

**CENTER FOR AMERICAN PROGRESS**

**BORN IN THE USA?  
THE HISTORICAL AND CONSTITUTIONAL UNDERPINNINGS  
OF BIRTHRIGHT CITIZENSHIP**

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CAROLINE FREDRICKSON: Hello, everybody. I'd like to welcome you to today's program, "Born in the USA: The Historical and Constitutional Underpinnings of Birthright Citizenship." I'm Caroline Fredrickson. I'm the executive director of the American Constitution Society for Law and Policy.

Founded in 2001, ACS is one of the nation's leading progressive legal organizations, and is a rapidly growing network of lawyers, law students, scholars, judges, policymakers and other concerned individuals.

We are delighted today to co-host this event with the Center for American Progress, who are our cohorts and friends in both promoting a progressive agenda and in sharing office space here in this building.

And we would really like to thank Angie Kelley and Marshall Fitz, who originally proposed to us to collaborate on this series and have done so much work to pull off a wonderful program. So, today we are going to have a very, very timely and also extremely important discussion.

On the first day of the 112<sup>th</sup> Congress, Congressman Steve King of Iowa introduced legislation seeking to amend the Immigration and Nationality Act to clarify which classes of U.S.-born citizens – U.S.-born children are citizens of the United States at birth.

His bill reflects the belief by some that the 14<sup>th</sup> Amendment does not somehow guarantee citizenship at birth for U.S.-born children of temporary or undocumented immigrants. And House Judiciary Committee Chair Lamar Smith agrees, and had declared that he will hold hearings on this topic.

But federal legislators are not the only ones who are taking aim at birthright citizenship. On January 5<sup>th</sup>, a group of state legislators launched their own challenge to the 14<sup>th</sup> Amendment at a press conference here in the District of Columbia saying that they would seek to pass state laws in order to trigger a review by the Supreme Court.

Today we are going to hear from a group of leading thinkers about the legislative history of the 14<sup>th</sup> Amendment and about current efforts to undermine its guarantees.

The American Constitution Society is pleased to release today an issue brief on this topic by one of our panelists, Elizabeth Wydra. In her issue brief, Elizabeth goes into great detail that we unfortunately can't go into in today's discussion. So I hope you will read the issue brief that was available at registration, or we'll find it on our website.

And the Center for American Progress and the American Constitution Society will be holding a second event on May 11<sup>th</sup>, which will focus on the real-world implications of ending birthright citizenship. So I hope you will join us for that event as well.

Now I'd like to introduce our esteemed moderator. And you do have, in your materials, Sam Fulwood's complete biography. And so I will only address a few of what I would have to say are many, many highlights of an amazing and accomplished career.

Sam is now a senior fellow at the Center for American Progress, and he analyzes the influence of national politics and domestic policies on communities of color across the United States.

He served previously as metro columnist at the Cleveland Plain Dealer and during the 1990s was national correspondent in the Washington bureau of the L.A. Times, where he created a national race relations beat and contributed to the paper's Pulitzer Prize-winning coverage of the L.A. riots in 1992.

He's the author of two books, "Waking from the Dream: My Life in the Black Middle Class," and "Full of It: Strong Words and Fresh Thinking for Cleveland." He was 1994 Nieman Foundation fellow and is currently a member of the foundation's board of advisors. During the spring of 2000, he was an Institute of Politics fellow at Harvard University.

And Sam was an inaugural presidential fellow at Case Western Reserve University in 2003, where he taught courses on media, politics and pop culture. So we are extraordinarily privileged to have Sam here today to moderate this event. So I will now introduce you to Sam.

Thank you, Sam.

SAM FULWOOD III: Thank you, Caroline. Thank you very much for that very kind introduction.

As my colleague Angie Kelley likes to say, the format for what we're going to do today is Oprah style. (Laughter.) Believe it or not, I'm Oprah. (Laughter.) And we think that part of the most impressive and important part of any kind of Oprah-style gathering will be you, the audience. So, don't do it now, but at some point look under your chairs to find who has the car. (Laughter.)

MS. FREDRICKSON: Tell them you're kidding.

MR. FULWOOD: Yeah, I'm kidding. I'm kidding. (Laughter.) John, are you hearing? I'm kidding.

I'm joined onstage with an esteemed group of scholars and academicians and legal experts who are going to help us unravel this whole issue of who is and is not a citizen of the United States.

You have, in your handouts, the bios – the full bios of the people who are here. I’m going to introduce them, but I’m not going to give the whole bio because we really want to get into our conversation as rapidly as possible. Those of you who are tech-savvy, all you have to do is Google them and you’ll find a wealth of information about them. Don’t do it now. Do it later.

Linda Chavez is the chairman for the Center for Equal Opportunity. Garrett Epps is a professor of law at the University of Baltimore School of Law. James Ho, to my immediate right, is a partner in Gibson, Dunn & Crutcher and a former solicitor general of Texas. And in the center, last but not least, is Elizabeth Wydra, chief counsel for the Constitutional Accountability Center.

And I want to begin our discussion with Garrett, who has written about the 19<sup>th</sup> century intellectual history of the 14<sup>th</sup> Amendment and the climate that sort of created that.

Can you sort of lay the groundwork to help us understand what was – what underpins the whole 14<sup>th</sup> Amendment?

GARRETT EPP: Yeah, I’m going to do this really quickly, even though I’m a professor – (laughter) – and just hit three points, which we can come back to if people want to talk about them.

But the first is a lot of the restrictive readings of the birthright citizenship clause keep going back to Madison and Locke, and they say, why, 18<sup>th</sup> century thinkers wouldn’t have wanted this. Maybe not.

The 14<sup>th</sup> Amendment has to be seen against the background of 19<sup>th</sup> century anti-slavery thought, which centered around one very important concept, which the scholar Jacobus tenBroek calls “paramount national citizenship,” and was summed up by John Bingham, one of the authors of the 14<sup>th</sup> Amendment as “one country, one Constitution, one citizenship.” National citizenship was the presumption and it transcended state allegiances or the social systems in the states.

Secondly, it has to be seen against the background of 19<sup>th</sup> century legal thought, in particular, and rarely do you encounter in the literature the fact that in 1866, when the Citizenship Clause was framed, birthright citizenship was already the formal legal policy of the United States, and had been since 1862, in an opinion called “Citizenship” by Attorney General Bates, that sets out basically what he understands to be the existing state of the law under the unamended Constitution, in which he says, “Every child born in the United States is prima facie a citizen, absent some overwhelming disfranchisement that can be shown.”

And the final thing is that the Citizenship Clause I don’t think can be really understood without some understanding of 19<sup>th</sup> century Indian law, because the phrase, “subject to the jurisdiction” in the Citizenship Clause is overwhelmingly a reference to the status of tribal Native Americans at that time, which was quite different from what is now. And a lot of the restrictive readings of the clause ignore that fact.

