

Disclaimer: This transcript was generated using AI-assisted transcription. While we strive for accuracy, it may contain errors or omissions.

Lisa: Hi, I'm Lisa Hernandez.

Avigail: And I'm Avigail Oren.

Lisa: And we are your hosts for Scholar Strategy Network's No Jargon. Every other week, we will discuss an American policy problem with one of the nation's top researchers without jargon.

Avigail: So Lisa, on June 30th, the Supreme Court rendered its decision on birthright citizenship. And I think for many people living in the United States, it represented a moment of having to take a step back and question what is the value of citizenship? What are the protections that citizenship offers? And why, why should this matter to me?

Lisa: Mm-hmm. I think a lot of people were thinking about what do future generations have coming for them as far as citizenship goes, but also like, what does a sense of belonging mean in this country? How is that going to change? How has it been changing over the last couple of years, decades? And it's all being debated by a very interesting and ever-changing Supreme Court over the last couple of years. I think every year I find myself with bated breath waiting at like around 10 or 11 AM. I'm like, okay, so what are the decisions that are gonna be coming in? Because we just never know what major, major decisions are gonna be coming down the pipe.

Avigail: Something you said really that like stuck with me was how this sense of belonging and idea of citizenship has changed over time. And I think, you know, this case is a good reminder that these have been open questions for all of American history. And that even though this feels like a pretty monumental shift, it is just like another swing of a long, a long swinging pendulum. Um, so yeah, I, I think one way to think about that is that the pendulum can actually swing back, right? We're always in a position to be able to make belonging and protection more expansive.

Lisa: Absolutely. And also, I think one of the things that I found really interesting when speaking to the expert that you'll be hearing from soon. Is that even though we upheld the same definition and amendment of citizenship that we have now, I think the fact that the question is being brought up just signifies such a huge change over the last couple of years. So I felt really fortunate to make sense of the question being brought up in general and learn more about when citizenship had been questioned in the past as well, and what that meant then.

So for this episode, I spoke with expert Anna Law, Associate Professor of Political Science and the Herbert Kurz Chair of Constitutional Rights at CUNY Brooklyn College. She specializes in US constitutional law, federal courts, federalism, and immigration and citizenship policy history. Here's our conversation.

Welcome to No Jargon, Professor Law.

Anna: Thanks so much for having me on.

Lisa: Of course. Well, let's get right into it. You know, a lot of people have heard the news by now that the Supreme Court upheld birthright citizenship. So before we get into the history of what citizenship even really means, can you just walk us through what the court actually decided in plain English? What was the question that the court was answering?

Anna: So the case was Trump v. Barbara, and it was the combination of several different court cases. So Donald Trump, when he became president, he issued an executive order trying to change the 14th Amendment's birthright citizenship clause. There's that gritty New York feel to, uh, the podcast that you just heard.

So Trump issued an executive order where he was trying to change the Constitution, which you cannot do because if you want to change the Constitution, there's an Article V procedure for that. Instead, he tried to issue an executive order stripping birthright citizenship and changing it for people going forward. So the Supreme Court case is about whether that is constitutional.

So the court on the constitutional question of whether the 14th Amendment bars Trump's executive order voted 5 to 4, which is very alarming. On the constitutional question of whether a federal law existing prohibits Trump's executive order, the vote was 6 to 3.

Lisa: Okay. And so what does a decision like that mean for people today? Obviously, the amendment was upheld, but what does that tension of the decision mean for people in the United States today?

Anna: So the immediate effect for everyone is that birthright citizenship stands as it has since the passage of the 14th Amendment in the late 19th century. So there is no change to that part of the Constitution. If you give birth on US soil, barring 3 narrow exclusions, your child is a US citizen. That's the immediate effect.

The political effects are much more complicated. The decision, to many court watchers, including myself, should have never made it to the Supreme Court. And the reason is the legal precedent, the text of the Constitution, of that part of the 14th Amendment.

The legal history and the original intent of the framers of the 14th Amendment are all extremely clear. This case should not have even been heard by the Supreme Court. The Supreme Court could have simply denied certiorari and said, this is too obvious a question. We're not even going to hear it. But instead, by hearing it, even though they ruled constitutionally in favor of it, it's now breathed new life into the political fight to overturn birthright citizenship.

