



ESSAY AUGUST 6, 2026

Jackson vs. Thomas

— ALLEN MENDENHALL

Her concurrence in *Trump v. Barbara* tries to undermine the colorblind Constitution.

THE SUPREME COURT ENDED ITS LATEST TERM WITH A spectacle that even the most jaded court-watcher may find diverting: Justice Ketanji Brown Jackson swinging hammer and tongs at Justice Clarence Thomas over the meaning of the Fourteenth Amendment. Thomas, with the serene indifference of a man who has heard it all before, mostly declined to swing back.

The occasion was *Trump v. Barbara*, in which the Court, by a vote of five to four on the constitutional question, struck down President Donald Trump's executive order purporting to withhold birthright citizenship from children born on American soil to parents unlawfully or temporarily present. Chief Justice John Roberts wrote for the majority, joined by

Jackson as well as Justices Sonia Sotomayor, Elena Kagan, and Amy Coney Barrett; Justice Brett Kavanaugh concurred in the judgment on the narrower ground that the order violated a federal statute, without joining the majority's constitutional holding.

Justice Thomas, joined by Justice Neil Gorsuch, filed a dissent of some 90 pages arguing that the Fourteenth Amendment, a creature of Reconstruction, was written to secure the citizenship of the freed slaves and their posterity, and that its language about being "subject to the jurisdiction" of the United States imports something more exacting than a stork's flight path. Gorsuch and Justice Samuel Alito each added dissents of their own.

Justice Jackson, for her part, joined the Court's opinion in full and then wrote separately, as she said, "to respond to some of the themes in the principal dissent." What followed was a rebuke, notable more for its passion than its legal arguments. Thomas's account of the Amendment's history, she wrote, "elides the entire point of the Second Founding." One pictures the old Georgian receiving this the way a man receives news that his hat is out of fashion: with mild interest and no particular alarm.

It is worth asking what Jackson's opinion actually contributes to the corpus of constitutional law, because a close reading of it suggests the answer is several fashionable metaphors dressed up as historical argument, and rather less history than advertised.

Start with the phrase "Second Founding." Conservative and libertarian scholars, not least among them Ilan Wurman, have used that term for years to describe the Reconstruction Amendments as a refounding of the Republic on principles more consistently applied than those of 1787: natural rights, equality before the law, a national citizenship that trumps the several states' pretensions. That an originalist and a progressive jurist can reach for the identical phrase and mean almost opposite things by it tells you the phrase itself is doing no work. It's a banner, not an argument, and Jackson waves it as though the mere waving settled a case that in fact turned on considerably drier questions of domicile, allegiance, and the common law of *jus soli*.

Then there is her central image: that the Reconstruction Amendments were “an anticaste, antistatist reset for the Nation, not a mere spot treatment for the dark stain of slavery.” In a judicial opinion, the borrowed vocabulary is important to note. “Caste” is not an American term of art; it originally referred to the hereditary, endogamous social order most fully elaborated in the Indian subcontinent, formalized by religious sanction and enforced by rules of ritual purity that have no American analogue. American slavery was a wrong of a different architecture: a labor and property system, race-based and brutal, but not a caste system in the technical sense.

Jackson reached for the jargon of the graduate seminar and the Internet meme in more or less equal measure, and asked readers to accept as historical fact what is, on inspection, an interpretive frame.

American law after 1865 did not need to abolish caste because caste, properly understood, was never the American condition. Jackson's use of the word is not a historian's term but a theorist's: it belongs to the [vocabulary that migrated out of comparative sociology and postcolonial studies](#) in the late twentieth century, in which "caste" became a portable metaphor for any entrenched hierarchy, decoupled from its Indian origins and redeployed to describe American racial subordination as a system of structural power, dominance, and enforced dehumanization. That vocabulary has its uses in a humanities seminar room, but it's unsuited for an opinion purporting to recover what a ratifying public in 1868 understood itself to be doing, since nobody in the 39th Congress was thinking in the idiom of caste theory. The anachronism is not incidental to Jackson's argument: *it is the argument*, smuggled in under a rhetorical flourish so that a contestable theoretical frame arrives looking like established historical fact.

