

## Militant Democracy vs. Originalist Authority: Trump and the Courts

Laura FABIANO

**Abstract:** *This paper examines the growing divide within the U.S. federal judiciary during the Trump presidency, focusing on the tension between the “militant resistance” of lower federal courts and the increasingly originalist and deferential orientation of the Supreme Court. Through the analysis of key cases—such as the litigation over the “Muslim Ban” and the more recent Trump v. Casa decision—the paper explores how judicial reactions to executive overreach reflected a broader institutional struggle over the limits of presidential power and the balance of the constitutional system.*

**Keywords:** *Universal Injunctions, Checks and Balances, Militant Judiciary Resistance, Nuclear Option, Immigration.*

### Centralization of Presidential Powers and Checks and Balances in the U.S. Federal Constitutional System

The principle of checks and balances is one of the foundational elements of American constitutionalism and one of the most original expressions of the separation of powers theory developed by the Founding Fathers. Conceived as a system of mutual restraints, it goes beyond a mere formal division between the legislative, executive, and judicial powers, establishing instead a complex mechanism of reciprocal control aimed at preventing the concentration—and abuse—of power in the hands of any one constitutional body. Within this architecture, each branch of the federal government is equipped with tools to limit, balance, and, in some cases, neutralize the actions of the others<sup>1</sup>.

The theoretical foundation of this system is clearly expressed in the *Federalist Papers*, where James Madison—drawing on the legacy of classical republicanism and the theory of mixed government<sup>2</sup>—states that «the accumulation of all powers, legislative, executive and judiciary, in the same hands [...] may justly be pronounced the very definition of tyranny» (*Federalist No. 47*). From this follows the need not only to separate functions, but also to design a system in which each power can defend its own sphere of authority and of resisting encroachments by the others. As Madison also wrote: «ambition must be made to counteract ambition» (*Federalist No. 51*), since only the balancing of opposing interests can guarantee liberty. In this regard, *Federalist No. 48* significantly emphasizes that «it is not enough to mark, with precision, the boundaries of each department»; powers must in fact be able to actively oppose one another to prevent the dominance of any single branch.

The relevance and centrality of this principle have often emerged in the relationship between Congress and the Presidency, where the tension between oversight and autonomy has taken on increasingly dynamic forms over time<sup>3</sup>. However, there have also been significant examples of the balancing of powers concerning the relationship between the Presidency and the judiciary

---

<sup>1</sup> A. Buratti, „Disegno, evoluzione ed interpretazione dei Check and Balances nella Costituzione americana”, in G. D’Ignazio (ed.), *Il sistema costituzionale degli Stati Uniti d’America*, CEDAM, 2020.

<sup>2</sup> On the mixed government theory in the English tradition see. L. Novack, *I nodi del Potere. La teoria del governo misto nell’Inghilterra del Seicento*, Giuffrè, 1979.

<sup>3</sup> See again A. Buratti, *Disegno, evoluzione ed interpretazione dei Check and Balances nella Costituzione americana*, op. cit.

(particularly with the Supreme Court), as exemplified by landmark decisions such as *Marbury v. Madison*<sup>4</sup>, *United States v. Nixon*<sup>5</sup>, and, in a different but still significant way, the entire body of pre-1937 Supreme Court jurisprudence concerning New Deal policies<sup>6</sup>.

While the Constitution does confer significant executive powers on the President, the system of checks and balances was designed to prevent authoritarian drift and to ensure democratic accountability in government action.

Nevertheless, although past presidential practices—whereby the head of the federal executive often adopted an interpretation of their role favoring a strong centralization of power (as in the cases of Nixon, Reagan, Bush, etc.)—have consistently encountered a natural counterweight in the system of checks and balances, this equilibrium seems to have faltered during the Trump era. Indeed, what we witnessed was a progressive erosion of the internal safeguards of the system and a resulting decline in the effectiveness of its built-in mechanisms against authoritarian deviations.

To fully understand the scope of the recent shift toward a more monocratic, hierarchical, and personalized configuration of the American system, one must examine the gradual transformation of the other branches of government, particularly the evolving role of the judiciary—and the Supreme Court most of all—in relation to the Presidency.

### **The Divide in Federal Jurisprudence: Between Militant Resistance by Lower Courts and the Originalist Turn of the Supreme Court**

Regarding the resilience of the checks and balances system and the ability of institutions to contain the centralization of power in the hands of the President, a significant evolution has concerned the judiciary, and especially the Supreme Court. By the end of Trump's first term, the Court had already undergone a substantial transformation—both in terms of its personal composition (and, consequently, its prevailing political orientation)<sup>7</sup> and in the Senate's rules governing the confirmation of its justices.

A preliminary observation is warranted here, aimed at distinguishing within the third branch between the Supreme Court and the lower federal courts. It was the latter, in fact, that stood out during Trump's first term (and the early part of the second) for adopting a posture of quasi-resistance to the executive's assaults on fundamental rights and federal constitutional principles. These courts have even been described as institutions of "militant democracy"<sup>8</sup> during a phase of "democratic degradation"<sup>9</sup>.

The Supreme Court, by contrast—though in some emblematic cases (such as *Texas v. Pennsylvania*, 2020<sup>10</sup>) it refrained from intervening in overtly partisan controversies—was nonetheless significantly

---

<sup>4</sup> 5 US137 (1803).

<sup>5</sup> 418 US 683 (1974).

<sup>6</sup> See C. Bologna, *Stato federale e National interest. Le istanze unitarie nell'esperienza statunitense*, BUP, Bologna, 2010.

<sup>7</sup> See G. Romeo, „The Supreme Court's debate on constitutional interpretation under Trump presidency”, in *DPCE Online*, vol. 46, nr.1, 2021, pp. 973 ss.; M. J. Klarman, „The Degradation of American Democracy, The Supreme Court 2019 Term”, Foreword, in *Harvard Law Review*, 2020, p. 1.

<sup>8</sup> See R. Toniatti, „Non-Deferential Judicial Checks and Balances and Presidential Policies, in *Dpce online*, nr. 1, 2021, pp. 989 ss. And again R. Toniatti, „President Trump's Political Agenda Vis-À-Viz the Supreme Court”, in G. F. Ferrari (ed.), *The American Presidency Under Trump. The first Two Years*, The Hague, 2020, pp. 81 ss.

<sup>9</sup> M. J. Klarman, *The Degradation of American Democracy*, op.cit.

<sup>10</sup> 592 US \_ (2020).

reshaped in its composition and frequently assumed the role of validating certain presidential decisions, even when those decisions were eccentric or constitutionally questionable<sup>11</sup>.

### **The Alteration of Senate Confirmation Procedures and the Crisis of the Supreme Court's Supermajoritarian Role**

The aforementioned recent jurisprudential divide is closely linked to the changes in the Supreme court composition resulting from the appointments made by Trump during his first term. These appointments were particularly marked by a significant alteration in the Senate's confirmation procedures.

This issue—one that has profoundly animated both political and legal debates in the United States, even leading, during the Biden presidency, to the establishment of a bipartisan commission of thirty-six members tasked with examining the possibility of a structural reform of the Supreme Court<sup>12</sup>—has its roots in an earlier episode, prior to Trump's presidency. On November 21, 2013, Democratic Senator Harry Reid invoked and obtained the so-called “nuclear option”, essentially a reinterpretation of Senate Rule XXII, in order to lower the threshold for confirming presidential appointments (with the exception of Supreme Court justices) to a simple majority, thereby bypassing the three-fifths supermajority normally required under Rule XXII. The move was explicitly aimed at countering the obstructionist tactics employed by the opposing party<sup>13</sup>.

This shift, together with a systematic obstruction of Obama's judicial appointments by the Senate starting in early 2015<sup>14</sup>, allowed Trump, upon entering office, to benefit from a large number of judicial vacancies and to proceed swiftly with numerous federal appointments<sup>15</sup>.