Lisa: Okay. And we have mentioned birthright citizenship. So could you define birthright citizenship for us? How does someone become a US citizen simply by being born here?

Anna: In the US Constitution, there are two ways that you can become a US citizen. The birthright citizenship clause in the 14th Amendment, Section 1, says that if you are born on US soil, and if you are not the child of a foreign diplomat, the child of invading armies, or a Native American child, you are automatically a U.S. citizen. The other part of the Constitution says if you are not a citizen, you can become naturalized to gain U.S. citizenship. But before the 14th Amendment, and before other changes in immigration law, naturalization was only available to free white persons.

Lisa: The changes that have happened to naturalization have happened some years ago. So a lot of people are probably wondering, you know, I thought this was settled law. I thought we had established citizenship, naturalization, what birthright means. Has there been any recent uncertainty about birthright citizenship itself, or was this case about something else that has come up in the last few years.

Anna: So if you look at the parallel of abortion rights in the United States and the landmark decision Roe v. Wade issued by the Supreme Court in the 1970s, that case has meant that women for an entire generation have had protected access to abortion rights. The minute Roe v. Wade was handed down, the conservative movement started and were plotting ways to overturn it. And it was a 49-year fight, but they didn't take down Roe v. Wade overnight. So it's not like you knock down abortion rights overnight. You do it brick by brick. You take bricks out of the wall one by one.

First, let's try a state law where Pennsylvania says that married women have to get the consent of their husbands before they get an abortion. Well, the Supreme Court struck that down, but they got through that if a minor girl wants to have an abortion, the parents have to be notified and have to consent. So that's how you take down abortion rights brick by brick.

So what has kicked off is a movement to take down birthright citizenship. They realize they're not gonna do it overnight, and so now the wheels are spinning. And a social movement has been created. It was already in existence of how to overturn birthright citizenship, which goes hand in hand with the other anti-immigration stuff that we see today.

Lisa: How does the US differ citizenship-wise with other countries? Is it unusual to grant citizenship based on just where you were born?

Anna: So there are two basic models of citizenship. First, let me define citizenship, which everyone thinks they know, but it's one of those mushy concepts. And defining it is sort of like nailing Jell-O to a wall. We kind of know what it is, but so let's use Hannah Arendt's definition. She's a political theorist writing in the 20th century, escaping Nazi Germany. And she said citizenship is the right to have rights. And that is the most concise way of defining citizenship.

There are two models around the world and some variations of those two models. One is to define citizenship by bloodline, that you have to have a certain amount of blood. You have to be Japanese. You have to be German. That is *jus sanguinis*, that model of citizenship that's based on blood, *jus soli*, which is the American model. We are not the only country to have it. Parts of Europe have moved away from it, but in the Americas, not just North America, but all of the Americas, *jus soli*, our model, birthright citizenship on soil, is quite popular.

I would ask your listeners to think if we moved to granting citizenship by bloodline in a multiracial, multicultural country like ours, exactly whose blood would we use?

Lisa: And that is a question that I'm sure many people are pondering as we keep debating the question of citizenship in general. And I want us to turn to your book. You've written a whole, very timely book on this issue. So *Migration and the Origins of American Citizenship*. It traces the history of American citizenship and the forces that shaped it. So I want to ask you what inspired you to write this book and what questions were you hoping to answer?

Anna: So the United States is a federal system of government where we have a federal government sharing power with the state and local governments. So my question driving that book was, where's the location of the dividing line between national and state control over migration? Question seems simple enough. The problem is, depending on which part of US history you're asking about, the line moves.

So you asked what inspired me to write this book. I was always sort of curious about, I'm really troubled by the phrase, a nation of immigrants, because it leaves out slavery, which I do not consider immigration because immigration implies consent and slavery is not consent. And it also leaves out Native Americans. So I wanted to figure out what's the relationship of slavery to voluntary migration, if there is any relationship.

Lisa: And there's also this underlying question that I think people are asking themselves lately more and more, and it's who gets to be American in general? That's definitely one of the themes that I found within your book. It's Americans having to debate who belongs in this country since

its earliest days. Why is that question so central throughout our history? Just who gets to be an American, who gets awarded this citizenship?