So I’ll just leave it there and come back to it.

MR. FULWOOD: Well, Elizabeth, you've written some about this too, and I wanted to sort of understand – the framers intended to enshrine this into the Constitution. Can you explain that?

ELIZABETH WYDRA: Absolutely. And one of the things that I think is most striking when you compare the debate today over whether birthright citizenship is in the Constitution or not, with the debates in 1866 when the Congress was drafting and enacting the 14<sup>th</sup> Amendment, including the Citizenship Clause, is that in 1866 there really wasn't a debate about whether or not automatic citizenship at birth would be included in the Citizenship Clause.

Both proponents and opponents of the Citizenship Clause understood that that would be the effect, but the difference was some of the members of the Reconstruction Congress considered that to be a welcome turn toward equality and voted for the clause in the amendment, and some considered it to be, you know, worrisome invitation to foreign migrants who they deemed unworthy of citizenship and therefore voted against the amendment.

And so I think when you look at the legislative history closely, there are three points that I think would be useful to our discussion today. The first is that all agree at the time, as I think indicated by the background intellectual history, that citizenship was given by birth, not bloodline, not ancestry, not by statute, but as one senator at the time phrased it, "Birth, by its inherent energy and force, gives citizenship."

Second is the – I think there's a misconception that the Citizenship Clause was just about granting citizenship to the children of freed slaves, or children born into slavery. And while that was certainly an important aspect of what the 14th Amendment was intended to do, citizenship at birth for children of foreigners was expressly contemplated by the Reconstruction Congress in 1866.

And then some of the objections to the Citizenship Clause, you know, for example, that they would give citizenship to children of Chinese immigrants in the West or the gypsy or Roma community in states like Pennsylvania, those were expressly raised on the House – on the floor of Congress and were not disputed in terms of the effect by the proponents of the Citizenship Clause but were instead embraced as sound constitutional policy.

And the final thing that I think is helpful for us to keep in mind from the legislative history is that the drafters of the Citizenship Clause constitutionalized the conditions of citizenship, rather than leave them subject to statutory revocation, precisely to take the concept of citizenship beyond the politics and prejudices of the day.

And that makes a lot of sense, particularly when you think that the 14th Amendment was passed right after the Civil War and the abolition of slavery. It would have made no sense to allow – if pro-slavery states gained power in Congress, to allow them to revoke the citizenship of freed slaves so easily if it weren't constitutionalized.

And the framers of the 14th Amendment drafted it – drafted the Citizenship Clause both to make citizenship a nonpolitical objective measure, and also to ensure that there weren't second-class citizens created by the states.

And so, in that respect – you know, it may sound a little corny but I don't think it's an exaggeration to say that the 14th Amendment really wrote into our Constitution the “all men are created equal” aspirations of the Declaration of Independence and lays the foundation for what we now think of as the American dream.

Because of the Citizenship Clause, all Americans are born equal, are equally American, whether your parents came over – you know, are descended from folks who came over on the Mayflower or came over, you know, as my father's family did in the 19<sup>th</sup> century – you know, whether they came over, you know, right before you were born, it doesn't matter. You know, whether your parents are rich or poor, saint or sinner, we're all Americans and born equal under the Constitution. And, to me, I think that's a great thing.

MR. FULWOOD: Now, Elizabeth and Garrett have talked about what happened a hundred years ago.

Jim, I want to ask you about today, in particular the efforts by some – some people even in Congress, who believe that by legislative edict, they can wipe away all of what we've just heard in terms of that history. What is the argument that Congress can find some justification for reinterpreting the 14th Amendment legislatively, maybe?

JAMES HO: Well, I don't believe there is an argument. I'll try to describe what some people say about it, but I think it is, in my estimation, quite and profoundly wrong. If I only leave one thought in people's minds as you leave today, it would be this: I don't regard this as a left versus right issue.

The issue of birthright citizenship and the meaning of the Citizenship Clause and the 14th Amendment is a profoundly universal American concept. Are there conservative legal scholars out there who are putting forth this theory that you can repeal birthright citizenship for the children of non-citizens, particularly undocumented? Yes, there is that scholarship. No question about it.

But I would like to prove that that scholarship is wrong. And in fact, what I would submit is – I mentioned this is not a left-right issue – conservatives are quite divided on this issue, and don't let anybody tell you otherwise. And I think the reason why there are a lot of conservatives who are on both sides of this issue is this: This proposal fundamentally violates three values that conservatives typically put forth.

That's the belief in textualism, that the words of a legal document matter; originalism, that you go with the original understanding of the Constitution or of a statute and not some subsequent, evolving concept; and, third, American exceptionalism, that there are just some things about America and in particular about American law that is different than from other countries, and proudly so. And I'll take each of them very, very quickly in turn.

The text, I think we've all touched upon it. The 14th Amendment says that you are guaranteed citizenship if you're born in the United States and subject to the jurisdiction of the United States. Now, to me the plain meaning of the text is quite simple.

What does "jurisdiction" mean? I think most people would think it means power. If you talk about the jurisdiction of a court, you're talking about the power of the court. If you talk about the jurisdiction of a federal agency, you're talking about the power of that agency.

There are those who say that it really means allegiance, and I've never really understood how the word jurisdiction can somehow be contorted to somehow mean allegiance. If you're subject to the power of the United States' law, all that means is you're required to follow U.S. law. That excludes people who have immunity – diplomatic immunity, combatant immunity – but otherwise covers everybody else.

So that's the textualism piece. On the originalism piece there is the argument that, well, fine, maybe the 14th Amendment meant that back then, but have you noticed we have a big illegal immigration problem? OK, that's fine. That's a policy argument. But I thought the conservatives believed that the meaning of the Constitution doesn't evolve and change depending what the present-day circumstances are. It's supposed to be fixed, and if you want to Constitution, you can. It's called a constitutional amendment.

And then, finally, as I mentioned, the American exceptionalism point, in particular those who believe that we should construe the 14th Amendment to be following what other countries might be doing violates one of the main tenets you hear in Supreme Court controversies today, which is the relevance of foreign law. I thought we were supposed to be proud of American law as being somehow distinct and special and, if different from other countries, then so be it.

MR. FULWOOD: Well, let me draw a final point now. Can Congress do anything to change birthright citizenship, in and of itself?

MR. HO: Absolutely. It can pass a constitutional amendment. It can go through the Article V process – two-thirds of both houses and three-fourths of the states.

I want to touch upon –

MR. FULWOOD: Whoa, whoa, whoa, you said – but that would take it then to the states, but Congress itself can't do it.

MR. HO: Oh, correct. Right. Right, it would have to be through a constitutional amendment.

And I think what Elizabeth said earlier is profoundly important. This issue was already debated. We've had this discussion. We had it through the 14th Amendment where we talked about not just freed slaves – actually, we didn't really even talk much in the debates about the slaves.