---

<sup>11</sup> See A. Bonica, *The Supreme Court Is at War With Its Own Judiciary*, (Jun. 25, 2025): <https://data4democracy.substack.com/p/the-supreme-court-is-at-war-with> last consultation, august 24, 2025. The author underline that «Since May, federal district courts have ruled against the administration 94.3% of the time. The Supreme Court, however, has flipped that outcome, siding with the administration in 93.7% of its cases (15 out of 16)». See also R. Weill, *Court Packing as an Antidote*, in *Cardozo Law Review*, vol. 42, nr. 7, 2021, pp. 2705 ss.

<sup>12</sup> The report of the Presidential Commission on the Supreme Court of the United States, established by Executive Order 14023 of 2021, can be found at the following URL: <https://www.presidency.ucsb.edu/documents/final-report-the-presidential-commission-the-supreme-court-the-united-states> (last accessed August 24, 2025). See R. Weill, *Court Packing as an Antidote*, *op.cit.* see also B.L. Frye, „Court Packing Is a Chimera”, in *Cardozo Law Review*, vol. 42, nr. 7, 2021, pp. 2697 ss.; D. Kosar, K. Sipulova, „Comparative court-packing”, in *International Journal of Constitutional Law*, Volume 21, Issue 1, January 2023, pp. 80–126.

<sup>13</sup> On obstructionism in the Senate and the regulations of the same body see T.B. Tatelman, „Constitutionality of a Senate Filibuster of a Judicial Nomination”, *CRS Report*, 14 June 2005: <https://www.everycrsreport.com/reports/RL32102.html> (last consultation august 24, 2025). On the nuclear option see B. Palmer, „Changing Senate Rules: The ‘Constitutional or ‘Nuclear’ Option”, *CRS Report*, RL32684, April 5, 2005; R. S. Beth, „‘Entrenchment’ of Senate Procedure and the ‘Nuclear Option’ for Change: Possible Proceedings and Their Implications”, *CRS Report*, RL32843, March 28, 2005. See also M. B. Gold, D. Gupta, „The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Over Come the Filibuster”, in *Harvard Journal of Law & Public Policy*, vol. 28(1), Fall 2004, pp. 205-272.

<sup>14</sup> About this theme P. Passaglia underlines: «since the Republicans gained a majority, the number of confirmations of Obama's nominees fell dramatically: as a matter of fact, since the new senators took office at the beginning of 2015, only 2 court of appeals judges and 17 district court judges were confirmed. In other words, with regard to appointments, Obama's Presidency could be divided into two periods: its last two years were characterized by robust opposition from the Republican Party, whose majority in the Senate strongly influenced the number of successful nominations», *President Trump's Appointments: A Policy of Activism*, *op.cit.*, pp. 934.

<sup>15</sup> Passaglia reports again: «During President Obama's years, the number of vacancies swelled dramatically (by 98.3%). As a result, at the beginning of his term, President Trump had 117 vacancies to fill, which constituted more than one-eighth (13.1%) of all 890 federal judge offices», *President Trump's Appointments: A Policy of Activism*, *op.cit.*, p. 934.

Building upon that precedent, on April 6, 2017, Republican Senator Mitch McConnell invoked the nuclear option again—this time extending it to Supreme Court nominations—in order to lower the threshold for confirming Neil Gorsuch to a simple majority<sup>16</sup>.

It is evident that extending the simple majority rule to the confirmation of Supreme Court justices (and, more broadly, all federal judges) marked a significant turning point in the U.S. constitutional experience, as it exacerbated political polarization<sup>17</sup>. The reform effectively eliminated the requirement for broader political consensus that had been safeguarded by the need for a qualified majority<sup>18</sup>. From Gorsuch's confirmation—approved by 54 votes to 45—Trump's subsequent nominees were also confirmed by slim majorities (50–48 for Brett Kavanaugh on October 6, 2018, after supplemental hearings regarding allegations of sexual misconduct; 52–48 for Amy Coney Barrett).

These appointments were further marked by an additional critical event—namely, a form of functional interference by the Senate toward President Obama in 2016, which was harshly criticized by many legal scholars<sup>19</sup>. Following the death of Justice Antonin Scalia that year, President Obama, then in his final year in office, nominated Merrick B. Garland as a replacement. However, the Republican-controlled Senate refused to bring the nomination before the Judiciary Committee, arguing that the nomination—made on March 16—came too close to the presidential election. This rationale, known as the “Thurmond Rule” (named after Senator Strom Thurmond, who advocated such a position in 1968), had not previously been applied with consistency and has often been regarded more as a political myth than a binding norm<sup>20</sup>. In fact, presidential “midnight appointments” have long been a part of American political tradition, dating back to John Adams's appointment of John Marshall to the Supreme Court and William Marbury as justice of the peace. Nonetheless, in this instance, the Senate chose to follow the Thurmond Rule and never acted on Obama's nomination. As a result, in April 2017—just three months after taking office—Donald Trump was able to nominate Neil Gorsuch to the Supreme Court.

As is well known, the controversy did not end there. Despite the clear precedent set in 2016, three years later the Senate declined to apply the same standard when filling the seat vacated by the death of Justice Ruth Bader Ginsburg on September 18, 2020. In that case, the Senate moved with extraordinary speed, confirming Amy Coney Barrett on October 26, just eight days before the presidential election.

It is clear that both the Senate's obstruction of Obama's nomination and the remarkable speed of Barrett's confirmation would not have been possible without the nuclear option and the resulting lowering of the confirmation threshold. The requirement of broader consensus would likely have compelled Senate Republicans to adopt a less extreme and more negotiation-oriented posture. Equally evident is that the changes to confirmation procedures and the specific events surrounding recent appointments have impacted the super-constitutional character of those appointments—an aspect often overlooked due to a superficial majoritarian reading of Supreme Court nominations in the U.S. system. The procedural change may have produced a structural alteration of the Court, with significant functional consequences now visible in the growing jurisprudential fault lines (across a

---

<sup>16</sup> On this matter see G. Conti, „Filibuster e nuclear option al Senato USA. L'effetto domino della nomina di Neil Gorsuch alla Corte Suprema degli Stati Uniti”, in *federalismi.it*, nr. 9, 2017.

<sup>17</sup> On this matter see T. Westphal, „Polarization & Federal Judicial Appointments: A Positive Political Theory Analysis”, *Stanford Law & Policy Review*, vol. 31, 2020, p. 267.

<sup>18</sup> See G. F. Ferrari, „President Trump and the Congress”, in *Dpce online*, n. 1, 2021, pp. 909 ss., spec. pp. 923 ff.

<sup>19</sup> See C. Tobias, „Transforming the Thurmond Rule in 2016”, in *Emory Law Journal on Line*, vol. 66, 2016, pp. 2002 ff.

<sup>20</sup> P. Passaglia, *President Trump's Appointments: A Policy of Activism, op.cit.*, pp. 939 ff.

range of issues such as abortion, LGBTQ+ rights, administrative powers, and interpretive theories)<sup>21</sup> that have emerged in recent years in the Supreme Court's work.

### **Trump's Muslim Ban and Resistant Lower Court Case Law**

One area in which the political choices made by the Trump administration encountered significant resistance from both district and appellate courts—and in which a notable divergence emerged between the jurisprudence of the lower courts and the positions ultimately endorsed by the Supreme Court—is immigration. This topic, in its restrictive sense, was at the core of Donald Trump's political platform from the very outset of his campaign and has long represented a central theme of populist discourse, closely tied to the nationalist objectives of "America First."<sup>22</sup>

A particularly emblematic case in this regard is the legal saga surrounding the so-called "travel ban" (also known as the "Muslim Ban")—a prohibition on entry into the United States for citizens of several Muslim-majority countries<sup>23</sup>, enacted by the Trump administration through the issuance of two Executive Orders<sup>24</sup> and a Presidential Proclamation<sup>25</sup>.

---

<sup>21</sup> The expression is used by the magazine *Forum dei Quaderni Costituzionali* in the call – "6-3: faglie ideologiche e nuove linee di tendenza della Corte suprema statunitense" ("6-3: ideological fault lines and new trends of the US Supreme Court", <https://www.forumcostituzionale.it/wordpress/?p=17644>).

<sup>22</sup> See M. Mazza, „L'onda populista: dalla Brexit a Trump fino al cuore dell'Europa", in *Dpce online*, nr. 2, 2017, pp. 215 ff.