Anna: So the question that you're referring to is a bigger question than formal legal citizenship. Formal legal citizenship, you can track through laws. To be formal legal citizens and who are not. But what came up earlier than formal citizenship was the colonies and then the states in the middle of the American Revolution trying to sort out who belongs and who doesn't.

So I tackle the question not just of formal legal citizenship, but of who belongs. And before the 14th Amendment, who belongs is not clear. Because we have enslaved migration and because we have Native Americans who have a completely different relationship to the government than even voluntary and enslaved migration.

So for example, it gets really messy because free Black people, their citizenship, their U.S. citizenship is not clear until the 14th Amendment. And that leads to all types of discrimination by the states.

Lisa: So there was no legal definition of who counted as American citizen before the 14th Amendment?

Anna: There was an informal definition of who belongs based on your race, your, whether you were indigenous or not, your gender, and definitely your social class. But the language of the US Constitution doesn't really say, it's not in the Constitution. The federal law of the Naturalization Act of 1790 says free white persons may naturalize, thereby leaving out free Black people. Okay. Enslaved people, their legal citizenship status is the easy case. If you are considered human property, you have no rights.

The harder case is what is the legal status and citizenship of free Black people? And because that was undefined, free Black people were applying for US passports in the 19th century and being denied by the State Department. And the State Department said, you are not US citizens. Free Black men might have been citizens of Connecticut or Massachusetts, but it was unclear until the 14th Amendment that they are also citizens of the United States.

Lisa: And in your book, you talk about folks fighting the colonization movement and how that shaped laws overall. Can you tell us a little bit more about this colonization movement and its defeat.

Anna: So there's a phrase I use in the book over and over, and it's the right to remain. And I borrowed that phrase from historian Samantha Seeley, who has a great book on that topic. We don't think today about the right to remain because we assume if we have legal authorization to

go into a geographical area, we also have the right to stay. But before the 19th century and the Reconstruction Amendments, the right to mobility and the right to remain were 2 different sets of rights, both controlled at the state level. So the right to remain is not to be assumed. And the American Colonization Movement was a movement of people across the United States. It was a private organization.

But for free African Americans, it was scary because major politicians were members of the American Colonization Movement, including Lincoln. And many politicians at the state and federal level were members. That organization advocated that they rejected the idea of a multiracial democracy. They didn't believe that free Black people could be productive members of society.

So if they were free, the only way they were going to become a member of a thriving society was to go to Africa, parts of Central America outside of the United States, but they could not achieve that within the U.S.

For free Black people, it was never clear whether this movement was voluntary or not and whether they were going to be asked if they wanted. To quote unquote repatriate to another country. How do you repatriate someone who's born in the United States?

Lisa: In order to address this, then the 14th Amendment guaranteed citizenship, but through the Constitution. Why did the authors think it was important to guarantee direct— guarantee it directly through the Constitution instead of leaving it up to Congress?

Anna: Good question. A very timely one. As Speaker, House Speaker Johnson just announced yesterday that he is going to look into congressional measures to change the protection of birthright citizenship. So if you look at the history of birthright citizenship, northeastern states already granted birthright citizenship to many free Black people in their states. And they did so on a non-racial basis. If you were born in Massachusetts or Connecticut or Maine, you were a Massachusetts, Connecticut, or Maine state citizen.

So the reason it's important that the birthright provision is in the Constitution, it first shows up at the state level, but at the federal level, it shows up in the Civil Rights Act of 1866. And Congress at the time said, you know what, this is too important. We need to make sure that another Congress, another Supreme Court can't come along and say, oh, we did it wrong and just overturn it.

So by going through the Article V procedure to change the Constitution and to add the 14th Amendment, They were making sure that they're trying to put it out of reach of everyday politics because they anticipated that another Congress may come up like the one we have now.

They anticipated that maybe a Supreme Court might come up and say, oh, Dred Scott was incorrectly decided. So by going through the Article V procedure and passing it as an amendment, having states ratify it they're putting it on safer ground, or so they thought, as it becomes under assault now.

Lisa: And the 14th Amendment, you mentioned it includes a few exceptions. Can you remind us of what those are and why exactly are Native Americans one of the groups that are excluded?

Anna: So there are three narrow exceptions in the 14th Amendment's birthright citizenship coverage. First, if you are a child born to a foreign diplomat or a child born to an invading army, you are not automatically a citizen. This derives back to British common law.