The main debate was about foreign nationals. And Elizabeth is absolutely right that everybody agreed that this language would cover the children of foreign nationals, other than those who have this kind of a diplomatic or other kind of immunity.

Everybody agreed on that. The dispute was whether that was good policy, but there was no dispute about the meaning of the 14th Amendment, and obviously the folks on the side of citizenship won.

MR. FULWOOD: Jim mentioned this isn't a left-right argument. Linda, you're a strong conservative voice on a lot of issues. Why is it – or do you agree with him that it's not a left-right situation? And why is it that so many conservative voices are the ones who are pushing this particular – and why are they doing it now?

LINDA CHAVEZ: Well, I think that's an important question, Sam, and I absolutely agree with Jim that this is not easily divided into a left-right issue. There are, in fact, conservatives – my colleague at the Center for Equal Opportunity, Roger Clegg, has spoken on this issue at the counterpart to the American Constitution Society, at the Federalist Society, at many legal events. So this is not something that easily divides along ideological grounds.

But you asked the question, why now? And I think Jim touched on it. There is growing frustration that has, I think, peaked and may be on its way down, but nonetheless has been quite pervasive, about illegal immigration to the United States.

There is no question that we are a sovereign nation and that we have the right to determine who comes and under what circumstances and what levels of immigration we want as a nation. I think that all of us could agree on.

But the real policy debate has been what to do about the fact that many people – we now have over 11 million people residing in the United States who have come illegally or who came legally but their visas expired. And that is, I think, what has driven the backlash. And it has been an attempt to try to come to grips with what to do about the broader issue of immigration.

Now, unfortunately, what has happened is it's sort of been taken over, I think, by the airwaves. I think this has been, you know, a very popular topic on talk radio, on cable news programs. There's lots and lots of misinformation out there.

If you ask the ordinary American today whether he thinks more illegals are coming today than 10 years ago, the average person would say yes, even though, according to the immigration service and the statistics that we gather, we're actually seeing fewer people trying to come into the United States illegally today. The peak really was 1995 to 2000.

If you ask people about the fairness question, this seems to be something that touches a chord among many conservatives, a feeling that it's simply not fair to people who go through the process to come legally for others to come in illegally, and then for those persons who come in illegally to be able to give birth to children who are American citizens.



So I think that is some of the sentiment that is driving it. Now, having said that, I think that the fact that conservatives have jumped on this bandwagon, I think Jim is absolutely right, it violates the whole idea of redefining American citizenship, violates important principles upon which conservatives have been united, and important legal principles that I think differentiate conservatives from those who would have a more progressive sort of, you know, living document kind of view of the Constitution.

And so, I think they have now gotten themselves into a bind. But there is also, I think, another issue for conservatives and for the Republican Party in particular, and that is we are seeing a huge demographic shift in the United States. The census figures came out last week. There has been over a 40 percent increase in the Latino population in the last 10 years. And, frankly, the Republican Party has been quite successful at reaching out and being able to woo Latinos into voting for Republican candidates at the national level and in some state elections as well.

And this, by the way, is not a recent phenomenon. It didn't start with George W. Bush. I've been writing about this issue for 30 years. It really goes back to the era of Richard Nixon. He was the first of the Republican presidents who had a Chicano strategy and did in fact go out and woo Mexican-American votes, and did so successfully. He got more than a third of those votes in 1972.

So, this is something that I think the Republicans are having to grapple with. Here they are essentially saying to Latinos – most of whom in fact overwhelmingly are U.S. citizens, but nonetheless may have friends, relatives and others or just general sympathy with the plight of people who have come here to work, who are contributing to the society, and who are now being demonized.

And I think the party itself has got to recognize that if it hopes to be a majority party and to maintain majority status, or even competitive status, the idea that you would suddenly redefine a whole group of youngsters born in the United States to make them non-citizens and to essentially make them stateless – it's not as if they're going to be citizens of another country – is something that will have profound repercussions on the political scene and could, in fact, really marginalize Republicans.

MR. FULWOOD: Is there a perception among the proponents on the right for revising the 14th Amendment that there is some political gain to be got – for them to earn there.

MS. CHAVEZ: Oh, absolutely. I mean, if you look at the kind of campaigns that have been waged at the congressional level, it is, I think, though, a matter of some dispute.

If you look back at the elections earlier in the decade when the issue of immigration was really very much a hot-button wedge issue in political races, by and large, if you had a candidate who favored strong enforcement for our border but some comprehensive immigration solution that would encompass market-based kinds of immigration levels, perhaps with a guest-worker

program, and that person was running against someone who was enforcement only proponent, often engaged in very anti-Latino rhetoric, the enforcement-only person lost.

And so, you know, I do think that there is a growing recognition that this is an issue that matters, but if you look at what happened in Arizona last week, this was, you know, “ground zero” in the immigration wars, and the Arizona legislature did in fact defeat a measure that would have tried to enshrine this into state law.

MR. FULWOOD: Yeah. Anyone else want to comment on that? Yeah.

MR. HO: Let me follow up briefly. There are many Americans of good faith and good will who have profound concerns about illegal immigration. So I think it’s very important not to paint with a broad brush.

And I think the reason why Americans of good faith can have concerns about illegal immigration is because they believe that illegal immigration presents challenges to the rule of law. And that’s – I mean, who can argue with that, that rule of law is a foundational, important principle?

My proposition would be this: You can’t say that you’re for the rule of law and then in the very same breath propose policies that violate our Constitution. You can’t do that. If you have a legal theory that works, fine, let’s hear it, but, candidly, I have not yet heard one that is even remotely convincing.

And so, if you take this concern – if you’re an elected official and you take this valid concern, good-faith concern, about the rule of law and you try to attach this proposal to it, I think frankly that’s – what I would say is if you’re against illegal immigration, you should be very upset about these proposals because they will sacrifice the moral ground that you’re trying to claim by championing the rule of law, and it will become clear that the rule of law really is just a sham. This is really just about disliking immigrants.

MR. FULWOOD: Garrett?

MR. EPP: Another thing I would say, following up on this, is that if you look at – I’m just back from Arizona, and talking to people who were involved in that vote, and if you look at the places where this restrictionist issue gets traction, it’s because there’s local political advantage to be had out of them.

It’s not, in national terms – I don’t think anybody – or very few people are sitting down and saying, the long-term strategy for the national Republican Party is let’s really put our fingers in the eyes of the Latino voter. But in some local districts and in some states, people perceive an advantage.

And in my judgment – and I think this holds very much with what Jim was saying, that question as far as citizenship is settled, that citizenship is not going to be a local matter. It was before the Civil War.