<sup>23</sup> The first EO concerned Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. Iraq was later removed from the list. The second EO concerned Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen. Chad was later removed from the list.

<sup>24</sup> The first EO, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States," No. 13769, was adopted on January 27, 2017. Among the most well-known and controversial measures included a 90-day suspension of entry into the United States for citizens of certain countries considered supporters of international terrorism (Iraq, Syria, Iran, Sudan, Libya, Somalia, and Yemen); a 120-day suspension of the U.S. Refugee Admissions Program (USRAP), specifying that, upon resumption of the program, priority would be given to applications for protection based on "religious persecution"; an indefinite ban on the entry of potential refugees from Syria, considered "prejudicial" to U.S. interests; and a suspension of the Visa Waiver Program, with the general reintroduction of the visa requirement and personal interview with a consular officer for non-immigrant visas. The second EO, No. 13780, was adopted on March 6, 2017 and was a partially revised version of the previous EO. With respect to the temporary suspension of entry from certain African and Middle Eastern countries, which was reintroduced in the new act, it was decided to eliminate Iraq, based on the close cooperation between the democratically elected Iraqi government and the United States and the strong American diplomatic and military presence in the country (Iraqi citizens intending to enter the United States were subject to enhanced controls in any case). Another significant amendment clarified the subjective scope of the suspension of entry, providing for exceptions (for example, in favor of permanent residents and those who had already been recognized as having the right to asylum or refugee status) and the possibility of waiving the ban on an individual basis. While reiterating the intention to suspend the USRAP for 120 days, the passages relating to the priority of religiously based persecution and the indefinite block on the entry of Syrian refugees were nevertheless eliminated. Meanwhile, with reference to the suspension of the Visa Waiver Program, exceptions were expressly indicated for certain categories of foreigners (e.g., holders of diplomatic visas, NATO or UN visas, those entering the United States for business reasons or meetings with the American Government, etc.).

<sup>25</sup> Presidential Proclamation No. 9645, adopted in September 2017. The proclamation prohibited citizens of the listed countries from entering the U.S. on certain types of visas. Chad, Libya, and Yemen were designated as countries supporting terrorist practices as well as having inadequate information-sharing systems; immigrant visas and non-immigrant business or tourist visas for citizens of these countries were suspended. Id. §§ 2(a), (c), (g). Iran, North Korea, and Syria "have consistently failed to cooperate" or "have not cooperated" in identifying security risks. All immigrant and non-immigrant entries from these countries were suspended, except for Iranians entering on non-immigrant student and exchange visas. Id. §§ 2(b), (d), (e). For Venezuela, the proclamation suspended the entry of certain government officials and their immediate family members on non-immigrant business or tourist visas. Id. § 2(f)(ii). And for Somalia, the proclamation suspended the entry of citizens seeking immigrant visas and required additional screening of nonimmigrant visas. Id. § 2(h)(ii). The order also contained a case-by-case exemption provision. Id. § 3(c)(i).

From the beginning, numerous legal challenges were brought before lower courts contesting either the substance of these measures or the harmful consequences they produced<sup>26</sup>. In several instances, these lawsuits led to the issuance of preliminary injunctions by the courts, temporarily suspending the enforcement of the executive actions *erga omnes*, pending a more thorough evaluation on the merits. However, the Supreme Court gradually adopted a jurisprudential line that placed increasingly strict limits on the issuance and scope of such preliminary injunctions—culminating, more recently, in what is effectively their near-total substantive demise.

Just days after the signing of the first Executive Order (No. 13769), the States of Washington and Minnesota promptly filed a legal challenge<sup>27</sup>, alleging that the Order violated the Equal Protection Clause of the Fifth and Fourteenth Amendments, as well as the Free Exercise and Establishment Clauses of the First Amendment. The U.S. District Court for the Western District of Washington ruled in favor of the plaintiffs on February 3, 2017, issuing a nationwide preliminary injunction<sup>28</sup> blocking the federal government from enforcing the challenged provisions. The federal government then appealed to the Ninth Circuit Court of Appeals, which upheld the district court’s decision<sup>29</sup>. In its ruling, the Ninth Circuit explicitly addressed the question of judicial deference to political branch decisions in matters of immigration and national security, citing in support the 2008 precedent *Boumediene v. Bush*<sup>30</sup>—a decision holding that political actors, including Congress, may not eliminate the federal courts’ habeas corpus jurisdiction over enemy combatants detained at Guantanamo Bay. The Ninth Circuit thus reaffirmed the inadmissibility of shielding executive actions from judicial review.<sup>31</sup>

The second Executive Order (No. 13780) was challenged by the State of Hawaii, which again obtained a preliminary injunction at the district court level—subsequently upheld on appeal<sup>32</sup>. In *State of Hawaii v. Trump*, the Ninth Circuit found that President Trump, in issuing Executive Order 13780 (“Protecting the Nation from Foreign Terrorist Entry into the United States”), had exceeded the authority delegated to him by Congress. After determining that the plaintiffs had standing under the Immigration and Nationality Act (INA), the court concluded that they had demonstrated a likelihood of success on the merits and upheld the district court’s injunction.

The panel held that the President, by suspending the entry of over 180 million nationals from six countries and placing a temporary ban on all refugees (while reducing the annual refugee cap from 110,000 to 50,000 for fiscal year 2017), had failed to meet the essential statutory precondition under 8 U.S.C. § 1182(f): namely, to provide a sufficiently persuasive showing that the entry of the excluded

---

<sup>26</sup> In addition to the events discussed in the text, among the many cases, we recall: *Aziz v. Trump*, No. 1:17-cv-00116 (E.D.Va. 2017); *Darweesh v. Trump*, No. 1:17-cv-00480 (E.D.N.Y. 2017); *Louhghalam v. Trump*, No. 17-cv-10154 (D.Mass. 2017); *Mohammed v. United States*, No. 2:17-cv-00786 (C.D. Cal. 2017); *Sarsour v. Trump or CAIR v. Trump*, No. 1:17-cv-00120 (E.D.Va. 2017).

<sup>27</sup> The appeal can be found at the following link: [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press\\_Releases/Amended%20Complaint%20as%20Filed.pdf](chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/Amended%20Complaint%20as%20Filed.pdf)

<sup>28</sup> The provision can be consulted at the following link: [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press\\_Releases/Washington%20v.%20Trump\\_Temporary%20Restraining%20Order.pdf](chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/Washington%20v.%20Trump_Temporary%20Restraining%20Order.pdf).

<sup>29</sup> *State of Washington and State of Minnesota v. Trump*, 847 F.3d 1151 (9th Cir. 2017).

<sup>30</sup> *Boumediene v. Bush*, 553 US 723 (2008). On this decision see G. Naroko, *Accuracy or Fairness: The Meaning of Habeas Corpus after Boumediene v. Bush and Its Implications on Alien Removal Orders*, in *American University Law Review*, vol. 58, no. 6, 2009, pp. 1611-1651.

<sup>31</sup> On this matter see M.C. Locchi, *Il “Muslim Ban” del Presidente Trump alla prova dell’Establishment Clause: alcuni aggiornamenti*, in *diritticomparati.it* (May 29, 2017).

<sup>32</sup> *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017); cert. granted, 138 S. Ct. 923 (2018).

groups would be detrimental to U.S. interests. The court further found that the Executive Order violated other INA provisions prohibiting discrimination based on nationality and requiring the President to follow a specific procedure in setting the annual refugee admissions ceiling. Accordingly, the injunction was largely upheld<sup>33</sup>.

Legal challenges were also brought against Presidential Proclamation No. 9645 before the U.S. District Court for the District of Maryland, which issued preliminary injunctions later affirmed by the U.S. Court of Appeals for the Fourth Circuit<sup>34</sup>.

