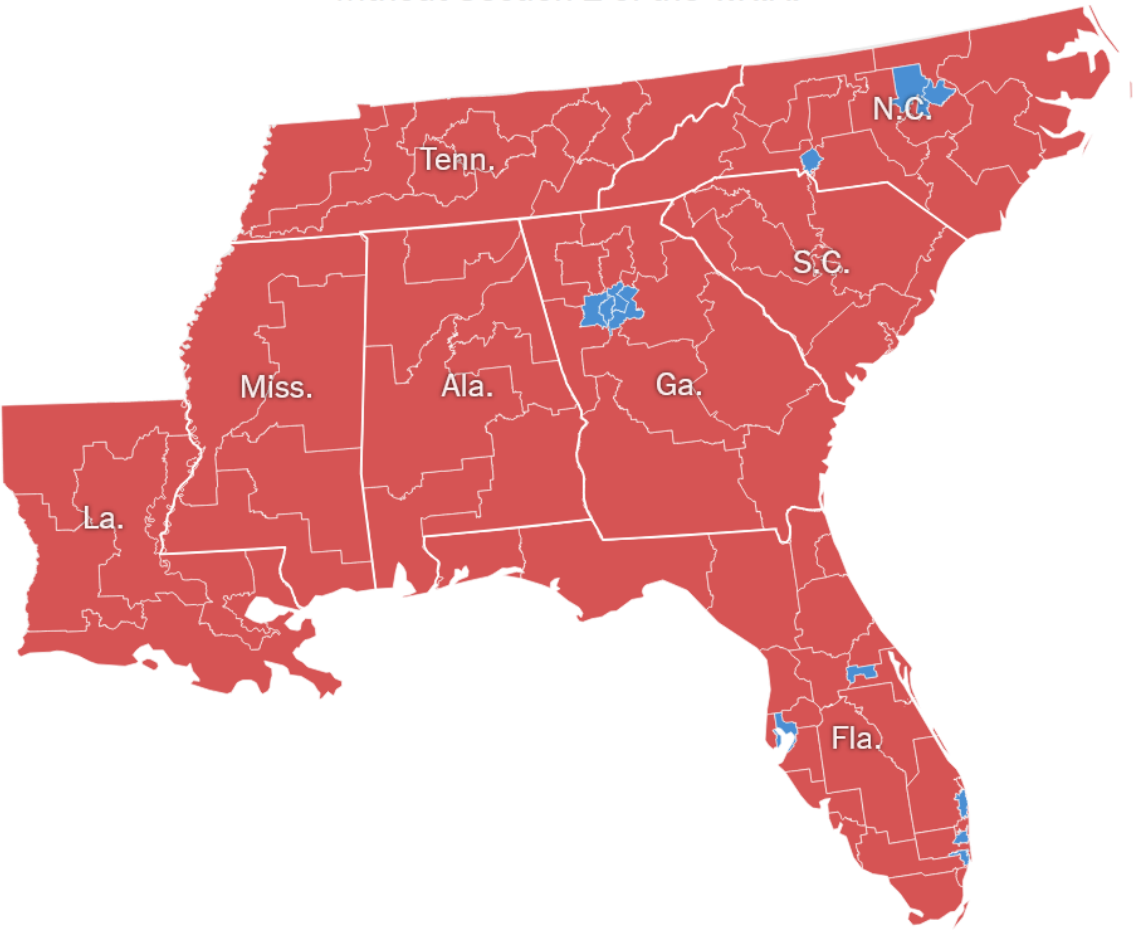
Current map

Democrats hold **24 seats** in these states



Plausible redistricting scenario

Republicans gain **12 more seats**, including nine without Section 2 of the V.R.A.