The Native American exception is an American creation because when the colonists came to the U.S., it was not empty land they were going into. There were people that already lived here. The dissents in *Trump v. Barbara*, the birthright citizenship case, kept holding up the Native American exception as a gotcha to the majority saying, you see, you see, these people are not subject to the jurisdiction of the United States and they don't automatically get birthright citizenship. Right.

But you shouldn't be using federal Indian law as a precedent for immigration because the reason the Native American exception is in there is because the 19th century drafters of the 14th Amendment were showing deference to Native nations and Native peoples' membership in their tribal nations. It would've undercut tribal sovereignty and self-determination to force US citizenship on them. Not all Native Americans wanted US citizenship. They wanted tribal sovereignty, not U.S. citizenship and rights.

Native Americans are made birthright citizens by a law passed in 1926, but when that law passed, many Native nations rejected it and contested it because they did not want rights. They wanted their own tribal sovereignty.

Lisa: And what does that distinction mean for Native Americans today as we continue to debate who gets to have rights under birthright citizenship?

Anna: That could fill many books. Um, but I suffice it to say that I, as a non-Indigenous person and as an immigrant myself, it is hard for us to break out of the framework of, of course everyone wants rights and citizenship and rights and privileges and protections that derive from citizenship. But if you are a Native person, not every Native person or nation wants rights or citizenship bestowed by the settler nation. What they want is their own ability to make legal and political decisions for their own tribal nations, and their rights, Native American rights, are secured through treaties. Collective treaties with the U.S. government.

Whereas African Americans and Chinese immigrants or any other immigrant group, they do want rights and they do want to be treated the same way as American citizens. But Native Americans, because they are such a distinctive case because of their relationship to the land and to the American government, when thinking about inclusion and respect for Native

Americans, we shouldn't use the framework of rights because it's very problematic. I'll leave it at that.

Lisa: Thank you for that. And you mentioned immigrants within this conversation here, and I want us to talk a little bit about how did immigration or immigration law change in the United States in the 19th century following the Civil War?

Anna: So the biggest finding that, that I'm building on the work of law professor Gerry Neuman. The biggest effect of the institution of slavery on voluntary migration is that it delays the transition of migration controls to the federal level.

So a lot of people assume, and the Department of Homeland Security still has it up on their official webpage, saying, well, before the 19th century, late 19th century, when the federal government started enforcing borders, it was basically a functionally open border place and anyone could come. And Alito's dissent in *Trump v. Barber* said, well, you know, anyone could just come and aliens could come, noncitizens could come, and they could stay as long as they wanted, which is not true because we have over a century beginning from the colonial period to 1888 of local control of international and interstate borders.

So what the 19th century and the Civil War does is separate slavery from voluntary migration. Prior to that, the slave states found the idea of a federal deportation and exclusion power very scary because what if the federal government deported all the enslaved people? So they insisted that migration controls be held at the state level, which it stayed at. Until after the Civil War and slavery and voluntary migration get pulled apart.

Lisa: You mentioned the phrase open borders. That is something that gets used very frequently, but I feel like, what do people see as the definition of open borders and what is the reality of the illusion of open borders?

Anna: I think the illusion of open borders is exactly right. I think that open borders gets invoked by conservatives because it sounds scary. It sounds like, oh my gosh, that's completely lawless, right? Anyone can come and we don't even know who's here. And what if bad, harmful people come? It also goes against the very definition of national sovereignty that, you know, the US government has said over and over. You are not a sovereign nation if you cannot control your borders.

So my book is about, since from the colonial period, we've had huge patchworks, gauntlets of state and colonial laws saying certain types of people can't come in. Other people are incentivized to come in by being given free land and fast and easy naturalization. So the borders were never technically open to everyone who just wanted to show up, but we're also not completely closed because of administrative capacity.

Do we actually believe that the colonial and early republic state officials inspected every boat and caught every person that was in violation of a state law? No, it can't be possible, right? Because they didn't have the manpower and the personnel and the money. Right.

But that's a different discussion than asserting there were no laws, anyone could come with no legal consequence whatsoever. So the borders historically have not been completely open, nor have they been completely closed.

Lisa: And this idea of open borders is probably one of the main reasons why we have so many debates over both immigration and citizenship right now. You mentioned the Supreme Court decision being surprisingly close, prevailing by just one vote. So if birthright citizenship had been eliminated, what would that have meant in practical terms for children, families, and the country as a whole?