As noted, however, the Supreme Court took a significantly different view. On June 26, 2017, in a *per curiam* opinion<sup>35</sup>, the Court granted the government's request to partially lift the injunctions issued by the lower courts—allowing enforcement of the travel ban “with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States,” while maintaining the injunctions for “respondents and those similarly situated.”<sup>36</sup> Referring to the equitable nature of injunctive relief, and the need to consider the specific circumstances of each case<sup>37</sup>, the Court thus restricted the scope of the nationwide injunctions—anticipating in substance what would later become a central doctrinal point in *Trump v. Casa*<sup>38</sup>.

In the subsequent case *Trump v. Hawaii*<sup>39</sup> (June 2018), the Supreme Court, in a 5–4 decision<sup>40</sup>, overturned the Ninth Circuit's ruling (*Hawaii v. Trump*), holding that the plaintiffs had failed to demonstrate a likelihood of success on their constitutional claims and reaffirming the broad scope of the President's authority in matters of national security<sup>41</sup>.

The dissenting justices, particularly Justice Sotomayor, strongly criticized the majority's opinion, emphasizing the discriminatory intent underlying the executive measures<sup>42</sup> and asserting that the decision bore troubling parallels to the infamous *Korematsu v. United States*<sup>43</sup> ruling—a decision that Chief Justice Roberts, in the majority opinion, went out of his way to explicitly repudiate<sup>44</sup>.

A particularly noteworthy element of the *Trump v. Hawaii* decision lies in Justice Thomas's concurring opinion, which focused specifically on the (il)legitimacy of nationwide (or “universal”)

---

<sup>33</sup> The decision is available at the link <https://law.justia.com/cases/federal/appellate-courts/ca9/17-15589/17-15589-2017-06-12.html> (last consultation August 26, 2025).

<sup>34</sup> *International Refugee Assistance Project v. Trump*, 883 F.3d 233 (4th Cir. 2018).

<sup>35</sup> *Trump v. International Refugee Assistance Project* (2017), No. 16-1436. Available at the link: <https://caselaw.findlaw.com/court/us-supreme-court/16-1436.html> (last consultation August 25, 2025).

<sup>36</sup> The Court therefore concludes by stating that: «We accordingly grant the Government's stay applications in part and narrow the scope of the injunctions as to §2(c). The injunctions remain in place only with respect to parties similarly situated to Doe, Dr. Elshikh, and Hawaii. In practical terms, this means that §2(c) may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States. All other foreign nationals are subject to the provisions of EO-2».

<sup>37</sup> The Court recalls in this regard the precedent *Nken v. Holder*, 556 U.S. 418, 433(2009).

<sup>38</sup> 606 US \_\_\_\_ (2025).

<sup>39</sup> 585 U.S. \_\_\_\_ (2018); Docket n.17-965.

<sup>40</sup> Justice Roberts wrote the majority opinion, which was joined by Kennedy, Thomas, Alito, and Gorsuch. Justices Kennedy and Thomas filed concurring opinions. Justice Breyer filed a dissenting opinion, which was joined by Justice Kagan; Justice Sotomayor filed a dissenting opinion, which was joined by Justice Ginsburg.

<sup>41</sup> The decision is commented on in the Harvard Law Review, vol. 132, no. 1, 2018.

<sup>42</sup> *Trump v. Hawaii*, 138 S. Ct. 2435-38. (Sotomayor, J., dissenting.) On the decision, see C.M. Rodriguez, *Trump v. Hawaii and the Future of Presidential Power over Immigration*, available at: [https://www.acslaw.org/analysis/acs-supreme-court-review/trump-v-hawaii-and-the-future-of-presidential-power-over-immigration/#\\_ftnref12](https://www.acslaw.org/analysis/acs-supreme-court-review/trump-v-hawaii-and-the-future-of-presidential-power-over-immigration/#_ftnref12).

<sup>43</sup> 323 US 214 (1944). In this infamous decision, the Supreme Court upheld the internment of American citizens of Japanese descent during World War II.

<sup>44</sup> On this point see N. Kumar Katyal, *Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived Korematsu*, in *Yale Law Journal Forum*, January 30, 2019, available at the url: <https://www.yalelawjournal.org/forum/trump-v-hawaii> (last consulted August 26, 2025).

injunctions issued by district courts—that is, preliminary relief with *ultra partes* (or *erga omnes*) effect. Justice Thomas expressed skepticism regarding the historical and legal foundation of such injunctions, viewing them as a threat to the proper functioning of the federal judiciary and to the principle of separation of powers<sup>45</sup>.

### **The Sterilization of Federal Courts' Universal Injunctions: *Trump v. Casa***

Building on the aforementioned decisions—and, in particular, in accordance with Justice Thomas's concurring opinion—the most recent case law of the U.S. Supreme Court has effectively stripped lower courts' injunctions of their substantive power. This development occurred most notably in *Trump v. Casa*, in which the Court addressed the ongoing debate concerning the authority of federal courts to issue *universal injunctions*<sup>46</sup>.

The *Trump v. Casa* case was connected to another controversial Executive Order issued by President Trump at the beginning of his second term, largely aimed at combating illegal immigration through a restrictive reinterpretation of the right to citizenship by birth, as enshrined in the Fourteenth Amendment to the U.S. Constitution.

The rule of *birthright citizenship* in the United States has its roots in the common law tradition<sup>47</sup> and had been applied several times by the Supreme Court (as well as by various federal courts) even prior to the outbreak of the Civil War. In an 1824 inheritance case, *M'Creery's Lessee v. Somerville*<sup>48</sup>, for example, the Supreme Court found it undisputed that three girls born in the United States were citizens, even though their father was an Irish subject who had never been naturalized. Similarly, in 1830, in *Inglis v. Sailor's Snug Harbor*<sup>49</sup>, the Court held that the English law governing citizenship at birth had also governed the former English colonies, and that a person born in New York after the Declaration of Independence of July 4, 1776, was a citizen of the United States—unless he had been born in territory occupied by the British, had returned to England as a minor, and had failed to assert U.S. citizenship within a reasonable time upon reaching majority.

Likewise, in 1804, in *Murray v. The Schooner Charming Betsy*<sup>50</sup>, the Court presumed the American citizenship of a man born in the United States but long resident on a Danish island. Again, in *Lynch v. Clarke* (1844)<sup>51</sup>, a New York court held that Julia Lynch, born in New York to Irish parents temporarily residing there, was a U.S. citizen.

---

<sup>45</sup> Judge Thomas states in this regard: «Injunctions that prohibit the Executive Branch from applying a law or policy against anyone—often called “universal” or “nationwide” injunctions—have become increasingly common. District courts, including the one here, have begun imposing universal injunctions without considering their authority to grant such sweeping relief. These injunctions are beginning to take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch. I am skeptical that district courts have the authority to enter universal injunctions. These injunctions did not emerge until a century and a half after the founding. And they appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts. If their popularity continues, this Court must address their legality» (*Trump v. Hawaii*, J. Thomas Dissenting).

<sup>46</sup> On recent issues concerning universal injunctions, see chapter 4 of the volume of the *Harvard Law Review* vol. 137, no. 6, 2024, dedicated to the topic “*District Court Reform: Nationwide Injunctions*,” pp. 1701 ff.

<sup>47</sup> In this regard, the so-called Calvin case adopted by the Exchequer Chamber in 1608 is well known, in which the said Court established that a child born in Scotland, after the Union of the Crowns under King James VI and I in 1603, was considered, according to common law, an English subject and entitled to the benefits of English law. On the use of this English precedent in the American context, see P. J. Price, „Natural Law and Birthright Citizenship in Calvin's Case (1608)”, in *Yale Journal of Law and the Humanities*, vol. 74, 1997, pp. 74 ff.

<sup>48</sup> 22 U.S. 354 (U.S. 1824).

<sup>49</sup> 28 U.S. (3 Peters) 99, 136 (1830).

<sup>50</sup> 6 U.S. 64 (1804).

<sup>51</sup> 1 Sandford Ch. 583, 646, 663 (N.Y. 1844).

Nonetheless, as is well known, such jurisprudential reasoning did not extend to African American slaves. Only after the infamous *Dred Scott v. Sandford*<sup>52</sup> decision and the ensuing Civil War did the principle of citizenship by birth become constitutionally enshrined. The Fourteenth Amendment constitutionalized the rule, later reaffirmed by Section 310(a) of the Immigration and Nationality Act. This normative and ideological approach to citizenship has consistently been understood in U.S. legal scholarship as an instrument of integration within a multicultural society—its constitutional rank serving as a powerful guarantee of inclusion<sup>53</sup>.