The pedagogical simile that follows is, if anything, worse. The Fourteenth Amendment, Jackson writes, "caused a paradigm shift in the trajectory of our Nation; the teacher who scolds a student for bullying a classmate hopes the student learns the broader lesson of treating everyone with kindness, not just that one kid." The sentiment is unimpeachable, and the jurisprudence is nonexistent. A teacher's hope about a student's moral development is not a rule of law, still less a rule about who possesses sovereign power to confer citizenship upon whom; it is an appeal to feeling dressed as the application of logic, and it fails at the point where someone asks what, specifically, was enacted, by whom, and with what words. A child's classroom is not the place to look for the original public meaning of a constitutional clause. Nor does Jackson's modish register belong in the High Court—her opinion reaches more for a popular audience than the kind of serious argumentation that is expected of the justices.

Insofar as Jackson makes a serious argument, though, the heart of it is the claim that “the Citizenship Clause reflects” a “universalist approach” to belonging, that the freedmen and their allies fought not merely for their own citizenship but for a capacious, race-neutral principle of birthright membership that happened, as a matter of historical accident, to benefit them first and everyone else after. But this is not what the record shows.

Jackson submits, “First in the North (as States abolished slavery), and then in the South (after Emancipation and the Union’s victory in the Civil War), Black people who were generally not permitted at the polls or in the halls of power mobilized nevertheless to advance the universalist vision of belonging and citizenship that eventually won the day.” As much as one might wish this were the whole story, the nineteenth century was considerably less tidy. Free Black communities in the antebellum and Reconstruction-era North were frequently in open competition, sometimes violent competition, with the era’s Irish immigrants for the same dock work, domestic positions, and unskilled labor—a rivalry that boiled over most infamously in the New York City draft riots of 1863, when Irish mobs lynched Black New Yorkers and burned the Colored Orphan Asylum, but that simmered in labor markets up and down the Atlantic seaboard for decades before and after.

Frederick Douglass, who figures prominently in Jackson’s text, complained bitterly, and more than once, that Irish immigrants were displacing Black workers from trades Black tradesmen had long held. This is not the record of two oppressed classes marching arm in arm toward a shared “universalist vision”; it is the ordinary record of groups competing amid scarcity, which is very different from a coalition united behind an abstract principle of belonging. It’s also a reminder, if one is needed, of how much more complicated the era’s racial and ethnic arithmetic was than the “universalist vision” allows.

Jackson’s thesis requires a Reconstruction-era coalition of the oppressed, marching together toward the light. The actual historical record offers something messier: a Black political class fighting, often alone, for its own concrete and particular claim to birthright citizenship, in a country where that claim was resisted not only by native whites but frequently by other groups jockeying for the same narrow rungs of the social ladder.

Consider, too, Jackson's use of the Colored Conventions—the free Black political gatherings of the antebellum decades. “Do note this,” she instructs the reader, in the imperative mood of a woman confident she has found her smoking gun: “The citizenship thesis of the Colored Conventions was thus not that some new status should be created and conferred on freed Blacks. It was instead that freed Blacks already had a rightful claim to citizenship because they had been born on American soil.” What that sentence actually proves, though, is that the free Black leadership of the era grounded its claim to citizenship in birth on American soil—as applied to former slaves and their children, people whose ancestors had been forcibly and permanently domiciled here for generations.

It says nothing whatsoever about children born to parents who are transient, unlawfully present, or owing allegiance elsewhere, which is precisely the class of case at issue in *Barbara* and precisely the distinction Thomas's dissent presses. Jackson offers this passage as proof of her “universalist” reading. It is better read as evidence for the opposite proposition: that the claim being pressed by the Colored Conventions was a specific claim, rooted in a specific historical wrong, made on behalf of a specific and identifiable class of persons—not an abstract doctrine of citizenship-by-mere-geography that Jackson's opinion then extends, by her own say-so rather than by any citation she offers, to cover a much broader population than the one that ever made the argument.

