



The Supreme Court Strikes Down President Trump's Executive Order on Birthright Citizenship

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[00:00:00.3] Tom Donnelly: From the National Constitution Center in Philadelphia, this is We The People.

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[00:00:07.6] Tom Donnelly: Hello, friends. I'm Tom Donnelly, Lead Scholar at this wonderful institution. The National Constitution Center is a nonpartisan, nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. This week in *Trump v. Barbara*, the Supreme Court struck down President Trump's executive order on birthright citizenship. At issue in the case was whether the Constitution guarantees citizenship to children born of parents unlawfully or temporarily present in the United States. The court concluded that it did. To help us unpack this landmark decision, we're joined by two scholars cited by the Justices in the case itself. Martha Jones is the Society of Black Alumni Presidential Professor and Professor of History at Johns Hopkins University. She is the author of numerous books, including *Birthright Citizens: A History of Race and Rights in Antebellum America* and *The Trouble of Color*. She filed a brief in support of the respondents in this case. Martha, welcome back to We The People.

[00:01:06.3] Martha Jones: Happy to be here. Thank you, Tom.

[00:01:08.8] Tom Donnelly: And Richard Epstein is the inaugural Laurence A. Tisch Professor of Law at the NYU School of Law, where he serves as a director of the Classical Liberal Institute. He is the author of numerous books, including *The Myth of Birthright Citizenship: What the Fourteenth Amendment Really Says*. Richard, welcome back to We The People.

[00:01:28.1] Richard Epstein: It's nice to be here.

[00:01:29.6] Tom Donnelly: Before turning to the competing opinions in the case, let's begin with some important background information. Martha, what did President Trump's executive order say and who did it cover?

[00:01:41.1] Martha Jones: Yeah, thank you for that, Tom. The executive order is really the culmination of many decades of debate, both in academic circles and in policy circles, about the future of birthright. And folks will likely remember that during the first Trump administration, we heard a lot of talk about undoing birthright. And the executive order is really a culmination of a long campaign, if I could put it that way. But the executive order, in short, as you put it, provides for a reinterpretation of the 14th Amendment's birthright provision, a reinterpretation that would exclude what had historically been protection for the children of both unauthorized and temporary residents in the United States. That executive order was issued on the very first day of the Trump administration on January 20th of 2025, and not surprisingly, it immediately engendered litigation

on behalf of children and families who were slated to be affected by the executive order.

[00:03:07.2] Tom Donnelly: Thank you for that, Martha. Richard, hop in here. Please give us any additional background you want to on the executive order, including maybe any of the rationale offered by the administration and any other background context that you think is important for the listeners to know before we dig into the opinions of the Justices themselves?

[00:03:26.6] Richard Epstein: First of all, I think it's very important with respect to the opinion that it did not purport to overturn the established interpretation, but what it said is in terms of the way in which we will operate our offices internally until we're overturned by the Supreme Court, we will follow what we think to be the original interpretation. They did not regard this as a transformation. They regarded it as a correction, early misunderstandings. And so what happens is they say a court has to validate it. They also, I think, had an extremely important provision which said that we do not want this particular decision, if we win, to have a retroactive effect. So it will only take effect with respect to people beyond 30 days after the order becomes final in our favor. And this was to protect the reliance interests of people who've been living in this country for many, many years. And I strongly support that. I don't think it's appropriate to change these things going backwards, but the reliance interest with respect to future people is vastly smaller. And so, therefore, I think it's appropriate to go forward. But I want to stress, I mean, I've written on this, I regard Trump as a hindrance rather than an assistance. I think the arguments have to be made on their merits. And my view is every time somebody invokes Trump's name in this thing, what it does is it makes it harder to defend a position which I hold completely independently of anything he's ever said or ever done. And so to me, the question is what the merits of the substance are. The question is not whether Trump endorsed it. I would have the same views if he were on the other side of the case.

[00:04:59.7] Tom Donnelly: Thank you for that, Richard. So now let's spend the rest of our time together really trying to dig into the various opinions in this case. And as you both know, we have over 190 pages of opinions, opinions by various Justices. We have a majority opinion by Chief Justice Roberts, joined by Justices Barrett, Jackson, Kagan, and Sotomayor. We have a concurrence written by Justice Jackson and joined by Justice Sotomayor. And then we have a concurrent... An opinion concurring in judgment and dissenting in part by Justice Kavanaugh. And then we have three separate dissents, one by Justice Thomas, joined by Justice Gorsuch, and then separate dissents also by Justices Alito and Gorsuch. So that's a real mouthful. Here I'd like to begin spending a good amount of time exploring the majority opinion of Chief Justice Roberts and placing it in dialogue with the dissent of Justice Thomas, which in many ways is the heftiest dissent in this case. And with that in mind, maybe Martha, beginning with you, for our audience who won't get to read all of these opinions, maybe as best you can, take Chief Justice Roberts' majority opinion and give us sort of the bottom line and sort of a nutshell version of how he gets there?