Over time, U.S. jurisprudence has confirmed the integrative function of birthright citizenship within the American context, not only with reference to the African American community (in connection with which the Fourteenth Amendment was adopted) but also to all those born on U.S. soil. This principle was made explicit in the Supreme Court's 1898 decision *United States v. Wong Kim Ark*<sup>54</sup>, which recognized citizenship as an individual right, irrespective of the parents' nationality or legal status<sup>55</sup>.

That decision arose from a petition by Wong Kim Ark—born in 1873 in San Francisco to Chinese parents lawfully residing in California—who was denied re-entry into the United States in 1895 after a trip to China. At the border, authorities refused to recognize his American citizenship and sought to apply the Chinese Exclusion Act of May 6, 1882, which prohibited the immigration of Chinese laborers into the United States. In its landmark ruling, the Supreme Court held that, under the Citizenship Clause of the Fourteenth Amendment, all persons born on U.S. soil were citizens, as the clause reaffirmed the common law rule of birthright citizenship. The phrase “subject to the jurisdiction thereof,” used in the Constitution, had to be interpreted in light of the common law<sup>56</sup>, thereby excluding only the children of foreign diplomats or of citizens of hostile occupying powers. Consequently, in Wong Kim Ark's case, his U.S. citizenship rendered the restrictive measures of the *Chinese Exclusion Act* inapplicable.

Following *United States v. Wong Kim Ark*, the rule of birthright citizenship remained uncontested for a long time and operated automatically with respect to anyone born within U.S. borders, except for a few specific categories—mainly, children born to members of Native American tribes<sup>57</sup> and children of foreign diplomatic personnel.

The alien or even unlawful status of a child's parents has never been deemed sufficient to deny citizenship to a person born on U.S. soil<sup>58</sup>. During World War II, former California Attorney General

---

<sup>52</sup> 60 U.S. 393 (1857). The case, as is well known, arose from the appeal of Dred Scott, a man born into slavery in Virginia in 1795, against John Sandford, who owned him. The slave believed he and his family were entitled to freedom. The Court, however, dismissed the appeal without examining the merits of the issue, holding that Scott had no standing to appeal to the Court because he lacked citizenship. President Taney, in fact, speaking for the Court, held that neither persons imported to the United States as slaves nor their descendants, even if they were later emancipated, could be considered part of the people and therefore citizens.

<sup>53</sup> See M. Dicosola, *Diritto alla Cittadinanza. Problemi e prospettive*, Rimini, Maggioli, 2023, ff. 103 ss. See also E. Grosso, *Cittadinanza e territorio. Lo ius soli nel diritto comparato*, Editoriale scientifica, Napoli, 2015, in part. ff. 15-23.

<sup>54</sup> 169 U.S. 649 (1898).

<sup>55</sup> On the decision see M. Mikyung Lee, „Birthright Citizenship Under the 14th Amendment of Persons Born in the United States to Alien Parents”, *CRS Report for Congress*, RL33079, 2012.

<sup>56</sup> See A. Frost, „By Accident of Birth”: The Battle over Birthright Citizenship After *United States v. Wong Kim Ark*”, in *Yale Journal of Law & the Humanities*, vol. 32, nr. 1, 2021, pp. 39 ss.

<sup>57</sup> Excluded in *Elk v. Wilkins*, 112 U.S. 94 (1884), Native Americans saw their right to U.S. citizenship automatically extended by legislation. See below for further details on this issue.

<sup>58</sup> *Perkins v. Elg*, 307 U.S. 325, 328-329 (1939) (“On her birth in New York, the plaintiff became a citizen of the United States”); *Bedoya Lopez de Zea v. Holder*, 761 F.3d 75, 78 (1st Cir. 2014), ruling in which it is stated that the petitioner's child “is a United States citizen and was born ... during one of [the petitioner's] visits to the United States”; *Hernandez-Rivera v. Immigration & Naturalization Service*, 630 F.2d 1352, 1356 (9th Cir. 1980) (ruling in which it is stated that the

Ulysses S. Webb attempted to overturn *Wong Kim Ark* in order to remove Japanese Americans from voter rolls, arguing that they were not citizens<sup>59</sup>. Nonetheless, the U.S. Court of Appeals for the Ninth Circuit upheld the district court's dismissal of the case, affirming that "[b]y authority of the Fourteenth Amendment to the Constitution, § 1, all persons born in the United States are citizens thereof, as interpreted by the Supreme Court of the United States in *United States v. Wong Kim Ark* ... and by a long line of decisions".<sup>60</sup> The Supreme Court denied certiorari, thereby leaving the appellate decision intact<sup>61</sup>.

Despite this clear line of jurisprudence, beginning in the 1980s a different and decidedly more restrictive interpretive theory of the Fourteenth Amendment emerged. This alternative interpretation was first advanced in a 1985 study by P.H. Schuck and R.M. Smith<sup>62</sup>. In that volume, the two Yale scholars questioned the broad scope of the right guaranteed by the Fourteenth Amendment, emphasizing the need for the relationship of citizenship to rest upon a consensual—rather than merely ascriptive—foundation<sup>63</sup>. In their view, both the individual who holds or seeks such a right and the legal order conferring that status must mutually express a form of consent.

Their reasoning drew upon the argumentative structure of a decision that slightly predated *Wong Kim Ark*—namely, *Elk v. Wilkins* (1884)<sup>64</sup>. In that case, the Supreme Court held that the federal government could exclude members of Native American tribes from citizenship by birth, since, although born within the territorial limits of the United States, they were not "subject to the jurisdiction" of the United States within the meaning of the Citizenship Clause, being bound instead by a relationship of allegiance to their tribe<sup>65</sup>. In interpreting *Elk*, the Court in *Wong Kim Ark* explained that the earlier decision had recognized the "peculiar relation of the Indian tribes to the national government, unknown to the common law," and therefore concluded that *Elk* "could not be

---

law that prevents a child under the age of 21 from applying for citizenship for his or her parents is legitimate, stating that "[a]n alien cannot gain favored status merely because he or she has a child who is a United States citizen"). The decisions are cited in A. M. Wyatt, "Birthright Citizenship and Children Born in the United States to Alien Parents: An Overview of the Legal Debate", CRS Report, R44251, October 28, 2015.

<sup>59</sup> *Regan v. King*, 134 F.2d 413 (9th Cir. 1943).

<sup>60</sup> *Regan v. King*, at 413.

<sup>61</sup> 319 U.S. 753 (1943) (denying certiorari).

<sup>62</sup> P.H. Schuck, R.M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity*, Yale University Press, New Haven, 1985.

<sup>63</sup> The first part of the volume introduces the distinction between an ascriptive interpretation of the citizenship rule, according to which an individual born on the geographical soil of the country automatically acquires the relevant citizenship, and a consensual interpretation of the same, linked to a moral relationship, linked to consent, which must bind the citizen and the country to which he or she belongs.

<sup>64</sup> 112 U.S. 94 (1884).

<sup>65</sup> *Elk v. Wilkins*, at 102: «The evident meaning of these last words ["subject to the jurisdiction thereof"] is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance. ... Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations». ». It is important to highlight, however, that over time, Congress has nevertheless provided by law for the automatic right to citizenship by birth also for Native Americans (Indian Citizenship Act, P.L. 68-175, 43 Stat. 253 (1924); Nationality Act of 1940, P.L. 82-414, §201(b), 54 Stat.

1137, 1158; INA §301(b), 8 U.S.C. §1401(b))). It has been correctly highlighted that the statutory extension of automatic U.S. citizenship to Native Americans demonstrates that the Citizenship Clause operates as a baseline that guarantees the minimum rights of citizenship, wherever that base is found, and Congress has the power to grant citizenship to categories of persons not covered by the constitutional guarantee. On this point, see A. M. Wyatt, „Birthright Citizenship and Children Born in the United States to Alien Parents: An Overview of the Legal Debate”, *CRS Report*, R44251, October 28, 2015.

held to deny citizenship to children born in the United States of foreign parents of Caucasian, African, or Mongolian descent not engaged in any diplomatic service.”