The 14th Amendment makes it national one rule, and that's why it's quite important to keep our eyes on the true meaning of the Citizenship Clause so it doesn't become this kind of football, because today it's Latinos; who knows what other group will be targeted in some other part of the country, which is kind of going back to the Antebellum situation.

MR. FULWOOD: Let me toss out for all of you maybe to ponder: The current debate seems to overlook or recognize that in the past, there were no illegal immigrants in the United States, or everybody was an illegal immigrant. How do you sort of reconcile that with – and the current debate seems to sort of gloss over that, or does it? Am I mistaken about that?

MS. WYDRA: I mean, there certainly are arguments that people make today that, you know, the legislative history from 1866 is not relevant because we didn't have the kind of illegal immigration problem that we have now.

And, you know, if you compare the anti-immigrant sentiment in the time of the post-Civil War Reconstruction time when the 14th Amendment was passed with some of the anti-immigrant concerns or unfounded fears that are raised now, they're very similar.

And, you know, there were significant immigrant communities – recent immigrant communities in the United States at the time the 14th Amendment was passed, and on the floor of Congress, when they were debating the 14th Amendment, there were, you know, unabashedly xenophobic statements being made. And those concerns were not allowed to be written into the Citizenship Clause.

And there were expressed concerns by those opposed to it that it would encourage, you know, waves of immigration that would overtake the United States. And, again, those concerns were not allowed to taint what we ultimately had written into the Constitution.

MR. HO: I think there's a factual response and a legal response. The factual response is there was illegal immigration. It may not be quite the same kind or magnitude that we're talking about today, but there was an illegal slave trade, there were categories of individuals who were not allowed into the country.

You know, back then we were much more of a closed open borders type country, so it's not trying to say the same thing, but factually speaking, there was illegal immigration.

But let's get to the more important distinction, which is the legal point. Basically what they're saying is originalism – what are you supposed to do in a situation – when you're faced with a modern situation that's somehow different and wasn't necessarily contemplated by the drafters?

I think conservatives typically invoke the original rule. You go back to what the text provides, and the text doesn't distinguish between illegal or legal, how much compliance you have with U.S. law or not. It's simply, are you subject to U.S. power? When you come to the United States, do you have to follow our laws? If you do, you're a citizen.

MR. FULWOOD: Yeah.

MS. CHAVEZ: Can I pick up on that for a minute, because one of the fascinating arguments is the way in which some conservative legal scholars attach this great significance to the question of “subject to the jurisdiction.”

Just sort of on a logical basis, if people who are residing in the United States without having gotten permission to do so are not subject to our jurisdiction and the jurisdiction of our laws, then we’ve just eliminated the whole category of illegal immigrants, it seems to me.

I mean, either you are subject to our laws or you’re not subject to our laws, and if you’re not subject to our laws, we, I guess, have no right to pick you up and deport you or do anything else to you. You don’t even have to, I guess, obey criminal laws or civil laws in the United States.

In fact, I mean, it is – I think – I am not a lawyer, but it seems to me I do – my background is in English – (laughter) – and I do think words matter. And, you know, “subject to the jurisdiction” seems, on its face, to be an open and closed shut, and people who are residing here, with the exception of those who have immunity, as Jim has suggested, are subject to our laws and therefore are included in that group that are conferred birthright citizenship.

MR. FULWOOD: Yes, Garrett?

MR. EPP: Yeah, the other thing I would say about the history, just following up on what Elizabeth said, is that there were analogous groups in the sense that – for example, Jim, you said we see – people see the illegal immigrant population as a challenge to the rule of law. There is this sense of the other that’s undermining our institutions. We can’t control them.

There were analogous groups that were very much present in the debates, the first being Chinese people in the West who were not eligible to be citizens. They could come in. They could work. They were – you know, the expectation was that they would go home. They were simply excluded from citizenship – a long debate about whether their children could be citizens.

And the proponents of the amendment, including the senator from California, who was himself an immigrant, said, of course they can. We mean all children born in the United States. We’re not talking about race.

And then, on May 30<sup>th</sup>, 1866, the debate enters what I call the “Lou Dobbs moment” – (laughter) – when they really bring out this terrifying prospect of, you know, you’re going to make citizens out of those people out there in the dark that we can’t keep track of.

And the senator from Pennsylvania says – he says, you know, in our state we have a certain number of people who invade our borders, owe us no allegiance, recognize no authority in our government. They have their own – a government of their own. They pay no taxes. They never perform military service. They do nothing that becomes the citizens. They have no

homes. They own no land. They go nowhere. They settle as trespassers wherever they go. I mean the gypsies. (Laughter.)

Now, my research assistants and I have walloped the archives for three years straight and we cannot confirm there was a single Roma person living in the United States at that time. There were bands of travelers probably, you know, of Irish origin, but not racially gypsies. But I think the gypsies were a kind of metonym for this same concept that we hear about on talk radio – those people out there who flout our laws.

And the proponents of the amendment very straightforwardly said – not only said, yes, of course we mean that their children will be citizens, but then turned around on Senator Cowan and said, and how someone – this is almost a direct quote – who professes such high regard for humanity and civilization could object to making citizens of these innocent children is simply beyond us. And that was the end of the debate.

So there not only were, as Jim says, you know, classes of people who shouldn't be here, the concept that we're arguing about was also present in those debates.

MR. FULWOOD: That raises an interesting question in my mind about practicality. Are we discussing something that really is fundamentally moot? I mean, if I'm hearing Jim's argument that it's settled law – you're born here; you're a citizen – is there really a danger that this is going to – that the 14th Amendment being revoked and something happening to people who are born here, is that a real practical thing that we should be worried about?

MR. HO: If your question is, if these laws are passed, will Congress strike them – I'm sorry, will courts strike them down, the answer is –

MR. FULWOOD: Will the laws be – will the laws be passed at all? I mean, are we discussing something that just can't happen?

MR. HO: Well, I'll leave it to political analysts to determine whether there's a chance in Congress or in some of these states that this legislation will be passed, but if the question is, once these laws are passed, will they be struck down in court, my answer is yes. I think it's –

MR. FULWOOD: You're convinced of that?

MR. HO: I'm convinced of that. I'm convinced of it as a textual matter. I'm convinced of it as an original matter. I'm also convinced of it as a Supreme Court precedent matter.

Certainly lower courts would have, in my opinion, no authority whatsoever to revisit the question because the U.S. Supreme Court has actually already dealt with this issue, first in the Wong Kim Ark case, which the proponents on the other side will say is only limited to lawful permanent residents, but even if you accept that view, one, it is the reasoning of the case that matters, and, two, that that reasoning was extended to undocumented, through Plyler versus Doe and other cases.

MS. CHAVEZ: Well, I think there is some hope on the part of conservative legal scholars that if they were able to get a case before the Supreme Court that, given the composition of the court, they would see a divided court, and that they would win the day.