Mail-in Ballots: *Watson v. RNC*

The Issue

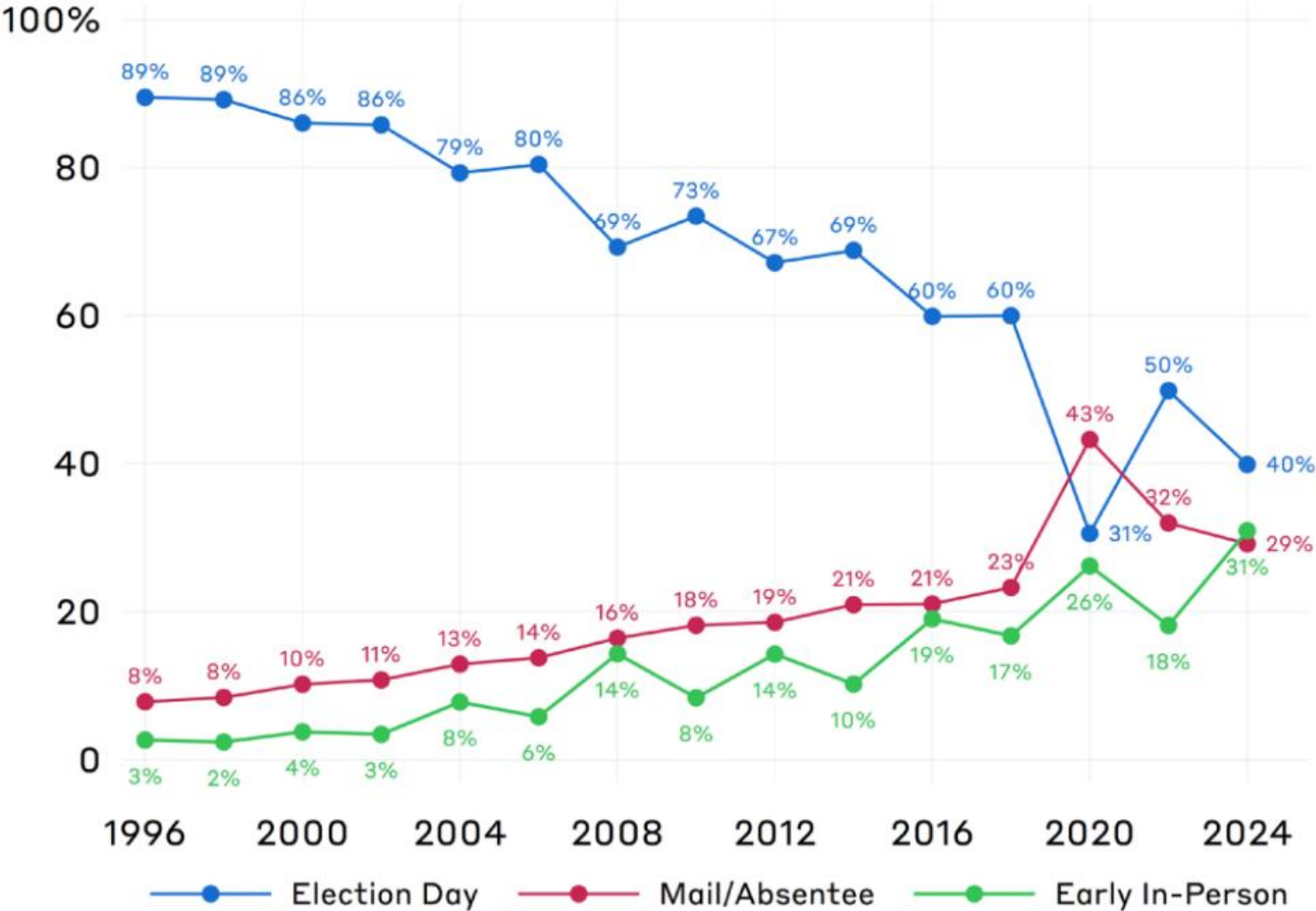
Question: Does federal law prohibit states from counting mail-in/absentee ballots cast by but received after election day?

Elections Clause (art. I, § 4, cl. 1): “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations”

2 U.S.C. § 7: “The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.” (and analogous statutes for elections for Senators and President)

So: Do these statutes preempt state laws that permit the counting of mail-in ballots postmarked by but received after election day?

FIGURE 1. VOTING MODE USAGE, 1996 - 2024.



Data sources: Census Bureau, Voting and Registration Supplement, 1996 – 2024.