Nevertheless, in Schuck and Smith’s reflections, the *Elk* decision underscored the centrality of consent in all considerations of citizenship—as a conscious bond between individual and state—and led the two scholars to argue that, in a society characterized by high levels of illegal immigration, this element ought to be given renewed emphasis.

Accordingly, proponents of this theory cast doubt on the unconditional attribution of citizenship to the children of undocumented immigrants. Since the parents’ presence on national soil is prohibited by law (and society has thereby chosen to exclude them from the political community), the consensual component of citizenship could be considered absent—just as it is in the case of the children of Native Americans.

This theory gave rise to a scholarly current that, invoking the distinction between “partial jurisdiction” and “complete jurisdiction” under U.S. law, contended that only the children of those subject to complete jurisdiction should be entitled to citizenship. In contrast, where only partial jurisdiction existed—because the “moral” bond of allegiance between the individual and the U.S. political community was lacking—the necessary conditions for recognizing citizenship were not met<sup>66</sup>.

Moreover, within the broader debate over restricting the Fourteenth Amendment’s scope, different strands of thought emerged. Some scholars maintained that citizenship should not be denied to the children of undocumented residents, but should not automatically extend to the children of non-domiciled individuals temporarily present in the United States—whether lawfully (for instance, tourists or students) or unlawfully<sup>67</sup>. Others argued instead that exclusion should apply specifically to the children of undocumented immigrants, but not necessarily to those born to individuals lawfully present, even if only temporarily.

According to Schuck and Smith’s original framework, limitations on citizenship were to be justified in moral rather than strictly legal terms, in connection with the idea of a *social compact* upon which the U.S. constitutional system is founded<sup>68</sup>. From this perspective, violations of immigration law could be regarded as specific instances of a “breach” of the “social contract” that underlies citizenship in the United States.

Following its doctrinal introduction in the mid-1980s, this interpretive approach resurfaced in judicial discourse through several *amicus curiae* briefs submitted in 2004 in *Hamdi v. Rumsfeld*<sup>69</sup>. Among the issues before the Court in that case was the scope of rights owed to a U.S. citizen—born in Louisiana to Saudi parents—who had been detained in Afghanistan as an enemy combatant<sup>70</sup>. In

---

<sup>66</sup> See M.D. Ramsey, „Originalism and Birthright Citizenship”, in *The Georgetown Law Journal*, vol. 109, 2020, pp. 405 ff.

<sup>67</sup> R. Posner, *The Controversy over Birthright Citizenship*, The Becker Posner Blog (Oct. 17, 2010), <http://www.becker-posner-blog.com/2010/10/the-controversy-over-birthright-citizenshipposner.html>.

<sup>68</sup> See M. Dicosola, *Diritto alla cittadinanza. Problemi e prospettive*, op.cit., pp. 109 ff.

<sup>69</sup> 542 U.S. 507 (2004).

<sup>70</sup> In the *Hamdi* case, the Court issued four separate opinions, none of which received a majority of the justices’ support. Nonetheless, the Court’s majority recognized that Congress’s 2001 enactment of the Authorization for Use of Military Force authorized the President to detain persons captured during combat against U.S. forces in Afghanistan, including U.S. citizens. *Id.*, at p. 518 (O’Connor, J., plurality opinion), pp. 588-589 (Thomas, J., dissenting).

A clear majority also held that U.S. citizens detained as “enemy combatants” had the right to a hearing in which they could challenge the lawfulness of their detention before a judge. *Id.*, at pp. 518, 533 (O’Connor, plurality opinion, joined by Breyer, Kennedy, and Rehnquist); 553 (Souter, J., concurring in part and dissenting in part, joined by Ginsburg). Justices Scalia and Stevens held that detention without criminal charge was permissible only if Congress suspended the writ of habeas corpus. *Id.* at 554 (Scalia, J., dissenting, joined by Stevens). For a comment on the decision see L. Fabiano,

that litigation, the briefs filed by the *Eagle Forum Education & Legal Defense Fund*<sup>71</sup> and the *Claremont Institute Center for Constitutional Jurisprudence*<sup>72</sup> argued that *Wong Kim Ark* had been interpreted too broadly and that the Citizenship Clause of the Fourteenth Amendment should instead be understood as promoting a consensual conception of citizenship—rooted in the mutual assent of both the individual and the sovereign state.

The Court, however, declined to address these arguments in its reasoning, though Justice Antonin Scalia's dissent significantly referred to Hamdi as a "presumed American citizen"<sup>73</sup>.

Within this broader debate, during the 1990s several members of Congress, along with state legislators and various interest groups, advanced legislative proposals to limit automatic birthright citizenship in the United States<sup>74</sup>. In some cases, proposed amendments to the federal Constitution were introduced<sup>75</sup>; more frequently, revisions to the Immigration and Nationality Act were suggested<sup>76</sup>, and multiple congressional hearings were held on the question of *birthright citizenship* for the children of immigrants<sup>77</sup>.

Given these intermittent but significant signs of a debate that never truly subsided, it is not particularly surprising that, from his first presidential campaign onward, Donald Trump explicitly called for a restrictive reinterpretation of the Fourteenth Amendment, drawing on the aforementioned theories<sup>78</sup>. This stance culminated in the adoption of an Executive Order to that effect at the beginning of his second term, on January 20, 2025.

Executive Order No. 14160, titled "*Protecting the Meaning and Value of American Citizenship*"<sup>79</sup> declares that "the Fourteenth Amendment has never been interpreted to extend universal citizenship to all persons born in the United States" and that it "has always excluded from birthright citizenship those born in the United States but not 'subject to the jurisdiction thereof.'" The Order further specifies that "Consistent with this interpretation, Congress has further clarified by statute that 'a person born in the United States, and subject to the jurisdiction thereof, is a citizen of the United States at birth,' 8 U.S.C. § 1401, generally mirroring the text of the Fourteenth Amendment."

On the basis of this premise, the Executive Order identifies certain categories of individuals born on U.S. soil who, being deemed not subject to U.S. jurisdiction, are therefore excluded from the automatic "privilege" of American citizenship. These categories include:(1) children

---

Garante dei diritti e giudice dei poteri: il doppio volto della Corte suprema nelle sentenze "Guantanamo", in *Diritto Pubblico Comparato ed Europeo*, nr. 1, 2005, p. 105 ff.

<sup>71</sup> Brief of Amicus Curiae Eagle Forum Education & Legal Defense Fund in Supp. of Resp'ts, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696).

<sup>72</sup> Brief of Amicus Curiae the Claremont Inst. Ctr. for Constitutional Jurisprudence in Supp. of Resp'ts., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696).

<sup>73</sup> 542 U.S. at 554 (Scalia, J., dissenting).

<sup>74</sup> See, for example, H.R. 3605, 102nd Cong. (1991).

<sup>75</sup> H. J. Res. 87, 104th Cong. (1995).

<sup>76</sup> See, for example, S. 45, H.R. 140, 114th Cong. (2015). Legislative proposals advanced to Congress on these issues are explored and discussed in A. M. Wyatt, *Birthright Citizenship and Children Born in the United States to Alien Parents: An Overview of the Legal Debate*, *op.cit.*

<sup>77</sup> See, for examples, Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary, 109th Cong. No. 63, at 2 (2005) ("2005 House Hearing"); Birthright Citizenship: Is It the Right Policy for America? Hearing before the Subcomm. on Immigration and Border Security of the House Committee on the Judiciary, 114th Cong., No. 21 (2015) ("2015 House Hearing").

<sup>78</sup> See B. Harrington, „The Citizenship Clause and “Birthright Citizenship”: A Brief Legal Overview”, *CRS Report*, November 1<sup>st</sup>, 2018.