I think that is positively Pollyannaish, crazy thinking. I will go out on a limb here. I would be very surprised if a case came to the Supreme Court, that it were not decided 9 to 0. And I just – you know, I do not think that there – for all the reasons that have been stated here – that there is any basis on which a conservative justice of that court can look at the 14th Amendment and decide that it excludes children born in the United States to people who do not have immunity to our laws.

MR. FULWOOD: Yes?

MR. EPP: I have a slightly different concern because I tend to agree that in the long term, this legal point is not going to change. The Citizenship Clause will continue to mean what it means.

But Samuel Johnson said, reason is by degree as accustomed to absurdity as the eye is accommodated to darkness. And I think there is a corrosive effect to what I regard as a fundamentally deceptive or misleading debate about constitutional interpretation generally and the 14th Amendment in particular.

And as Elizabeth said, the 14th Amendment is the place where human equality makes its first appearance in the Constitution. Previous to that, it was not textually anchored. And we are seeing, you know, what I call 14th Amendment denial in a fairly wide context. This is kind of the tip of the spear at this moment. But over and over we're being told, the 14th Amendment is very limited; it only meant freed slaves; it only meant a few rights for freed slaves.

And, you know, Senator Pearce of Arizona says, the 14th Amendment was only intended to give respect to African-Americans, which I think is almost the ultimate denial in the sense that not only does it only mean black people, but it's really just a kind of tip of the hat to them. It doesn't have any effect. It's just like, hey, guys, you get your own amendment. That's nice. (Laughter.)

So, I do think it's important to try to focus the constitutional dialogue a little more strongly on these values that are in the amendment, both as a matter of text and, I think, as a matter of history, because otherwise the debate just I think becomes unmoored in a way that's very ominous.

MS. WYDRA: I think that that's an extremely important point. I mean, this is an argument that should be moot. We shouldn't have to be here today talking about this. But I think it's extremely important that we do because, as Garrett said, there is this debate that sort of – in which some folks have selective amnesia about the amendments that were passed to the Constitution that enshrined basic equality and that gave the federal government the power to enforce that equality.

And so, I think it's extremely important that we continue to push back against limiting interpretations that are not founded in the text of history of the Constitution.

MR. FULWOOD: Yeah.

MR. HO: Let me just say at least one thing for folks on the other side. I think, to me, the most powerful argument that I hear – and I try to be fair to every argument that I hear – is, look, you know, you have one theory of the 14th Amendment, we have another. You say Wong Kim Ark but that doesn't apply. We don't agree with you on Plyler versus Doe. The bottom line is we just want our day in court.

Well, who can argue with that, right? Who's not entitled to their day in court? What I would say to people who believe this is this: If that's what you want, then maybe you do a federal statute and take a shot, but you should emphatically not do the state strategy, and let me tell you why.

If you do a state law – Arizona, Oklahoma – what the lawyers on the other side will do is – it's very simple. The very first thing you will say – the first part of your brief, if you will, won't even talk about the 14th Amendment. It will talk about the Supremacy Clause.

I don't think it takes a constitutional scholar to appreciate that you cannot have 50 different state laws, 50 different state definitions of what it means to be a U.S. citizen. It can't be that I'm a citizen in Texas and I travel to Arizona and all of a sudden I'm not a citizen.

So, frankly, I think courts will strike this down. If it's a state law, they'll strike it down on Supremacy Clause grounds. In other words, you will not get your day in court. You will not get a 14th Amendment interpretation because the courts won't have to do it.

And so the entire process, the entire project I think seems doomed to failure on their very own terms.

MR. FULWOOD: Can you be a citizen of the United States but not the citizen of a state?

MR. HO: Not after the 14th Amendment. The whole premise of the 14th Amendment was to basically abolish this notion of dual citizenship.

MR. FULWOOD: Why are they, in the state houses, even attempting it if it's so clear to you?

MR. HO: The honest answer is I don't know. (Laughter.) What I have heard is – you know, I think in sort of more candid folks that I've heard with folks is, we need something to rally people around.

MR. FULWOOD: Ah, politics then.

MR. HO: There is a political movement – it is a political movement. It’s an energizing movement. If we get states to do it, then that will motivate Congress and then we’ll start to get some action.

MS. CHAVEZ: It is, Sam, also – and I’ll be very blunt here – a terrific fundraising tool for some of the organizations that are pushing this. It’s the kind of thing you can go into the direct mails on and you can raise millions of dollars on, and it feeds a broader agenda.

You know, driving in this morning I listened to Dan Stein from the Federation for American Immigration Reform. They are now sort of jumping on this bandwagon, are out there. They’ve got perhaps a little split with the Center for Immigration Studies, which is their research arm, founded by the same people and lots of cross-fertilization that go on between those organizations.

Mark Krikorian has been – who heads CIS – has been a little bit more reticent to engage this. But the fact is there are those who want to change – fundamentally change what it means to be an American. And in groups like FAIR, their real objective is to not just eliminate illegal immigration in the United States; they want very draconian restrictions on legal immigration.

The organization was founded by somebody who believes not just in zero population growth but in negative population growth. They would like to return the United States to a country comprised of a population about half the size that it currently is.

That means we don’t just deport those 11 million illegal immigrants. That means one out of two of each of you had better find someplace else to live. (Laughter.)

MR. HO: I’m out of here. (Laughter.)

MS. CHAVEZ: I think you and I are both goners.

(Cross talk.)

MR. EPP: – Italy.

MS. CHAVEZ: I don’t know what other country will have me. (Laughter.)

MR. FULWOOD: I asked earlier about why now, and nobody mentioned – so I’m going to sort of put it out there – the Census Bureau is talking about the changing demographics of the country. Is that driving the fact that we are rapidly moving toward a majority/minority nation in population we think within maybe the next 40 years or so. Does that add fuel to this idea of who is a citizen and what a citizen would probably look like?

MS. CHAVEZ: Well, here I’m going to say something probably that many people in this room will disagree with me on. I have been, for 30 years, documenting the assimilation of Hispanics in the United States into the American mainstream. Hispanics intermarry at more rapid rates than immigrants of earlier immigration cohorts did.



So this idea that we're becoming a majority minority nation, if you look at the census data that was released last week, a majority of Hispanics in the United States, when asked their racial classification, check the box "white." They do in fact move up economically. They move into the middle class. They improve their education. And they eventually intermarry with non-Hispanic whites.

So this idea that children like my grandchildren – you know, I am the product of a father whose family came here in 1601 and a mother whose family came here from England in the 18<sup>th</sup> century and from Ireland in the 19<sup>th</sup> century.

I married a Jewish man whose grandparents came mostly from Russia and Poland. I have three sons, two of whom are married, one of whom married a girl who is mostly Scots Irish. The other married a girl whose mother was from Ecuador and whose father was from Cuba.