The Court's Analysis

(1) Text – “The electorate’s choice is made when voting is complete, not when ballots are received.” (slip op. at 9)

(2) History – “[H]istorical practice, detached from statutory text, is not controlling. Statutes do not ‘tra[p] in amber’ every contemporary practice on the same subject matter. *United States v. Rahimi*, 602 U. S. 680, 691 (2024).” (slip op. at 14)

(3) Statutory context – Plaintiffs’ statutory interpretation “is at odds with UOCAVA, which . . . presupposes that States retain the power to set ballot-receipt deadlines.” (slip op. at 14-15)

The Policy Issue

Dissent: “[T]oday’s decision leaves open opportunities for voter fraud that may further undermine Americans’ faith in the integrity of this country’s elections. Diverse sources have recognized that mail-in ballots increase the potential for fraud. . . . Today’s decision compounds these vulnerabilities. Allowing absentee ballots to pour in over the days and weeks after election day, by which point preliminary election returns are being publicly reported, creates greater opportunity for fraud and risks further undermining the public’s confidence in election integrity. As JUSTICE KAVANAUGH has explained, when ‘thousands of absentee ballots flow in after election day and potentially flip the result of an election,’ ‘charges of a rigged election can explode.’” (slip op. at 18) (citation omitted)

Majority: “As we have said time and again, however, policy arguments are properly directed to legislatures, not courts. The question today is not whether requiring ballots to be received by election day is a good or bad idea; the question is whether the idea has made its way into the United States Code. . . . Regardless, plaintiffs’ definition of ‘election’ would do little to address the concerns they identify. . . . [E]ven under plaintiffs’ interpretation, last-minute flips are possible, because the election-day statutes set no deadline for counting ballots or certifying election results.” (slip op. at 19-20) (citations omitted)

Campaign Finance: *NRSC v. FEC*

The Issue

Question: Do FECA limits on political party spending coordinated with candidates violate the First Amendment?

- Limits were already upheld in *Colorado Republican II* (2001)

Buckley framework:

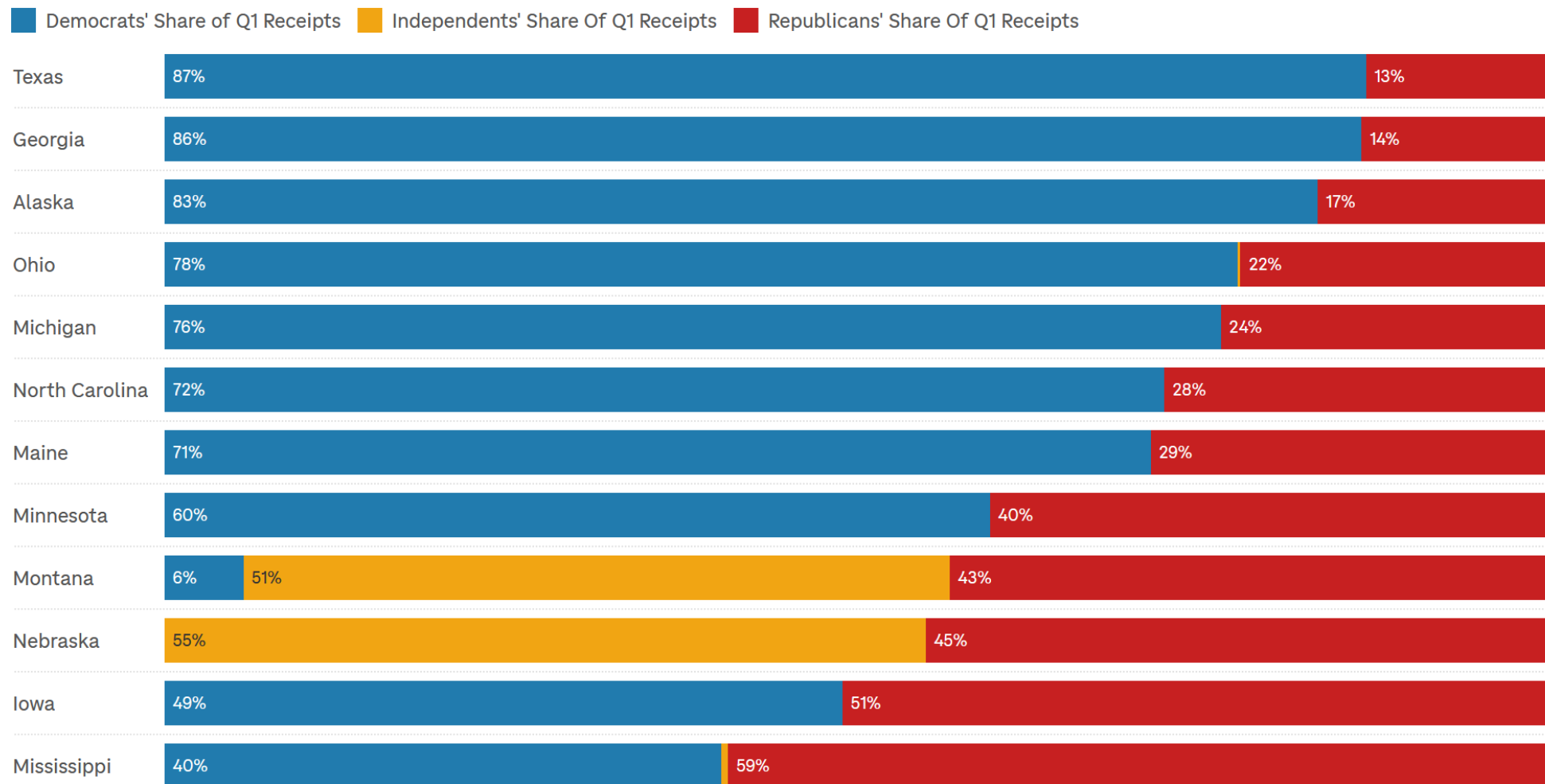
- (1) Money is speech.
- (2) The only government interest that can justify campaign finance regulations is preventing corruption (or the appearance of corruption—but see *Citizens United*).
- (3) Regulations of contributions—but not expenditures—can be justified by preventing corruption.
 - *McCutcheon v. FEC* (2014): aggregate limits on contributions can't be justified by preventing corruption
 - Coordination blurs the line between expenditures and contributions
 - Thomas dissent in *Colorado Republican II* argued that a \$20,000 contribution is not enough to corrupt a candidate
 - 2026 limit on individual contributions to national party committees is \$44,300 per year (vs. \$7,000 limit for contributions to candidates per election)