<sup>79</sup> 90 Fed. Reg. 8449.

born to mothers present illegally in the United States and to fathers who are neither U.S. citizens nor lawful permanent residents at the time of the child's birth; and (2) children born to mothers legally present in the United States but only on a temporary basis (for example, those visiting under the Visa Waiver Program or holding student, work, or tourist visas), where the father was neither a U.S. citizen nor a lawful permanent resident at the time of the child's birth<sup>80</sup>.

In response to this Executive Order, several states, along with various associations—most notably Citizens Assisting and Sheltering the Abused, Inc. (CASA), hence the case *Trump v. CASA*—as well as individual plaintiffs claiming harm from the measure, promptly filed lawsuits. In these proceedings, federal district courts in Maryland, Massachusetts, and Washington, D.C. issued *universal injunctions* on an emergency basis, enjoining federal officials from enforcing the Order throughout the entire United States.

The federal government appealed in all three jurisdictions, seeking to stay the injunctions, but these requests were denied. Subsequently, the consolidated appeals reached the Supreme Court, which—without addressing the merits of the alleged constitutional and statutory violations—partially granted the government's petitions.

In the majority opinion authored by Justice Amy Coney Barrett, the Court ordered a partial suspension of the challenged injunctions, finding them broader than necessary to afford *complete relief* to the plaintiffs possessing standing. The opinion focused in particular on the interpretation of the Judiciary Act of 1789 (specifically § 11, 1 Stat. 78), which conferred upon federal courts jurisdiction over all suits in equity—the same basis upon which the lower courts had issued their contested universal injunctions.

The Court held that, since federal judges may issue only those remedies traditionally available in courts of equity at the time of the Nation's founding<sup>81</sup>, *universal injunctions* must be considered *ultra vires*, as they first appeared only in the twentieth century—specifically, beginning in 1963—well after the establishment of the federal judiciary<sup>82</sup>. The Court further explained that universal injunctions could not be equated with the *Bill of Peace* employed in English equity courts because: “Unlike universal injunctions, which reach all persons affected by a legislative or executive act regardless of the group's size or the tangential nature of the effect, a Bill of Peace involved a group that was ‘small and cohesive,’ and the cause did not ‘resolve a question of legal interpretation for the entire realm’”<sup>83</sup>.

Consequently, the Supreme Court concluded that “The Bill of Peace survives in its modern form, but not as a universal injunction. It has evolved into the modern *class action*, governed by Rule 23 of the Federal Rules of Civil Procedure”<sup>84</sup>.

The majority opinion went on to distinguish between the concept of *complete relief*—to which equitable remedies were historically bound—and that of *universal relief*, holding that it is not always

---

<sup>80</sup> The Executive Order explicitly does not affect citizenship rights already acquired, specifying that it applies starting 30 days after its issuance. Its retroactive effect would likely have exposed it to further margins of unconstitutionality, considering that in a Supreme Court decision, *Afroyim v. Rusk*, 387 U.S. 253 (1967), the Constitutional Court held that Congress cannot revoke a person's U.S. citizenship unless that person voluntarily renounces it. The issue specifically concerned the revocation of citizenship following the vote of a naturalized U.S. citizen in a foreign election.

<sup>81</sup> Taking into consideration the previous judgment *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999).

<sup>82</sup> *Trump v. Casa*, Opinion of the Court, p. 9.

<sup>83</sup> *Ibidem*, p.13.

<sup>84</sup> *Ibidem*.

necessary for a judicial injunction to extend universally to all potentially affected parties in order to be effective. The Court therefore remanded the cases to the lower courts to determine whether narrower remedies (for example, an injunction limited to the territory of the plaintiff states) might suffice to afford complete relief.

Finally, the majority emphasized the desirability of pursuing alternative procedural avenues in similar cases, explicitly mentioning injunctive measures connected to the filing of *class actions*<sup>85</sup>.

In fact, following this suggestion, only days after the Supreme Court's ruling, the American Civil Liberties Union (ACLU), together with several other organizations, filed a nationwide class action challenging Trump's Executive Order<sup>86</sup>.

Nonetheless, it is evident that the *class action* does not represent an equivalent instrument to the *universal injunction*, given its significantly greater procedural complexity and cost<sup>87</sup>.

Moreover, in their concurring opinions, several Justices of the majority stressed that the standing requirements for class actions should be applied rigorously in future cases to prevent such proceedings from becoming a de facto circumvention of *Trump v. CASA*<sup>88</sup>. Similarly, Justice Kavanaugh's alternative proposal—outlined in his concurrence—that litigants could seek the annulment of agency rules deemed unlawful under the Administrative Procedure Act was not endorsed by the remainder of the majority, which expressly reserved judgment on the procedural viability of such an approach<sup>89</sup>.

At the heart of the dissenting opinions by Justices Kagan, Sotomayor, and Jackson lay concerns over legal certainty and constitutional guarantees. The dissenters also warned that *Trump v. CASA* risked producing a patchwork system of rights protection across U.S. territory. This concern proved well-founded: following the Court's decision, numerous lawsuits were filed in various states<sup>90</sup> challenging Executive Order 14160, with state courts issuing injunctions applicable solely within their respective jurisdictions—thus effectively circumventing the Supreme Court's ruling.

## Concluding remarks

The political era inaugurated by Donald Trump represents not only a moment of unprecedented tension between the federal powers, but also a critical laboratory for testing the validity of the principle of checks and balances in the 21st century. The interaction between the presidency

---

<sup>85</sup> Rule 23 of the Federal Rules of Civil Procedure.

<sup>86</sup> [Groups File Nationwide Class-Action Lawsuit Over Trump Birthright Citizenship Order | American Civil Liberties Union](#).

<sup>87</sup> On the procedural bottlenecks that have made it increasingly difficult to file class actions in the US context over the years, see R.H. Klonoff, „The Decline of Class Action”, in *Washington University Law Review*, vol. 90, 2013, pp. 729 ff. See also the immediate reflections on this point by L. Serafinelli, *A Requiem for Universal Injunction: Trump v. CASA*, in *diritticomparati.it*, July 15, 2025 (last consulted August 30, 2025).

<sup>88</sup> For example, Alito states in his concurring opinion: «district courts should not view today's decision as an invitation to certify nationwide classes without scrupulous adherence to the rigors of Rule 23. Otherwise, the universal injunction will return from the grave under the guise of “nationwide class relief,” and today's decision will be of little more than minor academic interest. Lax enforcement of the requirements for third-party standing and class certification would create a potentially significant loophole to today's decision. Federal courts should thus be vigilant against such potential abuses of these tools. I do not understand the Court's decision to reflect any disagreement with these concerns, so I join its decision in full», p. 4.

<sup>89</sup> In footnote 10 of the opinion of the court we read «Nothing we say today resolves the distinct question whether the Administrative Procedure Act authorizes federal courts to vacate federal agency action. See 5 U. S. C. §706(2) (authorizing courts to “hold unlawful and set aside agency action”)).

<sup>90</sup> Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Washington and Wisconsin.

and the judiciary has revealed an unprecedented dynamic: on the one hand, the resistance of the lower courts, which have often acted as an active guardian of fundamental rights and constitutional constraints against the excesses of executive power; on the other, a Supreme Court increasingly homogeneous in its ideological leanings, inclined to legitimize—sometimes posthumously—presidential choices.

However, this resistance from the lower courts is now at risk of being progressively neutralized due to a structural mechanism, since the judicial appointments made by Trump during his first term (and potentially strengthened in his second) have profoundly affected the composition of the Supreme Court, but will also become evident over time with regard to the entire federal judicial system.

This opens a scenario in which the judiciary's internal counterbalancing capacity—a key element in the system's physiology—could be eroded from within, threatening its ability to function as an effective barrier to the strengthening of the executive branch.

The paradox represented by the Supreme Court itself is emblematic in this regard: in pursuing a vision of empowerment for the presidency, it has shown itself willing to undermine historically important instruments for constitutional balance, such as universal injunctions, thus weakening one of the most effective tools available to lower courts to ensure effective and uniform protection of rights nationwide.