My grandchildren range from fair-haired, red-headed, green-eyed little boys to little girls that look very much like me. They are all considered Hispanic, but I would really venture to say that if you were to put them out here, you would be very hard-pressed to see that they were very much different than any other group.

MR. EPP: Sam, I also think, historically, if you study American immigration history, the United States has always been on the verge of becoming this other place in which the real Americans would be outnumbered.

The first time this pops up is 1798 when the Alien and Sedition acts were passed and people were saying, my god, who are all these French people in here. (Laughter.) They're radicals. They're going to change the language to French. We've got to get them out.

So that – I think – you know, I agree with you. You know, I think that that perception of this, you know, historic quantum change in American life is probably – not that people don't feel it and it doesn't power this, but I think it's overdone.

MR. FULWOOD: Yeah.

MR. HO: Just to follow up on what Linda said, on a purely personal note, my wife and I are about to have baby twins, and we'll promise to report back what they look like. (Laughter.)

MR. FULWOOD: OK, on that note, I'm very eager to sort of turn the tables around and throw the floor open to you for questions.

Do we have a microphone? OK.

Q: I was born in the USA and I am a disenfranchised citizen of the USA. I am not a citizen of a state. I have no representatives in Congress. (Laughter.) I live a few blocks away from here. (Applause.)

MR. FULWOOD: Comments? Suggestions?

MS. WYDRA: I feel your pain.

MR. EPP: I live here too.

MS. WYDRA: Me too.

MR. EPP: It sucks.

Q: Hi. This was a wonderful discussion.

I have a question about sort of the American exceptionalism, and I'm just wondering if – deep in the recesses of my memory when I studied comparative law in law school, we learned a little bit about jus sanguinis and jus tertius and, you know, sort of the role of whether blood or territory determines citizenship, and European countries obviously follow different models.

The Germans are by blood. I think they've modified that to some extent. And other countries do it differently. And I'm wondering, did that play into, at all, the debate about which model we follow, the Romans or something else?

MS. WYDRA: I think that's a great question. And, you know, absolutely the idea of citizenship by blood, jus sanguinis, is, you know, kind of contrary to the very being of America and, you know, the ideals that we profess as Americans.

And so, it makes sense that Americans would follow the jus soli, or law of the soil idea that no matter, you know, what bloodline you come from, whether your – you know, your ancestors don't have to be aristocracy.

Even to be president, our Constitution just says you have to be a natural born citizen. And some people have problems with that but, you know, at least it doesn't specify a particular class or aristocracy to be the leader of the United States.

And I think that gets to the idea behind the 14th Amendment, which we still cherish today, is this anti-caste idea, this American dream that you can come here and make your own way. And that is part of the objective, ascriptive nature of our citizenship, that it's based on this objective measure of birth on U.S. soil and subject to U.S. law, not on jus sanguinis, or law of the blood.

MR. FULWOOD: Garrett?

MR. EPP: In the 1862 citizenship opinion, which is part of the background of the 14th Amendment, Attorney General Bates addresses this issue very directly, and he says, "It is an error to suppose that citizenship is ever hereditary. It never 'passes by dissent.' It is as original in the child as it was in the parents. It is always either born with him or given to him directly by law."

So, in the air was a repudiation of this idea that there was some birth blood quantum that made you an American citizen, I think.

MR. HO: I think this is a great point about American exceptionalism. There is no question there are other countries that have a different rule. There is no question that there are other countries that have had our rule and departed from this rule. The question is, what's the American rule?

And, you know, I'll speak, you know, as somebody who is Taiwanese by birth but Texas by marriage. Texans care about where you were born. (Laughter.) This is a profoundly American principle.

MR. FULWOOD: Right here and then right there.

Q: Yeah, along those lines, I'm just curious, what is the constitutional basis of acquiring citizenship if you're a child born outside the United States of American parents, in the military for instance?

MR. EPP: It's statutory.

MR. HO: Yeah, it's statutory. You would not – if I understand your fact pattern correctly you would not be constitutionally guarantee citizenship unless you were naturalized. It depends on your status. If you're naturalized in the United States or born in the United States, you would.

If you're outside, you would not fall within the 14th Amendment but you would fall within Article I, Section 8 of the Constitution, which gives Congress the power to pass laws to provide citizenship above that floor known as the 14th Amendment.

MR. FULWOOD: Yes, sir?

Q: Yeah, Charlie Ericksen with Hispanic Link News Service.

I'd like your reactions on dual citizenship and if – do you believe that such a thing should be allowed, and to become a U.S. citizen, must you reject any past citizenship or any – or to be allowed to have dual citizenship?

MR. FULWOOD: Good question.

MS. CHAVEZ: Well, I will take that on because my guess is that there will be people on the panel who will disagree with me on this.

I am not in favor of dual citizenship. I do think that it is important to have primary allegiance to one country, and so I have opposed and continue to be unpersuaded by arguments in favor of dual citizenship.

MR. EPP: I do think it's a matter for Congress, though. I don't think the 14th Amendment –

MS. CHAVEZ: Right.

MR. EPP: – settles it one way or another. Congress can make, as a policy judgment, the decision that they want to permit or don't want to permit dual citizenship.

MR. FULWOOD: What's the current state of law?

MR. HO: Just to follow up on that, it's a policy stamp issue, except that there is the constitutional floor.

MR. EPP: Yeah.

MR. HO: And I know you don't disagree with that, but the 14th Amendment doesn't say you're guaranteed if you're subject to the jurisdiction of the United States, and, by the way, you're not a citizen of another country.

MR. EPP: Right.

MR. HO: That is not in the 14th Amendment. If you want to add it, you have to pass a constitutional amendment.

MR. FULWOOD: I think there was a fellow over here.

Q: I came down here a little bit worried. There were 68, I believe, members of Congress who signed onto legislation which will do away with birthright citizenship. And I've discovered that there's no difference on this issue between left and right. And if only people of good will would speak directly.

It seems to me there is actually something out there we should be worried about, and this panel seems to be so unanimous that I shouldn't worry that I'm kind of worried. (Laughter.)

MS. WYDRA: Well, I think you – you know, as I said, we shouldn't have to be worried, but I think we should be worried and pay attention. You know, there are prominent folks who are pushing this line, as you mentioned, in Congress: the speaker of the House, the Senate minority leader.

So, you know, while the folks on this panel are certainly united on what the Constitution says and means, you know, I do think it's important to be informed about all of these issues and to push back whenever you can against those folks who perhaps are either misinformed or misusing information.

MR. EPP: Yeah, I worry about it too, and I would encourage people to worry about it in this sense, because I tend to agree that as a forecast of positive law, I think Jim's nailed it right on the head. The court is not going to go along with this.

But this is a debate about the meaning of American citizenship. What does it mean to be an American? And I think we all need to engage with people who want to narrow that definition, who want to give it a kind of essentialist vision that is contrary to what we have had in this country.