[00:06:20.1] Martha Jones: Yeah. Thank you. Well, folks may know that I'm a historian and so you can imagine how pleased I was to see how much history matters in the majority opinion authored by the Chief. And so we are treated to a review of the history of birthright citizenship, beginning with the English common law, coming through the ambiguities of the post Constitution antebellum period, the... Of course, the 14th Amendment itself, on through *Wong Kim Ark*, the only US Supreme Court case that squarely addressed this question, and on to the 20th century and the debates that undergird the decision today. So it's to say that folks are treated to this, I think, very fine-grained look at the history of birthright, all of which adds up, I think, for the majority opinion to the view that the meaning of birthright, the birthright provision in the 14th Amendment, was in part set by English common law, was constitutionalized in the middle of the 19th century, and has not been challenged, abrogated, or otherwise deviated from until this effort by the Trump administration in 2025. So in a sense, the Court's conclusion that the administration's order cannot

stand in the face of the Constitution continues along both an intellectual but also a practical approach to the question of citizenship in the United States. It remains unchanged.

[00:08:30.1] Tom Donnelly: So Richard, Martha gives us an overview there of the Chief Justice's majority opinion, and we'll drill into some of those details in a moment. Before we go there, though, can you please place on the table Justice Thomas' dissent in this case? Maybe give us a sense of his bottom line and, again, sort of a nutshell version of how he gets there?

[00:08:51.4] Richard Epstein: What Justice Thomas does is write an exhaustive opinion which is a critique of what it is that the Chief Justice said. And I think by and large that is the appropriate situation. And indeed, when I wrote the book on birthright citizenship, what I did is I looked at the history, and here are some of the issues you have to say. First of all, there was no common law with respect to naturalization. In England, it was by statute only, and that was stated explicitly by our good friend Blackstone. He adopted the birthright citizenship case, principle in England, but it did not carry over to the United States. One of the things that Justice Thomas pointed to, but needs even more stress, was that the naturalization acts that passed in 1790 and 1795 were pursuant to an exclusive grant of jurisdiction to the federal government to deal with naturalization. And the Chief Justice quite improperly argues that all sorts of state law decisions, in fact, support that position. He's a little bit over the top on that, but the important thing to remember about those cases is they dealt with state law questions. Can you inherit under state law? Can you hold public office under state law?

[00:09:58.0] Richard Epstein: Can you vote under state law? And so forth. It turns out his general proposition about citizenship is just wrong. One of the things that was so striking about the debates over the 14th Amendment was the status of the right to vote for people who are now covered by the reversal of *Dred Scott*. And the Supreme Court held in a case called *Minor v. Happersett* that voting was not affected. And if you go back to the testimony on that particular case, this was not by accident. When they drafted the 14th Amendment, they made it very clear that they did not believe that voting rights were on the table. And they said quite explicitly that if we put voting rights on the table, we cannot pass this amendment. So when you're arguing about a general argument, the right to freely participate in our community, that right was not governed with respect to voting or with respect to anybody who was foreign. So then to figure out that, you had to look at the naturalization acts. And the Chief Justice did not mention them once. Justice Thomas referred to them.

[00:11:04.0] Richard Epstein: And they're pretty emphatic about what they said. And what they did is they started with a proposition that only free white persons are eligible to become citizens through naturalization, exclusively done by the federal government. And there were a bunch of other conditions, quite onerous, that were attached, including the view that you had to renounce all citizenship loyalty to anybody else, had to prove good character, had to do this before a court, had to essentially accept the proposition that the status of minor children was always determined by the status of their parents and was not independent of that, which is what *Wong Kim Ark* held. And so you go forward with all of this stuff, and what you discover is the 14th Amendment was adopted before the 1870 Naturalization Act, which essentially gave blacks the right to apply for citizenship, or anybody of African descent, but that didn't guarantee them. So you have to say, well, did they give you the right to apply in 1870 when they had automatically conferred this upon everybody without going through any of these tests? And the two things just do not match. And if you go through all of the cases afterwards, the words subject to the jurisdiction, meant loyalty in exchange for protection.

[00:12:16.2] Richard Epstein: And what the Chief Justice did was to scramble the meaning of the term so they did not draw an essential distinction that was drawn by Blackstone between what he called local and natural allegiances, the former being temporary and the latter being permanent.

What he did when he just used the term jurisdiction, is he merged the two of them together so that you couldn't see the difference. And I'll just end on this note. That difference was if you had natural allegiance, it meant that you were citizens, and you could get it in England by birthright, but not in the United States. But if you had only local jurisdiction, you had to abide by the local rules on criminal law and traffic laws and so forth, but you were not bound by the state, and the moment you left, there was no connection. And this did not accord a path for citizenship. And so when people start talking about the plain meaning of jurisdiction, they confuse the two concepts. And there is no plain meaning in ordinary English. You have to know the history to realize that both these conceptions were widely accepted in the United States, everywhere else in the world, and were ratified by the most important treatise at the time by a man named Vattel, which dealt with this in 1758.

[00:13:26.6] Tom Donnelly: Now, there's obviously a lot to unpack there, Martha. One bottom line we get from both of your openings here is the degree to which you see between the majority and the dissent arguments about history, which you flagged there at the top, Martha. Richard has begun to critique the Chief Justice's majority opinion and his account of a lot of it being a debate over the legal background that wound up leading to eventually the text of the 14th Amendment's citizenship clause. Maybe do a little bit to fill more... Fill a bit more of the Chief's historical narrative there, sort of how he gets from the beginning to the 14th Amendment, and also hop in with any specific responses you have to Professor Epstein there, whether on the naturalization acts or the English legal background or anything else that you think is particularly relevant?