Anna: So the practical implications, Trump in his executive order said, oh, don't worry. The executive order, if it goes into effect, would be proactive. It would start 90 days from its passage. So we're not applying it retroactively. That's still a problem.

Let's say the Supreme Court upheld the executive order. So most of us can produce proof of citizenship status, but can you produce proof of your parents' citizenship status? That's harder than it appears. And if Americans who have babies or anyone who has babies in this country, imagine you try to enroll the child in school or try to get some sort of vaccinations and the hospital asks for proof of your citizenship.

I mean, and if your citizenship is unclear, do we go back to your grandparents' citizenship? This is an administrative nightmare. It's going to send schools and hospitals and, and government services into being what, genealogical detectives about your actual lineage?

And it politically is a move where Trump is trying to shift the spotlight to the legal status of the parents, but that's not what the text of the Constitution says. It is about the birthplace of the child. It has nothing to do, and the debates surrounding the 14th Amendment, there was never discussion of the status of the parents. It was always about the child.

So if you hear someone saying, oh, well, you know, but if the mom was a temporary sojourner, okay, they had that in the 19th century too. They thought of that. If they wanted to prevent those babies, they would've said so, don't you think? There were unauthorized immigrants back then as well.

Lisa: We are speaking of children here. So another claim that comes to mind that we hear is that birthright citizenship could encourage people to come to the United States specifically to have children here. Terms that are being used like tourism birth. What does the evidence actually tell us about this?

Anna: It's hard to measure how many foreign women come here for the sole purpose of giving birth. Let's put that number aside, but first, how do you police intent?

How do you mind read all the women who come to the United States? I mean, how do you mind read and say, oh, your intent is only to go there to give birth? Are we going to have women pee on a stick when they apply for a visa to come into the country? What are we doing? It's mind-boggling what they are attempting. What they're asserting and going to attempt.

Lisa: You have a lot of history that could inform the present and maybe the future too, but I'm not asking you to get a crystal ball out for this next question. I'm just wondering where we go from here. Do you think now that we've had this debate over in the Supreme Court and we've had a decision, do you think there will still be other challenges to redefining citizenship, or is it now officially and so on settled law?

Anna: Uh, it's not settled law if it's 5-4. If it was settled law, the Supreme Court would've never even taken the case. But we should be prepared for a very long fight and a fight to defend birthright citizenship along with other immigrant due process rights.

And one thing that I take from studying U.S. history is that we should not accept only what the elites, the political elites and the Supreme Court say the Constitution means. We have eyeballs. I can read. When it says all persons born or naturalized in the United States, I can read. The U.S. Constitution has never been only about what political elites say it means.

Birthright citizenship is in the Constitution not because white men decided out of the goodness of their hearts to give it to African Americans. It's because African Americans were insisting on full belonging and citizenship from the very start, from the colonial period.

So it is looking at the broad sweep of U.S. history, it is a reminder that the price of liberty is eternal vigilance, and that we all have a role in understanding and defining what the Constitution means. We should not outsource our brains to the Supreme Court.

Lisa: Absolutely. Well, I appreciate you for joining us on our podcast. I'm wondering if you have any final thoughts to our listeners who are feeling empowered by some of the messages that you've shared about the ongoing fight. to protect our rights.

Anna: Thanks for having me on. And I think that for people who are feeling either empowered or disempowered, please read some US history. And because there are so many inspiring stories of people who overcame huge odds to get rights and also to push America to define itself in a more inclusive way.

Lisa: Thanks again for joining us. And thank you to the New York City honkers for also joining us today. We appreciate you and thanks for coming on No Jargon.

Anna: Thanks a lot.

Lisa: And thanks for listening. For more on Professor Law's work, check out our show notes at scholars.org/nojargon. No Jargon is the podcast of the Scholar Strategy Network, a nationwide organization that connects journalists, policymakers, and civic leaders with America's top researchers to improve policy and strengthen democracy. The producers of our show are Wendy Chow and Dominic Doemer. Our audio engineer is Peter Linnane. If you liked the show, please subscribe and rate us on Apple Podcasts or wherever you get your shows. You can give us feedback at our email address, nojargon@scholars.org.