We ought to engage with them on the broad terms of our history and the values embodied in the 14th Amendment, and that's a debate worth having, whatever, even if it's going to be 9 to nothing in the Supreme Court, which, from your lips to God's ears, I hope it would be.

But we still – you're right to worry. Please worry, and pick up the phone and do something about it.

MS. CHAVEZ: Let me just pick up on that because I think that, you know, we have sort of made this appear as if there are only those on the right who are pushing this kind of agenda.

In fact, I think where we are today is, in large part, a backlash and a reaction to a very different conceptualization of what it meant to be an American that was out there being promoted in progressive circles in the 1980s and 1990s, the idea that we weren't really one nation and one people, that one could retain one's loyalties, one's language, one's affinity to one's national origin group in the public square – there's no question you can do it in the private square – that we should become a multilingual nation, that there really wasn't any such thing as an American character, and that one could not define what it meant to be an American.

I think a large part of the reaction that we see today was a kind of pushback against that notion. And I am very pleased to see that those on the progressive movement now do not treat the word "assimilation" or "acculturation" as the kind of dirty word that it was treated as in the 1990s. So I think – you know, I think there's some blame to go around for how this issue has been fomented –

MR. HO: With all due respect, though, I don't think that's an accurate interpretation. I think that's the way in which the right characterized what the left was saying. No one has ever sort of put forth the idea that it was not something to be American.

In fact, from my point of view, that was the highest thing that you wanted, was to be included in America when America didn't want you. So I don't think that that's an accurate assumption.

MS. CHAVEZ: Well, but there were in fact efforts to teach the children of immigrants, and even those children who were born here in the United States in a foreign language, in Spanish. When my children entered the public schools of the District of Columbia, my son Pablo was enrolled in bilingual education.

I speak almost no Spanish and he spoke not a word of Spanish. But, because of the policies of that era, there was an attempt to try to kind of reinforce an ethnic identity that was, in fact, distinct. And I think that was where some of this foment began.

MR. EPP: Can I just return to the gentleman's question, though, because – just speaking personally, I am profoundly worried, first of all from a legal standpoint. You know, I'm a litigator. No litigator wants to promise what a court will do. I feel good about our arguments. I think they're stronger than the other side's. But, you know, I'm not going to promise you a particular outcome.

But, even more, putting aside the legal worries, I'm profoundly worried on a cultural level. I'll go back to what I said earlier. There are Americans of good will who have good-faith concerns about illegal immigration. But there are a lot of tools that are available to deal with illegal immigration. There's comprehensive immigration reform. There's enforcement only. There are legitimate tools at least that we could talk about from a constitutional standpoint that are legitimate.

With all that's available, why talk about something that is, in my view, a complete waste of taxpayer money, because I would hope that the courts would strike it down, but beyond that, an affront to the rule of law and reopening the scars of the Civil War. It's the cultural corrosiveness that Garrett talked about that I think worries us all.

MR. FULWOOD: There's a fellow there that's patiently waiting.

Q: Do you see any parallel between the proposals to restrict birthright citizenship and the Nuremberg laws of 1935, one of which stripped German Jews of their German citizenship?

MS. WYDRA: I mean, I think that historically there, you know, is certainly a concern – at the time the 14th Amendment was passed, it was a concern that the citizenship of freed slaves could be revoked if it weren't secured in the Constitution.

So, you know, Senator (sic) Hotchkiss, for example, in the 1866 debates, said, you know, it's important to have citizenship enshrined directly in the Constitution so that it couldn't be taken away by legislation.

So it didn't matter which groups were popular today or unpopular tomorrow, that the Constitution was clear about who could and would be a citizenship, and they didn't have to win a majority vote, they didn't have to be popular. You simply had to be born here to be a citizen.

MS. CHAVEZ: I do think also – and this is a question I'd ask either Garrett or James or you, Elizabeth – those who are so concerned about illegal immigration, if in fact we were to revoke birthright citizenship, and if it came to the court and I'm wrong and we got a split decision and they interpreted this amendment differently than all of us think they should, I guess it would raise the question, what about the 3 million children who are currently here, born on U.S. soil, who are now presumed to be citizens?

What would that do, and would we not in fact, you know, increase our illegal immigration – our illegal immigrant population by that many more persons?

MR. EPP: Yeah, I'd like to say – you know, I try not to go for the Nazi analogies first because I think they kind of make it hard to differentiate nuance. And I don't think – as someone who grew up in Richmond, Virginia within two blocks of the statue of Robert E. Lee, I don't think we need to go there. We need to go to our own history, which is where this comes from.

And I think if you look at the purpose and the function of the three Civil War amendments, it was to do away with the institution and legal heritage of chattel slavery in this country, chattel slavery being an institution that was hereditary, lifelong and hierarchical, that guaranteed you and your children a subordinate status by law.

It is unimaginable to me that we would want to reinvent that kind of life-long hereditary, inborn subordinate status in this country because of our own history. We know where that ends up. It doesn't end well. And so that's what I would focus on rather than talking about Germany.

Q: If the 14th Amendment seems all right, or at least it looks like it is very difficult to be challenged, I wanted to hear your opinion – any of your panelists' opinion – whether or not there is a need to reform our immigration system. If we do need to reform our immigration system, how?

I can give – I want to give you an example. I'm from China, and right now there are a lot of wealthy Chinese. They would like to pay several thousand dollars to spend a couple of months in the United States, particularly in the West Coast, California, Los Angeles, to give birth to a child here in the U.S. And automatically their children get U.S. citizenship. And they think that is a very good investment.

How would you – I would like to hear your comments on that phenomenon, people coming here legally but they want to take advantage of this system.

MS. WYDRA: Well, I think – thank you for that question. You know, and I'm glad to have the opportunity to address that because there was a New York Times story a couple of days ago about that precise issue.

And, you know, particularly by giving it national prominence, it makes it seem like it's this, you know, widespread problem, and I have not seen any data to suggest that this is something that is a widespread problem or that a lot of people are doing this.

And certainly, you know, there are some people who, you know, are going to the San Gabriel Valley, which, you know, if I were going to California, which is where I'm from, that's not where I'd go, but whatever. (Laughter.) You know, people break the law all the time, and, you know, from what I understand, is that this is an isolated problem.

And certainly the immigration system needs to be reformed, but I don't think that birth tourism is a major problem within the immigration system. And, moreover, I find it somewhat

preposterous that people put forth the idea that people immigrate here to give birth to children in order to get citizenship for themselves.

That's like a long-term, really well thought out and committed plan, because you have to wait and – you know, you can't petition to bring your parents in until you're 18. You know, even then it might not happen. So, you know, that just doesn't make any sense.