[00:14:24.5] Martha Jones: Yeah. Thank you. I guess where I think both the Chief and then amplified by Justice Jackson's concurrence is the significance of the case of black Americans, free black Americans before the Civil War, as permitting us to understand the stakes in this long debate. We all know the example of the *Dred Scott* case, *Dred Scott* concluding that no black person, be they enslaved or free, can be a citizen of the United States. But what the Court is aware of today is the long debates that precede that. Are black Americans citizens of the United States when they are free persons? Are black Americans citizens of the United States when they are citizens of the state in which they reside? Are black Americans citizens when they vote, when they own property? And the answer is that in the many decades leading up to *Dred Scott*, the answer is, it depends. And it is a profoundly muddled circumstance that reveals the way in which, up until the 14th Amendment, race and racism has been an arbiter of citizenship in the United States. White Americans born, so-called white Americans born in the United States, are presumed to be citizens of the United States.

[00:16:13.0] Martha Jones: They need engage in no open, overt, formal act to be citizens of the United States. They are presumed by virtue of that carryover of English common law to be citizens of the United States. But what *Dred Scott* affirms is that in the case of black Americans, indeed there is a color line, unspoken, oftentimes unacknowledged, but operating to prevent black Americans from enjoying citizenship despite their having been born free in the United States. The gravamen of that concern for black Americans, however, is not voting rights at all. The gravamen of the concern, as it's articulated by black Americans in the lead-up to *Dred Scott*, is the question of what is called today the colonization movement, a political movement that has organized over the course of many decades not to deprive black Americans of the right to vote or sit on juries, but to remove black Americans from the United States without cause and without process because the United States is intended to be a white man's country.

[00:17:30.0] Martha Jones: And the ongoing presence of black Americans is disruptive and undermining in the view of colonizationists. So in order to appreciate how we get to the 14th Amendment requires not only that we study the distinction in the way in which black and white Americans were for a very long time regarded before the Constitution, but to appreciate the stakes in that distinction. And as I said, before we get to civil rights, before we get to political rights, black

Americans, not unlike immigrant Americans today, are looking to ensure their claim to place, to ward off the threat of exile or banishment or removal from the United States. And this is a concern that takes them all the way to *Dred Scott* and beyond. The last thing I'll say, just to bring it back to yesterday's decisions.

[00:18:33.7] Martha Jones: Part of what the Court in the majority opinion, and again in Justice Jackson's concurrence, is clearly concerned with is not returning us to a pre-*Dred Scott* constitutional scheme in which political actors can, by virtue of their judgment, determine who is despised and who should be excluded. This was Justice Taney's position that individual states and the United States could decide to exclude black Americans. They were accepted from the general principle, the general birthright principle that governed the United States. And this is precisely what I think the Court is trying to prevent us from falling back into, a world in which a political administration can determine who is despised, who should be excluded, who is not suitably American, and issue executive order or acts of Congress, frankly, that would exclude them. And so the Court has, in essence, prevented us from returning to the tenets that Justice Taney affirmed in *Dred Scott*.

[00:19:57.7] Tom Donnelly: So Martha, thank you so much for placing on the table the advocacy of African Americans prior to the Civil War and also talk about the possible relevance of the *Dred Scott* decision in this case. We certainly see both the Chief Justice and Justice Thomas wrestle with *Dred Scott* and how it should inform the Court's approach to the specific question in *Trump v. Barbara*. Maybe Richard, hop back in, certainly respond to any of Martha's history there and her argument about its relevance to this case. And as you do that, also if you can, return to Justice Thomas' dissent and his decision to center domicile and talk about that relationship to citizenship?

[00:20:48.9] Richard Epstein: Okay, well, let's first go. What Martha's doing is fighting a war that was already won. The entire purpose of the 14th Amendment, disputed by nobody, was to reverse the decision of *Dred Scott*. But *Dred Scott* was only a case that devoted to domestic issues that had nothing to do with foreigners. If you look at the 1866 Civil Rights Act, which tried to address the question, what it did is it did not use the phrase subject to the jurisdiction thereof, but it basically said foreigners are not included and Indian tribes are also out. This was done in 1865. So by the time you get 1866 on the amendment, they changed the word into the other direction, subject to the jurisdiction thereof. So this was meant to obviously protect people from deportation and abuse by virtue of their black birth, but it had nothing whatsoever to do with the question of whether we're going to take other people into this country from foreign nations.

[00:21:46.4] Richard Epstein: And that's a much more controversial question. And to answer that, you have to see the interaction between the naturalization acts on the one hand and general policy on the other hand. And as it was articulated later in some of the Chinese exclusion cases, the rule remained even after the 14th Amendment that anybody who wanted to come to the United States who was an alien, could be absolutely excluded from the United States. No due process rights or anything else were extended. And that was actually decided by Horace Gray, who is the very same Justice who wrote *Wong Kim Ark*. And so the exclusion principle was well established, and there was nothing about the 14th Amendment which was designed to reverse that particular point. What happened is they left it to the naturalization laws.

[00:22:35.1] Richard Epstein: And it's pretty apparent by 1868 that if you have a statutory exclusion from naturalization, it is going to create an all-white nation. And what they did is they reversed the statute. But reversing the statute would have never conferred automatic jurisdiction on everybody. So you'd have to go through the whole situation. I think what's clear about Justice Thomas's opinion with respect to that is he understands the complicated interaction between all of these things and therefore says you can't find the birthright principle in the statute, even though he,

like me, are very strong opponents of segregation. And it's really important to understand the basic structure of this, because the 14th Amendment made black citizens only in terms of protection in exchange for loyalty, but it did absolutely nothing with respect to the distribution of public benefits. That includes the right to vote or the right to live in public schools or to get public monies and so forth.