The hermeneutic and functional rift between the various federal jurisdictions is therefore not merely an expression of interpretative differences: it reflects a deeper friction regarding the current structure of the US form of government, revealing the extent to which the system of checks and balances is now subject to tensions that risk compromising its structural and functional effectiveness. In this sense, the "war between the courts" could represent a symptom of an ongoing constitutional transition, whose final trajectory will depend—more than in the past—not only on positive law, but on the political and cultural balances that shape institutions and determine their postures.

## **Bibliography**

### **Documents**

Brief of Amicus Curiae Eagle Forum Education & Legal Defense Fund in Supp. of Resp'ts, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696).

Brief of Amicus Curiae the Claremont Inst. Ctr. for Constitutional Jurisprudence in Supp. of Resp'ts., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696).

### **Books**

BOLOGNA, C., *Stato federale e National interest. Le istanze unitarie nell'esperienza statunitense*, BUP, Bologna, 2010.

DICOSOLA, M., *Diritto alla Cittadinanza. Problemi e prospettive*, Rimini, Maggioli, 2023.

GROSSO, E., *Cittadinanza e territorio. Lo ius soli nel diritto comparato*, Editoriale scientifica, Napoli, 2015.

NOVACK, L., *I nodi del Potere. La teoria del governo misto nell'Inghilterra del Seicento*, Giuffrè 1979.

SCHUCK, P.H., Smith R.M., *Citizenship Without Consent: Illegal Aliens in the American Polity*, Yale University Press, New Haven, 1985.

## Articles and studies

BETH, R. S., „‘Entrenchment’ of Senate Procedure and the ‘Nuclear Option’ for Change: Possible Proceedings and Their Implications”, *CRS Report*, RL32843, March 28, 2005.

BURATTI, A., „Disegno, evoluzione ed interpretazione dei Check and Balances nella Costituzione americana”, in G. D’Ignazio (ed.), *Il sistema costituzionale degli Stati Uniti d’America*, CEDAM, 2020.

CONTI, G., „Filibuster e nuclear option al Senato USA. L’effetto domino della nomina di Neil Gorsuch alla Corte Suprema degli Stati Uniti”, in *federalismi.it*, nr. 9, 2017.

FABIANO, L., „Garante dei diritti e giudice dei poteri: il doppio volto della Corte suprema nelle sentenze “Guantanamo””, in *Diritto Pubblico Comparato ed Europeo*, nr. 1, 2005, p. 105 ff.

FERRARI, G. F., „President Trump and the Congress”, in *Dpce online*, n. 1, 2021, pp. 909 ss..

FROST, A., „‘By Accident of Birth’: The Battle over Birthright Citizenship After United States v. Wong Kim Ark”, in *Yale Journal of Law & the Humanities*, vol. 32, nr. 1, 2021, pp. 39 ss.

FRYE, B.L., „Court Packing Is a Chimera”, in *Cardozo Law Review*, vol. 42, nr. 7, 2021, pp. 2697.

GOLD, M. B., Gupta, D., „The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Over Come the Filibuster”, in *Harvard Journal of Law & Public Policy*, vol. 28(1), Fall 2004, pp. 205-272.

HARRINGTON, B., „The Citizenship Clause and “Birthright Citizenship”: A Brief Legal Overview”, *CRS Report*, November 1<sup>st</sup>, 2018.

Groups File Nationwide Class-Action Lawsuit Over Trump Birthright Citizenship Order | American Civil Liberties Union

KLARMAN, M. J., „The Degradation of American Democracy, The Supreme Court 2019 Term”, Foreword, in *Harvard Law Review*, 2020, pp. 1.

KLONOFF, R.H., „The Decline of Class Action”, in *Washington University Law Review*, vol. 90, 2013, pp. 729 ff.

KOSAR, D., Sipulova K., „Comparative court-packing”, in *International Journal of Constitutional Law*, Volume 21, Issue 1, January 2023, pp. 80–126.

LEE, M. Mikyung, „Birthright Citizenship Under the 14th Amendment of Persons Born in the United States to Alien Parents”, *CRS Report for Congress*, RL33079, 2012.

MAZZA, M., „L’onda populista: dalla Brexit a Trump fino al cuore dell’Europa”, in *Dpce online*, nr. 2, 2017, pp. 215 ff.

NAROKO, G., „Accuracy or Fairness: The Meaning of Habeas Corpus after Boumediene v. Bush and Its Implications on Alien Removal Orders”, in *American University Law Review*, vol. 58, nr. 6, 2009, pp. 1611-1651.

PALMER, B., „Changing Senate Rules: The ‘Constitutional or ‘Nuclear’ Option”, *CRS Report*, RL32684, April 5, 2005.

PRICE, P. J., „Natural Law and Birthright Citizenship in Calvin's Case (1608)”, in *Yale Journal of Law and the Humanities*, vol. 74, 1997, pp. 74 ff.

RAMSEY, M.D., „Originalism and Birthright Citizenship”, in *The Georgetown Law Journal*, vol. 109, 2020, pp. 405 ff.

ROMEO, G., „The Supreme Court’s debate on constitutional interpretation under Trump presidency”, in *DPCE Online*, vol. 46, nr.1, 2021, pp. 973 ss.

SERAFINELLI, L., „A Requiem for Universal Injunction: Trump v. CASA”, in *diritticomparati.it*, July 15, 2025.

TONIATTI, R., „Non-Deferential Judicial Checks and Balances and Presidential Policies”, in *Dpce online*, nr. 1, 2021, pp. 989 ss.

IDEM, „President Trump’s Political Agenda Vis-À-Viz the Supreme Court”, in G. F. Ferrari (ed.), *The American Presidency Under Trump. The first Two Years*, The Hague, 2020, pp. 81 ss.

WEILL, R., „Court Packing as an Antidote”, in *Cardozo Law Review*, vol. 42, nr. 7, 2021, pp. 2705 ss.

WESTPHAL, T., „Polarization & Federal Judicial Appointments: A Positive Political Theory Analysis”, *Stanford Law & Policy Review*, vol. 31, 2020, p. 267.

WYATT, A. M., “Birthright Citizenship and Children Born in the United States to Alien Parents: An Overview of the Legal Debate”, *CRS Report*, R44251, October 28, 2015.

TOBIAS, C., „Transforming the Thurmond Rule in 2016”, in *Emory Law Journal on Line*, vol. 66, 2016, pp. 2002 ff.

### Online resources

chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press\_Releases/Amended%20Complaint%20as%20Filed.pdf.

chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press\_Releases/Washington%20v.%20Trump\_Temporary%20Restraining%20Order.pdf .

BONICA, A., *The Supreme Court Is at War With Its Own Judiciary*, (Jun. 25, 2025): <https://data4democracy.substack.com/p/the-supreme-court-is-at-war-with> .

KATYAL, N. Kumar, „Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived Korematsu”, in *Yale Law Journal Forum*, January 30, 2019, <https://www.yalelawjournal.org/forum/trump-v-hawaii>.

LOCCHI, M.C., „Il “Muslim Ban” del Presidente Trump alla prova dell’Establishment Clause: alcuni aggiornamenti”, in *diritticomparati.it*. <https://law.justia.com/cases/federal/appellate-courts/ca9/17-15589/17-15589-2017-06-12.html>.

POSNER, R., *The Controversy over Birthright Citizenship*, The Becker Posner Blog (Oct. 17, 2010), <http://www.becker-posner-blog.com/2010/10/the-controversy-over-birthright-citizenshipposner.html>.

RODRIGUEZ, C.M., *Trump v. Hawaii and the Future of Presidential Power over Immigration*, available at: [https://www.acslaw.org/analysis/acs-supreme-court-review/trump-v-hawaii-and-the-future-of-presidential-power-over-immigration/#\\_ftnref12](https://www.acslaw.org/analysis/acs-supreme-court-review/trump-v-hawaii-and-the-future-of-presidential-power-over-immigration/#_ftnref12) .

TATELMAE, T.B., *Constitutionality of a Senate Filibuster of a Judicial Nomination*, CRS Report 14 June 2005: <https://www.everycrsreport.com/reports/RL32102.html>.

*Trump v. International Refugee Assistance Project* (2017), Nr. 16-1436, <https://caselaw.findlaw.com/court/us-supreme-court/16-1436.html>.