Influence of parties on candidates? – is that even something we want to prevent?

Influence of donors on parties—or on candidates via parties? – anticircumvention interest

Democrats (and independents) in key Senate races are largely outraising Republicans

From Jan. 1 to March 31, 2026, Democratic candidates accounted for the vast majority of fundraising in some of the most competitive Senate races in the midterms. In Montana and Nebraska, the independent candidates outraised incumbent Republicans.

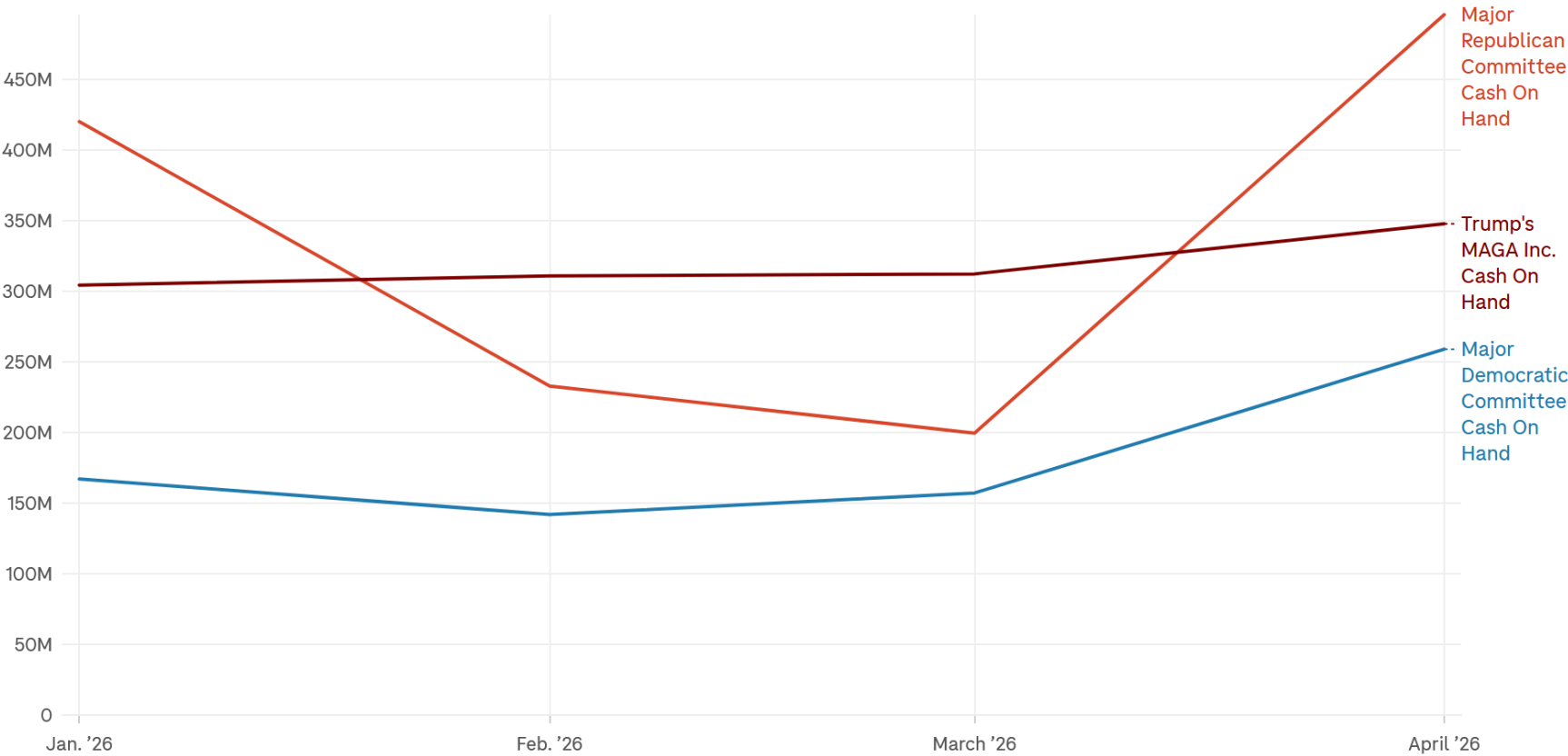


Source: Federal Election Commission data

Credit: Stephen Fowler, NPR

Republican-aligned committees have a massive cash advantage over Democrats

National Republican Party committees have raised more money and spent less than the major Democratic committees and super PACs. With President Trump's MAGA Inc. super PAC sitting on more than \$350 million, Republicans have more than three times as much cash on hand that they could use to defend key seats.



Notes

For Democrats, data includes the Democratic National Committee, Democratic Congressional Campaign Committee, Democratic Senatorial Campaign Committee, House Majority PAC, Senate Majority PAC. For Republicans, the data includes the Republican National Committee, National Republican Congressional Committee, National Republican Senatorial Committee, Congressional Leadership Fund, Senate Leadership Fund.

Source: Federal Election Commission data

Credit: Stephen Fowler, NPR

A Welcome Correction: NRSC v. FEC and the Need to Empower Parties

Samuel Issacharoff

This is the dynamic that Pam Karlan and I have called the hydraulics of campaign finance regulation: money under pressure does not disappear, it finds the path of least resistance. Squeeze coordinated party spending, and the same dollars migrate to Super PACs, 501(c)(4)s, and other independent-expenditure vehicles that face no coordination limits, minimal disclosure obligations in some cases, and—crucially—no responsibility to the broader coalition-building function that parties perform. Donors did not stop spending; they stopped spending through parties. The consequence has been a campaign finance system increasingly dominated by single-issue and candidate-specific vehicles with no stake in governing coalitions, party platforms, or the discipline of having to answer for a ticket rather than a single race.

That matters because healthy democracies have historically depended on parties to perform a mediating function that no other institution replicates: translating diffuse voter aspirations into coherent programs, vetting and disciplining candidates who run under a shared label, and then converting electoral victory into the capacity to govern. Parties are what allow an electorate's preferences to be aggregated into something a legislature or an executive can implement, and what allow voters to hold a governing coalition accountable at the next election. Weakening parties relative to unaccountable outside spenders does not reduce the influence of money in politics; it severs influence from responsibility. A Super PAC owes nothing to a platform, a coalition, or a future election in the way a party does.