[00:23:31.0] Richard Epstein: All of that was regarded as exclusively a political question at the time. And there is no question that the same Southern forces that were strongly in favor of *Dred Scott*, 10 years later, they come back and the way in which they address themselves is they're in favor of allowing citizenships. They know they have to do that. They want to do that. But they do not want to require integrated schools. And so what happens is that only comes much later and has nothing to do with the originalism. It has to do with the evisceration of privileges and immunities. I do want to stress one thing which is, even though there's no birthright citizenship, and even though there was toleration of segregation, there were certain major achievements that they tried to achieve in the name of racial justice when they passed the 14th Amendment. One of them was to protect all civil rights having to do with not with voting, but with making contracts, giving wills, testifying, and so forth. That was supposed to be protected. And that was removed from protection under the *Slaughter-House Cases*, one of the great scandals of American law. And the other part was to make sure that nobody, regardless of race, was going to be victimized by the criminal law.

[00:24:40.7] Richard Epstein: And that's what equal protection and due process were about, not just for citizens, but for all persons. And that was butchered completely in the *Cruikshank* case that came down in 1875. So to understand what's going on, you have to understand that the tone of the 14th Amendment was segregationist, but it was not segregationist in a brutal style. And what happens is within 10 years after its passage, the situation becomes much more dire because of several Supreme Court decisions which took a very long time to overcome. But there's nothing whatsoever in Martha's history which tells you about what's the status of foreign individuals coming into the United States. What is critical about that and what she's correct about is it meant that people who are now citizens in virtue of their status could not be abused by the federal government because that would be inconsistent with the duty of protection and loyalty which was the essence of citizenship throughout this entire period.

[00:25:39.1] Tom Donnelly: Martha, I'll give you a chance to respond to that.

[00:25:42.4] Martha Jones: I think you can only conclude that the 14th Amendment and its birthright provision was unrelated to the status of the children of immigrants to the United States if you fail to read the transcripts of the debates in the 39th Congress when the birthright provision was drafted and added to the 14th Amendment. In those debates, members of Congress openly, at length, pointedly debate the implications of language that indeed, as it is today, right, all persons. And they acknowledge that even the despised among immigrants, even the children of despised immigrants, and here I want folks to know I've got my scare quotes out, right, but whether it is the children of the Chinese or the children of Gypsies, members of Congress talk this out, debate through this question, and the conclusion is the retention of that language, all persons born in the United States. And it is language that didn't have to be that way. It could have said all persons except Gypsies or all persons except the Chinese. But instead, Congress knowingly retained the all persons language and knowingly opened the door to the unequivocal citizenship of children born to immigrants, even despised immigrants to the United States.

[00:27:40.7] Tom Donnelly: Richard, any response to that account of history by Martha?

[00:27:45.6] Richard Epstein: Yes. What happens is legislative history and debates are highly inconclusive. They say all sorts of things. And there were some remarks there by saying that passing

this amendment would help the Chinese. Then when you look at the text, it's not drafted in that fashion. The word, subject to the jurisdiction thereof, was just a transposition of the earlier view that foreigners were not covered by this amendment. And then on the voting question, it was made very explicit on the floor of the debates that we can't get this thing through if we extend to all American citizens the vote, and we're not required to do so. So you cannot essentially, when you have an explicit text which cuts the other way around, a legislative history directed to the text at the time it was done, turn out and show that this is incorrect by saying that there were several inconclusive debates with lots of disagreements, all of which were tabled in the discussion and none of which were conclusive. Justice Scalia had a general view, which I largely share, that you have to be very wary about debates that's going on. You have a very different view if there's an organized statement written by the sponsor of the bill which explains it. That, I think, you could take into account.

[00:28:53.8] Richard Epstein: But those rambling debates are utterly inconclusive. And if you then start to follow the history, you have to explain why, if they wanted to give citizenship by Chinese, they didn't extend the right under the statute two years later for the Chinese to actually apply for citizenship in the United States. That was only granted after 1900. And it turns out the history is much darker than one might think in the sense that what you did is you had a lot of forces who were basically bigoted in many ways. They were very active before the Civil War. When the states get reunified again, those forces actually have their say, and it leads to a very interesting compromise on the form that I get you. And the citizenship clause essentially did not cover voting. It did not cover the distribution of public benefits. It did not cover the criminal law. That was extended to all persons. The only thing that it did was to make sure that you got protection by the sovereign. And that's the thing that Martha stressed, and that's the thing that was in fact provided.

[00:29:55.9] Tom Donnelly: Well, we've been debating the history. Let's place the text of the citizenship clause squarely on the table here. It reads, 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. A lot of the debate over that language, subject to the jurisdiction thereof, maybe, Martha, give us an account of how the Chief Justice reads that text and how he sort of blends some of the history that you've already told and that he lays out with what he takes to be the best reading of the citizenship clause?

[00:30:34.3] Martha Jones: Right. This language, subject to the jurisdiction thereof, is, I think, not surprisingly, been at the center of long, vexed debates. It is not self-evident what subject to the jurisdiction thereof means, I don't think. And this Court, [Chief] Justice Roberts' Court, has looked at the historical meaning ascribed to that phrase. We know that it included, as far back as the debates within Congress around the drafting of the 14th Amendment, that it was going to include Native Americans who were regarded as subject to the jurisdiction of their own sovereign nations or tribes and thus not included in the 14th Amendment's birthright provision. We learn that the children born to foreign diplomats in the United States are regarded as non-birthright citizens, again, not covered by the 14th Amendment. And later we'll also learn the hypothetical, the more hypothetical case, the children of soldiers of standing armies, not a true case in the US, but another instance in which persons would not be subject to the birthright protections and privileges of the 14th Amendment. So this is the universe of very modest, if you will, small numbers of persons who are excepted from the 14th Amendment. And as had been true before the ratification of the 14th Amendment, it is true after the ratification of the 14th Amendment that most all persons born in the United States are regarded as citizens of the United States.

