LABOR AND EMPLOYMENT PANEL
ARIZONA V. U.S.: IMMIGRATION POLICY AND THE ECONOMY*

Panelists:
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H. Christopher Bartolomucci, Partner, Bancroft PLLC**;**
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Moderator:
Judge Stephen F. Williams, U.S. Court of Appeals, D.C. Circuit

I. Introduction

JUDGE STEPHEN WILLIAMS: I'm going to very briefly—very briefly introduce our four panelists who are lined up in the order in which they will make their initial talks. You have, on the website, access to much more elaborate description of their careers so there's no need for me to do more than this very brief summary.

Working in the order in which they will appear, I start with Chris Bartolomucci, who

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is a partner at Bankcroft, the firm which represented Arizona in *Arizona v. United States*. He's been in the Solicitor General's Office, clerked for Judge Garwood on the Fifth Circuit, and has an illustrious array of important cases that he has argued, and many won.

Margaret Stock, the next speaker, practices immigration and citizenship law and is a retired lieutenant colonel in the military police. She is a member of the American Bar Association Commission—was a member, I'm sorry—Commission on Immigration from 2008 to 2012, and has been an adjunct professor at the Department of Political Science at the University of Alaska, and many other distinctions.

John Eastman was dean and is a teacher at Chapman Law School in California. He is the director there of the Center for Constitutional Jurisprudence. He clerked for Judge Luttig, when Judge Luttig was a judge, and also for Justice Thomas. He practiced with the law firm of Kirkland & Ellis.

Ana Avedaño is president and director of the Immigration and Community Action at the AFL-CIO and has been the United States Worker Representative to the ILO.

So, as I said, you can get much more detail on these distinguished people from the website; and so I invite Chris to start. The basic idea is they will run for six to eight minutes. Then we may have an interchange among panelists, and then I hope provocative questions from the floor.

II. Section 2(B) of the Arizona Law and the Preemptive Issues

CHRISTOPHER BARTOLOMUCCI:

Arizona v. United States, I think it's fair to say, would have been the most important case of the Supreme Court term but for this little case about the health care system in America. Despite being overshadowed in that way, the Arizona case presents very important questions about the scope and limits of state authority to deal with illegal immigration. As Judge Williams indicated, my firm and I represented Arizona in the Supreme Court in that case, and so I bring that perspective to the table.

The magnitude of the impact of illegal immigration in Arizona was not in dispute during the litigation. Arizona has a 370-mile-long border with Mexico and it's estimated that one-third of all illegal border crossings occur in Arizona. An estimated 400,000 unlawfully present aliens are to be found in the state of Arizona, comprising 6 percent of the state population. By one estimate, criminal aliens make up 17 percent of Arizona's prison population, and in Maricopa County, the county that includes Phoenix, 22 percent of felony defendants are unlawfully present aliens.

I think one of the most dramatic pieces of evidence in the record dealt with signs, highway signs, that can be found just 30 miles south of Phoenix, and these signs are somewhat alarming. They say "Danger. Public Warning. Travel not Recommended. Active Drug and Human Smuggling Area. Visitors May Encounter Armed Criminals and Smuggling Vehicles Traveling at High Rates of Speed." This is just 30 miles south of Phoenix. Are these signs put up by Arizona to make a political point? No, these are signs posted by the federal government.

In terms of the legal question, I think at the outset it would be fair to ask, you know: why do the states have any authority to regulate immigration since Article One, Section 8 of the Constitution assigns to Congress the power to establish a uniform rule of naturalization? But here a distinction must be made. The federal government has exclusive authority to regulate immigration, meaning the determination of who may or may not enter the country and who must leave the country. While states have no authority to decide who may stay or who must go, they do have some authority to regulate unlawfully present aliens within their borders.

In fact, this was established long ago in a 1976 case called *De Canas v. Bica.* The Supreme Court, in a unanimous opinion written by Justice Brennan, wrote that, "The Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se preempted." The Court in that case sustained a California law that regulated the employment of illegal aliens.

So the Arizona immigration law known as SB 1070 does not regulate immigration itself; it regulates unlawfully present aliens in Arizona. Arizona enacted the law in response to what it perceived to be insufficient federal enforcement of the federal immigration laws. The United States government sued Arizona, claiming that its law was preempted by the federal immigration laws.