But are political parties vectors of accountability today?

Taking Stock

A mixed bag, but *Callais* was clearly the most consequential case.

- Rick Hasen: “one of the most pernicious and damaging Supreme Court decisions of the last century”

Watson’s statutory analysis was straightforward. Four justices, however, foregrounded concerns about voter fraud, despite all the evidence showing that voter fraud is very rare.

The implications of *NRSC v. FEC* are unclear. It is not the most damaging elaboration of the *Buckley* framework—and may even be a valuable corrective for the political marketplace.

Prof. Emily Berman
Presidential Removal After
Slaughter & Cook

University of Houston Law Center
Supreme Court CLE
August 12, 2026



Read together, the cases create three buckets:



RULE

Principal officers exercising executive power are removable at will.



EXCEPTION

Federal Reserve independence survives through historical tradition.



UNCERTAINTY

Adjudicators, inferior officers, and civil servants remain unresolved.

Slaughter began with a direct collision over the FTC Act

1914

FTC Act

5 commissioners;
staggered seven-
year terms;
bipartisan
composition;
removal only for
specified cause.

1935

Humphrey's Executor

Removal protection
OK because the
FTC was viewed as
predominantly
quasi-legislative
and quasi-judicial.

2025

Trump removes Slaughter

No statutory cause;
Article II and
disagreement with
the Administration's
priorities supplied
the rationale.

Slaughter constitutionalizes at-will removal

6–3 • ROBERTS, C.J.

Article II places executive power in one President.



Executive power

Rulemaking
investigation
prosecution
adjudication
civil enforcement



Precedent

Humphrey's Executor overruled
to the extent
anything remains.



FTC application

Commissioners
exercise executive
power and
therefore must be
removable at will.

The holding is broad—but not without exception(s?)

DECIDED

Executive power = rulemaking, investigation, prosecution, etc.

FTC commissioners exercise executive power.

Their for-cause protection is invalid.

LEFT OPEN

Non-Article III adjudicators

Inferior officers and civil servants

Entities without sovereign power

Historically grounded exceptions—including the Fed

Separate writings

THOMAS, J., concurring

Declined to join the historical carveout. His Cook dissent confirms he would apply a blanket Article II rule.

GORSUCH, J., concurring

Warns that delegated legislative and judicial powers have migrated into presidential control.

Calls for stronger structural limits.

SOTOMAYOR, J. + 2, dissenting

Humphrey's controls.

History, practice, and reliance support independence.

The majority creates new uncertainty.

Cook: facts and posture

14-year term ending 2038

§ 242: removed only “for cause”

- 2025 mortgage-fraud allegation
- No formal notice or chance to respond
- Stay application—not final merits review



Cook confirms Federal Reserve independence

5–4 • ROBERTS + SOTOMAYOR, KAGAN, KAVANAUGH, JACKSON

The Court denied the stay because the Government had not shown likely success.

- Cook's ultimate removability remains unresolved
- The Court set some legal and procedural ground rules.

- ⓪ Fed protection is constitutional
- ⓪ “Cause” is judicially reviewable
- ⓪ Cause has a substantial threshold
- ⓪ Courts may preserve a Governor in office
- ⓪ Notice + opportunity to respond

The *Cook* dissents divide over law and posture

THOMAS

- The Board exercises executive power
- Governors must be removable at will
- Fraud is cause
- No implied process

ALITO + GORSUCH

- The record was undeveloped
- Would correct two lower-court errors, grant the stay, and leave the Fed's constitutionality for later

BARRETT

- The historical exception conflicts with *Slaughter's* categorical language.
- Its boundaries—and the injunction's scope—remain unclear.

What *Slaughter* and *Cook* establish

GENERAL RULE

Principal officers exercising executive power are removable at will.

SURVIVING PROTECTION

If a restriction survives Article II, cause is meaningful and procedural.

HISTORIC EXCEPTION

A sufficiently rooted tradition may support independence. The Fed qualifies.

UNCERTAINTY

Adjudicators · inferior officers · civil service · Fed powers beyond monetary policy