[00:32:54.0] Martha Jones: The shameful distinction that is drawn between Chinese Americans and their children, Chinese Americans, Chinese persons of Chinese descent born in the United States, is the case that will take us to a clarification by the Court in the case of *Wong Kim Ark*. And

folks will, I think, remember *Wong Kim Ark* is born in the city of San Francisco, California. He is born on US soil to Chinese parents, parents who cannot, by virtue of federal law, themselves become naturalized citizens. And the Court recognizes that *Wong Kim Ark* and many, many others like him are being detained, are being jailed, are being harassed at the border when they look to return to the United States after a sojourn abroad.

[00:33:58.4] Martha Jones: The question is, can they be detained, harassed, refused at the border? And the Court's answer is no, that they are born in the United States and regardless of the status of their parents, they are by virtue of birth in the United States, citizens of the United States. The Court, in Justice Roberts' opinion, looked for evidence of further qualification in the instance of *Wong Kim Ark* and found none. That there was no requirement of so-called allegiance, no so-called requirement of domicile, that birth for *Wong Kim Ark*, as was true for all Americans, all Americans born in the United States in the 19th century, was a citizen of the United States without qualification.

[00:34:52.6] Tom Donnelly: Thank you for that, Martha. Richard, to bring you back in, you've already discussed a bit how Justice Thomas reads the text in his dissent and about the relationship between the citizenship clause and the language of the Civil Rights Act of 1866, which came before it. Certainly, if you wanna say more about that, please do. Otherwise, I'd love to hear your response to Martha about the relevance of *Wong Kim Ark* here and how Justice Thomas and even you read that case and how it relates to the specific issues in *Trump v. Barbara*.

[00:35:33.0] Richard Epstein: Okay. First of all, it's very important to note that the Chief Justice was exceedingly slippery when what he said was jurisdiction simply means the power to deal with somebody else. Go right back to Blackstone and the local versus the natural jurisdiction stuff says in the jurisdiction only gives you transient stuff. You have to be subject to allegiance, i.e., you have to be born or accept the crown. And that distinction gets completely lost and it is ignored in Martha's account. You then look at the testimony at the time of the 1866 debate, and virtually everybody who spoke about this understood that, and very explicitly, that you had to be not only in the United States, but you had to be all in with respect to loyalty of the United States. And those rules were not unchallenged. And so it becomes completely innocuous to say that, oh, we have all of these very explicit texts and then now being within the jurisdiction gets you that. And in fact, it's not just the illegal people that you're talking about. If you really believe that version, anybody who's legally in the United States and born becomes a citizen by birth of birth.

[00:36:38.7] Richard Epstein: And so we'd have a crazy situation where millions upon millions of children who were born in the United States go through the naturalization process, and now we find out that this is essentially not even necessary, that it's completely backwards to the history. With respect to *Wong Kim Ark*, the decision is frankly a disaster intellectually. So let me explain what the problems with it are, first of all, it was a case of somebody who was Chinese, and it was very well established at the time that Chinese persons could not apply for citizenship if they came from abroad. And the rule was they could not apply for it if they were born in the United States, their status being determined by that of their parent. And so you're shut out. This guy gets sent overseas and wants to come back in. And the real problem here is the interpretation of sovereign immunity. I would have said that if you give somebody the permission as a sovereign to leave the country and to come back in again, you should be bound by your promise. But the version of sovereign immunity that applied in those days is the sovereign could disregard its obligations to other people when made by contract, which I regard as completely wrong.

[00:37:50.1] Richard Epstein: So I think the right answer is he's entitled to come back in by virtue of the assurances that he received. But he comes back in with exactly the same status as his parents, i.e., he's a permanent legal alien. He is not a citizen. Then you look further and you have the

renunciation provision, also ignored by Justice Gray, which says you have to get rid of your loyalties to another nation. This guy's carrying a Chinese passport. He hasn't gotten rid of any loyalty. So now what you're going to do is create a situation of dual citizenship, which was the very status that they were systematically denying at the time. And third, there are treaties after treaties that are made with the Chinese, starting from about 1860 to the present, in which if you start reading the description of the Chinese aliens, the stuff that Judge Field says would curdle your stomach. Because what he does is he basically says they're a version of the yellow peril who will simply upset the morals of the United States. We want no part of them. That's part of this particular history. And so he said you could absolutely keep them out.

[00:38:53.3] Richard Epstein: And we have treaties to that effect. So what this man does is he creates out of nothing a situation in which somebody who is barred on three separate grounds gets in. Because what he does is he says there's a common law history in England which does this. But there was no common law history. As I mentioned to you, everything that was done with naturalization was done as a virtue of a sovereign act, not as a common law action which would say that judges could determine citizenship rather than it being determined by the state. So the opinion is an absolute intellectual shambles. And when the Chief Justice starts to write, well, there's nothing to be said on the other side of it, it's utterly irresponsible to do that when all these arguments were presented before him in the particular case. And I will say this about his, what I regard as thoroughly atrocious opinion, every time somebody raised an objection, there is not a single word that he writes in reply to the objections that are made. And that's very different from Justice Thomas, who takes everything that's said by the majority fairly seriously and then tries to explain why it's wrong.