People – you know, there are other people who can speak to this probably more than I can, but I think the data shows that people immigrate here mostly for economic reasons, to be part of the American dream that we were talking about. And so, I don't think this – you know, this whole giving birth in order to get yourself citizenship, I don't think it's really at the heart of what is broken about our immigration system.

MR. FULWOOD: Yeah.

MR. EPP: I think one of the triumphs of the nativist movement, if I can use that term, over the last 20 years, is the term “anchor baby.” Brilliant, whoever thought of that, because it contains, you know, so many errors that you can't combat them all, the first being that a baby is an object.

In other words, instead of – this is about the citizenship of children who have done nothing wrong. But you turn the child into an object and then you focus on the parents, who are supposedly tethered by this object.

And Lou Dobbs ran a poll once that said, do you believe that illegal aliens who come here and have anchor babies should get automatic citizenship? And 93 percent of the people said no. Well, because the fact is, that's not how it works, as Elizabeth said.

MR. HO: Ninety-three percent of the people who watch Lou Dobbs. (Laughter.)

MR. EPP: Yeah, a representative sample.

MR. HO: I'm sorry; I just had to say that.

MR. EPP: Right. But, I mean, who would answer yes, right? I wouldn't answer yes.

But the fact of the matter is, I don't think this is really, you know, the condition that should be driving the debate, that what's much more important is the growth of a shadow population within our borders, which we're already in the midst of, of people who have fewer rights than everybody else because they don't have legal status. This is, I think, much more dangerous than some small number of babies being born here to rich foreigners.

And the final thing I would say is, I would like to relate your question to the question about should we be worried, because the fact of the matter is that all the time we spend talking about the 14th Amendment and the Citizenship Clause and Senator Pearce and everything is time we take away from what we really need, which is comprehensive immigration reform.



Our politics are broken on that level and we need to focus our efforts on getting that back on track, because I don't think anybody says the current situation is great.

MS. CHAVEZ: Can I just say something on comprehensive immigration reform? If people who are concerned about illegal immigration were really serious about solving the problem, it would be easy to fix.

We might not be able to eliminate a hundred percent of people who are going to cross the borders without permission, but in fact, if we have market-based immigration reform that allowed people in based on our needs, our national interests, and our economy, the flow would, in fact, of illegal immigrants, would decline.

We saw it during the Becerra (ph) program. You had at the time the Becerra program was enacted approximately a million Mexicans were coming into the United States at a time when our population was a fraction of what it is today.

It was a much bigger problem then than it is today. When the Becerra program was passed, illegal immigration from Mexico declined to about 100,000 a year. So, we could fix this if we could get beyond the kind of divisive rhetoric in politics.

Q: Following on his idea of including parents in the conversation, as you said, this could be an isolated situation, but it would be also an isolated item in the whole problem just considering children, because from my perspective, a family is the heart of society.

So, if you're separated from your children since they're born, legally and eventually geographically, then we will have to consider giving citizenship to parents too, because then you're giving the right to these children and immediately you're separating them from their parents legally.

But the other side of it is giving citizenship to parents would be enforcing – or encouraging people to come and do that, as you said.

MS. WYDRA: I mean, I think what happens, you know, more frequently is that American citizen children who are born here are constructively deported when their parents are removed back to their country of origin.

So, that's my understanding of how it – I don't think it generally works the other way. So, to keep families together, essentially you have constructive deportation of birthright citizen children.

MR. FULWOOD: I think I saw one person back there, and then we're going to thank our panel.

Q: Thank you. I just had a quick question about how you saw public benefits, and particularly the health care debate that's going on right now, the health care reform debate that's

going on right now, playing into or feeding into this discussion of birthright citizenship and whether we should repeal the 14th Amendment. Obviously citizenship comes with it, a lot of benefits and entitlements.

And I've heard some conservatives argue that, well, citizenship means a completely different thing these days than it did in 1866. And I was wondering if you could just comment on how to combat that kind of argument, particularly taking a historical perspective but also a legal perspective. Thank you.

MS. WYDRA: Well, I think that's a great question that gets to the sort of "why now" issue as well. And something that you see in common with the citizenship debate and health care reform debate is some folks using the Constitution as sort of a weapon, and often very incorrect, ahistorical use of the Constitution as a weapon.

And that's why I think events like this are extremely important, so that misinformation cannot be taken as fact. I mean, sometimes I hear these things, and I'm sure there are disagreements on the panel about this, where folks are talking about the Constitution and health care reform, and I'm thinking, you know, you're talking about the Articles of Confederation and health care reform, you know, but I'm sure we have different views on that.

But I think that gets to a "why now" point, and that that's – it goes from arguing about, you know, OK, look, if you want to have a discussion about benefits, you know, there's a certain sphere of that that's policy and not constitutional, but when the Constitution gets brought in, I think it both whips up sort of emotions which can be dangerous.

And it also, you know, has been used in this current debate and recent election, the recent congressional election, as a tool to make these policy points seem more grounded in history and texts when I really don't think that they are.

And I think as we've all discussed today, the Citizenship Clause in particular is extremely clear as a constitutional matter and is not – you know, really, the debates about, you know, certain policies and whether, you know, health care reform benefits should go to certain undocumented groups or not is really not a constitutional question in a certain respect.

MR. EPP: The other thing I think that is – this is because I study things historically; this may be a little mischievous but it's fun to play with – is the idea that somehow we now have welfare – social benefit programs and such that were completely unforeseen in 1866 and therefore we have to rethink.

The fact of the matter is that the 39<sup>th</sup> Congress, which passed the – which proposed the 14th Amendment, wrote the Citizenship Clause, also created and expanded the first social welfare – comprehensive social welfare program in the history of the United States, which is – when you go back and read about the Freedmen's Bureau, which was intended to reach out in a kind of – you know, it's like – you can't believe it. It's so anachronistic. You think, this must be a joke. People in the 19<sup>th</sup> century couldn't really have thought of a welfare agency like this.

And so, we have a tendency to look back – you know, I don't think that – I'm not saying that proves anything in terms of the meaning of the Citizenship Clause. I think it shows us that we have a tendency to look back and see history as much different – much more different from where we are now than it really is, that there is a continuity of institutions, a continuity of concepts, and that to say, oh, things are totally different today –

You know, this goes back to what Jim said. It's like, well, the framers, you know, they didn't really know what they intended, because if they had known what we know, then they would do it – you know, the continuity of concepts between us and the people who thought about the Citizenship Clause is much greater than people are liable to think.

MR. FULWOOD: On behalf of the American Constitution Society and the Center for American Progress, I want to thank our panelists. Let's give them a round of applause – (applause) – Linda Chavez from the Center for Equal Opportunity; Garrett Epps, professor of law at the Baltimore School of Law; James Ho, a partner of Gibson, Dunn & Crutcher; and Elizabeth Wydra, chief counsel of the Constitutional Accountability Center.

Thank you all for being here for a fascinating conversation.

(END)