■ A jurisprudence built on universalist fiction is not less consequential for being well meant. It is only less true.

A great deal of Jackson's opinion, then, is interpretation presented as if it were simply what the text says: the critic's own reading smuggled in as the plain sense of the document, so that disagreement with the critic starts to look like disagreement with reality itself. Take Jackson's culminating flourish: "With this recognition, the US Constitution finally got an anticaste engine. And with it, the Nation gained a new font of legitimacy and vitality." The phrase "anticaste engine" is not legal nomenclature; it is a metaphor where a citation should be, and metaphors, however energetic, cannot be shepardized.

Texts do not interpret themselves. Meaning, as Stanley Fish taught us, is always the product of an interpretive community bringing its own assumptions to bear, and Jackson's opinion is a case study in the phenomenon: a critical-theory reading of the Reconstruction Amendments, complete with its vocabulary of caste, hierarchy, and structural subordination, presented not as one plausible interpretive community's gloss on the text but as the text's own self-evident meaning, discoverable by anyone who simply looks hard enough.

It is not self-evident. It is a theory, imported wholesale from academic departments that do not customarily concern themselves with the original public meaning of 1860s legislative text, and dressed, for the occasion, in judicial robes.

The longer passage that follows compounds the trouble. Jackson insists that the Fourteenth Amendment "is not color-blind; rather, its core principle is that our Nation does not tolerate racial caste," that its architects "did not think or pretend that race didn't matter," and that "the Citizenship Clause applies universally precisely because such universal application was necessary to achieve the Amendment's own race-conscious remedial purposes." This is a striking thing to ask a reader to accept, since it requires holding two propositions at once that sit uneasily together: that the Amendment's purpose was narrowly race-conscious,

remedial, and particular to the freedmen, and also that its text must be read as universally, indiscriminately applicable to any child born on American soil regardless of parentage, allegiance, or the circumstances of the parents' presence here.

One cannot have the remedy be narrowly race-conscious, and the application be indiscriminately universal without doing some fairly athletic interpretive work to explain why the universal reading was “necessary” to the particular purpose—work Jackson asserts rather than demonstrates. It is possible to write a great deal of confident prose about “systemic subordination” and the “remaking of the soul of a Nation,” as Jackson does, without ever quite closing that gap.

None of this should be mistaken for a claim that conservatives must agree or disagree about the result in *Barbara*, or that Thomas's dissent was beyond argument. Reasonable originalists have disagreed about domicile, allegiance, and the scope of *Wong Kim Ark* for a long time, and will go on disagreeing. The complaint here is narrower and, I think, more damning: that a concurring opinion of the United States Supreme Court, in the process of answering one of the oldest questions in American constitutional law, reached for the jargon of the graduate seminar and the internet meme in more or less equal measure, and asked readers to accept as historical fact what is, on inspection, an interpretive frame.

Jackson closes by insisting that the advocates of the Fourteenth Amendment never “pitched Black Americans against immigrants,” that “freed Blacks fought for the shared humanity of all people,” and that Lincoln foresaw a need to “link the fates of all” against any return to subordination. It is a generous proposition, but it is not, on the record, quite the whole truth. From the antebellum labor competition on the northern docks through the 1863 draft riots to [Booker T. Washington's Atlanta Compromise address](#), in which he pointedly urged Southern industrialists to “cast down your bucket” among the Black workers already present rather than import foreign labor, to A. Philip Randolph's friction with immigration policy and organized labor in the twentieth century, the relationship between Black Americans and successive waves of immigrants has been one of recurring, often painful competition for the same rungs of American economic and civic life—not the seamless

coalition of universal belonging that Jackson would have us believe. A jurisprudence built on that fiction is not less consequential for being well-meant. It is only less true.

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