[00:39:58.0] Richard Epstein: And so the response to this opinion should be, it's an intellectual disaster. And all the history that Martha talks about is perfectly consistent with the perfect interpretation of the amendment, which is designed to alter the status of citizenship of children born of slaves in the United States who were denied citizenship under *Dred Scott*. This is a great achievement, by the way. I mean, nobody should belittle it, but it was not an achievement to change the relationship of the United States to every other place in the world as a matter of international law, where the uniform conventions went everywhere else. There's not a single place in the world where they have birthright citizenship as a constitutional right. There was none in 1868, there's none now. So why it is that this should become a constitutional imperative is simply inexplicable.

[00:40:46.7] Tom Donnelly: Martha, I'll let you hop back in here. Any responses to Richard's critique of *Wong Kim Ark* and Justice Gray there, of the Chief Justice, and of also the final argument Richard makes there, which is particularizing the citizenship clause to *Dred Scott* and the case of enslaved people and children of enslaved people?

[00:41:14.3] Martha Jones: Yes. The trouble, I think, with the claim that the 14th Amendment's purpose, sole purpose, exclusive purpose was to make citizens of the children of former slaves, well, the trouble there, of course, is that by the time we're on the eve of the Civil War, there are some one-half million free Black Americans in the United States who are not the children of slaves at all. They are free persons, as are white Americans born to free parents. And if indeed this amendment only applied to the children of slaves and enslaved people, those free Black Americans would not have become citizens of the United States. They would have remained in some legal limbo that was constructed by *Dred Scott*. So I think we have to be careful about how narrow an aperture we want to construct here, because if only the children of slaves come through, then those of us, for example, who are descended from free Black people are here under some very dubious circumstances.

[00:42:42.5] Martha Jones: I want to emphasize that part of what the 14th Amendment and its

birthright provision does for us is to sequester the racism that runs through the challenges to Black citizenship, that run through the challenges to Chinese citizenship, that run through the challenges of the citizenship of immigrants today. The 14th Amendment, its birthright provision, not only does not respect race, it does not respect color, it does not respect the status or the origins of one's parents, nor does it respect religion, wealth or health, sex and sexuality. It is perhaps, in my view, regrettably, one of the very few human rights provisions in our Constitution today. I have heard it said many times, why does the US stand apart from its peer nations? The US stands apart from its peer nations with respect to its citizenship regime, in part because it continues to be governed by an 18th-century Constitution that was amended in the 19th century. Our peer nations, Western Europe, for example, Western Europe rewrote its constitutions in the 20th century in the wake of the Second World War, in the wake of the Holocaust. Those are constitutions that understand and anticipate everything from the extraordinary migrations of humanity that are characteristic of the modern world to the possibilities of the rise of an authoritarian regime within a nation.

[00:44:54.3] Martha Jones: These are apples and oranges. And to compare the US Constitution to modern European constitutions, or the Brazilian Constitution after dictatorship, or the South African Constitution after apartheid, is to feign naivete about the limits of our Constitution. So I'm one who not only appreciates and endorses the conclusion the court reached this week, but I am prepared to go a step further, as Justice Roberts signaled us we must do, which is we must appreciate that this is not simply a constitutional question, that frequently this is a political question masking itself as a constitutional question. And that, yeah, those of us who believe that the 14th Amendment was intended to apply to all persons, can stand firm today on this point, but we can't stop there. We must recognize that the same sorts of thinking that were manifest in *Dred Scott*, versions of them are with us today. And that means that we have to be vigilant in the policy context and make the affirmative argument for why birthright is not only good constitutional law, but why it's also good policy in the United States. And it was Justice Roberts who cautioned the government during oral argument to not conflate those two things and to let the constitutional issues stand as constitutional questions and leave to the Congress the policy questions that run through this regime.

[00:46:44.2] Tom Donnelly: Richard, I'll give you a chance to respond to that. And as you do, if... We're getting towards the back end of our conversation here, and we've focused on Chief Justice Roberts and Justice Thomas, but if there are any other insights that you see from the dissents of Justices Alito or Gorsuch that you think are worth bringing in, please feel free to do that as well.

[00:47:04.9] Richard Epstein: Okay, let me go back first to the question of *Dred Scott*. What it did is surely it made that the children of slaves were free. But if you read the text of the amendment, any person born or naturalized in the United States, that would include every free Black person. That was the conclusion, by the way, in the Bates report in 1862, which went so far to say, quite correctly, that in fact every free Black person was entitled to run for President because there was no constitutional barrier associated with natural born person. And so any point about that is, "a red herring". The key issues on the political front, I think actually are gonna run very much in the opposite direction. What this particular decision says, and it's applied nowhere else, is that somebody who is birthright tourism coming into Guam, giving birth to a child, and then going back to China, Korea, or wherever it is, those children are citizens. You're talking about, as of 2023, 300,000 children of uncertain citizenship status coming into the United States. And so the political debate's going to be that Justice Roberts' opinion was so egregious, the man is intellectually irresponsible.

[00:48:18.2] Richard Epstein: In my view, the debate's going to be, if we can't stop birthright citizenship, can we essentially exclude people at the border if they have any pregnancy, being pregnancy? That's gonna be the debate. And on the political debate, I don't think there's anything that's racist whatsoever about saying the proposition, we do not believe that these people deserve to

run around the requirements for naturalization. They have to observe them. And that in fact, what we should do if we can't essentially deny birthright citizenship, you look at the statutes which were basically articulated by the same Justice Gray, and he said the United States has the absolute power to exclude anybody whom they want because the naturalization power is plenary. And now it's the immigration power that turns out to be plenary. And I think, in effect, it's a national disaster that you're awaiting if, in fact, you allow people unilaterally to decide their children are citizens instead of having to go through standard processes where the United States can do this. So on political grounds, I think the public reaction is going to be actually quite furious with this, and what will happen is people will want to end this, by another means if you can't do it.

[00:49:26.6] Richard Epstein: And this essentially points out that the United States was a complete outlier everywhere at every time, both before and after any particular event, when it starts to endorse a constitutional principle of birthright citizenship. Other nations have tried it and then have repealed it, but there's nobody else who's taken a principle which is utterly destructive of how you maintain a polity in doing it. The essential props of attribute of sovereignty is that a nation gets to determine who becomes a citizen. And if you allow people who are illegally here, overstay their visas, or violate its terms to become citizens by their unilateral action, what you've done is you've limited and destroyed the sovereign power of the United States. This is, as Martha says, a very powerful political debate that we're having, but there was nothing whatsoever in the 14th Amendment that mandated this. Every text as I told you, essentially drew this strong distinction between subject to the jurisdiction thereof, citizens, in the jurisdiction, non-citizens. And what Justice Roberts did is he gave a flim-flam definition of sovereignty that deliberately obscured the difference between them and never once referred to the Blackstone decisions which were recognized everywhere, which made the distinction, or to Vattel who did the same thing. His opinion does not have a single true historical statement in it. It's an absolute outrage.

[00:50:46.8] Tom Donnelly: Martha, I'll give you a chance if you wanna respond to any of those critiques of Chief Justice Roberts' version of the history as we get towards the end of the discussion. Also give you an opportunity if you wanna say anything about some of the other separate opinions written in the case. You've already mentioned Justice Jackson's concurrence, which relies in part on your scholarship and brief. We also have an opinion by Justice Kavanaugh just for himself, concurring in the judgment and dissenting in part where he disagrees with the majority on the constitutional question, but thinks that the executive order needs to be struck down on statutory grounds. And so, sort of anything you wanna say on either of those fronts?

[00:51:34.2] Martha Jones: Well, without sounding too self-serving as someone who was cited both by the Chief and by Justice Jackson, I think that for me these are decisions that do an extraordinary job of recounting for us the historical record by not only engaging with the secondary literature, the scholarship on the historical questions, but also going back to the primary materials and rethinking the historical questions from that perspective. And so for listeners, I really recommend these two opinions for an interesting and important lesson in how a court can go about approaching the question of history for itself through scholarship and through primary materials.

[00:52:30.2] Martha Jones: I think the thing, I do... I don't want us to end without commenting on Justice Kavanaugh's opinion. I have watched various pundits. Was the decision 6:3 or 5:4 or, I don't know, three and a half? Kavanaugh really splits, which is to say he would strike down the executive order, but not on constitutional terms, not with the 14th Amendment, but instead by virtue of 20th century acts of Congress that are inconsistent with the executive order. And that, I think, brings us to a way of appreciating what may indeed be on the horizon, which is not a revisiting of the 14th Amendment, but a testing of the limits of Congress's ability to legislate on the question of subject to the jurisdiction thereof.

[00:53:36.3] Martha Jones: Up until this point, Congress has agreed with the ruling in *Wong Kim Ark*. This appears to be consistent with the ruling of the court this term, which is to say Congress has itself legislated the view that all persons born in the United States are citizens of the United States. But Justice Kavanaugh certainly points to a route that the administration might take up. Sounds like, if I'm hearing the news reports correctly, there's at least talk of that, which is going to Congress and looking to Congress to legislate the terms of the executive order, even as they have not succeeded before the Court in that form. I think should that legislation come to pass, and that's an open question, but should that legislation come to pass, what we will then be faced with is another long round of litigation over the question now not of the President's authority to reinterpret the 14th Amendment, but Congress's capacity to reinterpret the 14th Amendment. That seemed to be where Justice Kavanaugh was suggesting the administration might go, and at least early noise from the administration seems to suggest that that's where we're headed next.

[00:55:08.0] Tom Donnelly: And, Richard, allowing you to get in here, what do you see projecting forward on the horizon and what sort of power remains potentially in Congress or with the President following this ruling?

[00:55:21.8] Richard Epstein: Well, according to Justice Roberts, if this is a constitutional issue, it can't be changed by the President and it can't be changed by the Congress. What happens is there's a statute which uses the same language, subject to the jurisdiction thereof, and the effort of Kavanaugh is to say, well, I'm willing to live with that as the way they've done it, but not on the constitutional ground. I think this is a very dangerous position. First of all, I think that the statute in this case was quite consciously designed to parallel the Constitution, and it actually takes no substantive position of what that clause means. And in fact, if you start looking around, there are all sorts of things that are not part of the 14th Amendment. Diplomatic immunity has nothing to do with the 14th Amendment. It has to do with traditions that have been gone for very long. So I think, in effect, what he's doing now is he's creating a situation in which there will be fierce efforts and they will be met with fierce resistance to reverse this thing by Congress. This will lead to another situation. I think it's a mistake. I think the constitutional issue is clear.

[00:56:25.4] Richard Epstein: If you wanna change it, you have to claim it by amendment, or what you're going to have to do, and I think this is much more troublesome, is you have to basically make sure that pregnant women from foreign countries cannot come into the United States. That's going to be challenged. But if you actually look at Justice Horace Gray, he says it's okay. I think the Kavanaugh position is a mistake, but I do think that the political consequences of this are going to be a fierce effort to reverse birthright citizenship, the numbers of which and the problems associated which were not touched once by Justice Roberts, who has his, well, I only look at the Constitution. But he didn't even do that. And so I think he's going to be subject to being attacked, as I have done, on substantive grounds. And I also think that on political grounds, the birthright case for tourism will be very powerful. Already you have closed off the border, so future birthright cases from immigrants coming in illegal is going to be a smaller problem. Birthright's not gonna go away unless there's some more dramatic acts.

[00:57:30.6] Tom Donnelly: And now we've come to the end of the podcast and an opportunity for each of you to offer your closing arguments here on this issue of birthright citizenship and President Trump's executive order. And so maybe I'll begin with, come back to you, Richard. Give us your closing argument here as to why the President's executive order on citizenship here is consistent with the Constitution?

[00:57:55.2] Richard Epstein: Well, first of all, I think it's consistent with the Constitution because the Constitution does not create any form of birthright citizenship. And the defense is not a defense of the Trump order. It's a defense of what you think to be the original understanding of the 14th

Amendment. And in this case, by the way, originalism is absolutely the dominant mode of interpretation, because the Chief Justice, when he speaks, talks about the framers of the 14th Amendment, and what he does is he gives them a kind of universalism which they did not have. So if you start looking at the constitutional text, subject to the jurisdiction thereof, does not mean within the jurisdiction of the United States. It means having to have the loyalties and so forth. This was confirmed during the debates by virtually every statement. It was confirmed by practice that took place afterwards. It's confirmed by the fact that there would be an utter anomaly if, in fact, what you do is conflate the two terms. Because now what you do is you go back and read the Due Process Clause and say, within the United States.

[00:58:56.8] Richard Epstein: Well, what that really means is subject to the jurisdiction of the United States. And what you've done is to limit the protections of the criminal law, which are meant to apply to all people, but not citizenship. You then look at the naturalization acts, and what those do is have very specific requirements that were fully in effect at the time of the 14th Amendment. They were changed by legislation. All to the good. The Chinese stuff was not changed by legislation, so that what *Wong Kim Ark* does is creates for people who are present in the United States an exception to the rule that children or status is determined at birth by that of their parent. So everything that was done in the case, every legal doctrine that was cited by the Chief Justice, was blundered. And Justice Thomas did not say everything the way I would say it, that's perfectly acceptable, but he did not make those kinds of egregious mistakes.

[00:59:42.8] Tom Donnelly: Thank you, Richard. And finally to you, Martha, your closing argument. Why is President Trump's executive order on citizenship unconstitutional?

[00:59:54.3] Martha Jones: Thank you. The Constitution of 1787, for Black Americans, had a very intriguing and important provision, and that was that in order to serve as President of the United States, an individual had to be a natural-born citizen of the United States. And this clues Black Americans as far back as the end of the 18th century into the view that there is operating underneath our Constitution the presumption, the carryover from English common law, of the birthright citizen. And their view is, if the President is a natural-born citizen, why aren't we natural-born citizens like all persons born in the United States? This is a deeply contested question for Black Americans, though not for white Americans, before *Dred Scott* and then the Civil War. But the 14th Amendment functions to settle that question by giving us, with three very narrow exceptions, the principle, the birthright principle, persons born in the United States are citizens of the United States. There have been many efforts to derogate the terms of the 14th Amendment. Some of them get resolved in cases like *Wong Kim Ark*. Others of them do not get resolved by the Constitution. American women, birthright citizens, lose their citizenship in the early 20th century when they marry non-US nationals despite their birth in the United States.

[01:01:48.0] Martha Jones: Mexican Americans deported, Chinese Americans detained in camps, we have experienced many shameful episodes in the derogation of birthright. But as a matter of law, and certainly before this court, what we've discovered is that we remain true to the unspoken rules as they were practiced in the early 19th century, the terms of the 14th Amendment as they were debated and then ultimately ratified by the states, the very careful consideration of the US Supreme Court in 1898 in *Wong Kim Ark*. and a long 20th century in which this nation was remade by immigrants whose children became citizens only by virtue of their birth on US soil.

[music]

[01:02:42.6] Tom Donnelly: Martha Jones, Richard Epstein, thank you so much.

[01:02:46.0] Richard Epstein: Welcome. Bye-bye.

[01:02:47.9] Martha Jones: Thank you.

[music]

[01:02:53.8] Tom Donnelly: This episode was produced and mixed by Bill Pollock, with production support from Charles Sahm. Research was provided by Anna Salvatore, Trey Sullivan, and Tristan Worsham. Please recommend We The People to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional education and debate. *Trump v. Barbara* was the last case decided by the Supreme Court this term. For much more from the Court's term, I hope you'll join us in-person or online for our annual Supreme Court Review on July 7th. Together with our partners at Texas A&M Law School, we'll convene three panels featuring leading constitutional law scholars and commentators with differing perspectives to examine the Court's term. To register, visit constitutioncenter.org. And as always, remember that the National Constitution Center is a private, nonpartisan nonprofit, and we rely on your generosity, passion, and engagement for all of our programming, including this podcast. Please consider donating today at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Tom Donnelly.