By the time the case got to the Supreme Court, four provisions—four separate provisions of SB 1070 were at issue and the Court rendered a split decision on those provisions. The Supreme Court said that three out of the four were preempted, although the one that it upheld was widely considered to be the most important provision and certainly the one that garnered the most public attention. The one that was upheld was known to its critics as the "show me your papers" provision.

This is Section 2(B) of the Arizona law. Section 2(B) says that when Arizona law enforcement officers have reasonable suspicion that a person they have lawfully stopped, detained, or arrested is an unlawfully present alien, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person by checking with federal authorities.

The law includes several safeguards. First, a person is presumed not to be an unlawfully present alien if he or she has a valid driver's license or similar ID.

The law says that Arizona officials may not consider race or national origin in implementing Section 2(B) except to the extent permitted by the United States and Arizona constitutions. Third, the Arizona law states that Section 2(B) must be implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons.

The United States argued that Section 2(B) was preempted essentially because the United States did not want the state to call Department of Homeland Security whenever an Arizona officer found an unlawfully present alien. The United States argued that the problem with 2(B) was that it required state officers to inquire about immigration status whether or not the inquiry was in sync with the federal government's separate enforcement priorities.

So the government's position was that while it was fine for an individual officer in appropriate circumstances to make a report to the federal government about a suspected illegal immigrant, it was preempted, the government argued, for a state to have a mandatory statewide policy such as the Arizona law.

Well, this argument didn't fly well in the Supreme Court. In fact, at oral argument Justice Sotomayor said to the Solicitor General, quote, "Your argument that systematic cooperation is wrong. You can see it's not selling well. Why don't you try to come up with something else?"

Well, when Justice Sotomayor tells you that your argument is not selling in this case, your argument's in trouble, and indeed it was. So the Court actually held unanimously by an 8-to-0 vote—Justice Kagan was recused—that Section 2(B) was not preempted. The Court concluded that Congress would not view 2(B) as an obstacle to the achievement of its objectives in the immigration area.

And no wonder. I mean, Congress created what's known as the Law Enforcement Support Center, which is operated by the Department of Homeland Security ("DHS"). The whole reason the LESC exists is to provide immigration status information on particular individuals to federal, state, and local officers on a 24-by-7 basis.

Multiple federal statutes authorize, expressly, state officers to communicate with DHS about suspected illegal immigrants, and in turn require DHS to respond to such inquiries. For example, 8 USC Section 1373(c) says that federal immigration authorities "shall respond to an inquiry" by a state agency seeking to verify or ascertain the citizenship or immigration status of any individual within its jurisdiction. There are other statues in federal law to the same effect.

It's hard to say, I think, that Section 2(B) frustrates federal enforcement priorities because all that Arizona officials can do is make a report. Arizona can't make the federal government take or do anything to an unlawfully present alien when the federal government has no interest in taking action as to a particular individual and can simply tell Arizona to let that person go. Now, it may prove embarrassing to the federal government if it ends up telling Arizona to release a large number of unlawfully present aliens, but all that Arizona can do is call the federal authorities. Then it's up to the federal government to decide what to do with them.

We are operating under strict time limits here so I will just briefly mention there were three other provisions of the Arizona law that were held to be preempted. One imposed state law criminal penalties for violations of the federal law dealing with registration and carrying of registration papers. A second preempted provision imposed penalties on aliens for working or applying for work, and there was a final preemptive provision that dealt with the authority of state law officers to make warrantless arrests. There is continuing litigation about similar laws enacted in other states, and maybe we will have time to get into that in the question-and-answer period.

III. The Five Myths Surrounding DACA and its Political Significance

PROFESSOR MARGARET STOCK:

In the panel description we talked about the fact that the Obama administration has recently started a new policy initiative that relates to *United States v. Arizona*. In fact, it's probably constitutional because of something the Court said in *United States v. Arizona*. I'm not going to directly discuss in my opening remarks the case of *United States v. Arizona* because I think Chris has done a really good job of explaining it to you. They went up on four counts. They lost on three. One of them is back now for the as-applied challenge, so it's probably going to go up to the Supreme Court again. Please don't lose your notes, Chris because I think they're going to need you on the as-applied challenge.

What I've been asked to do is discuss the Obama administration's recent initiative known as Deferred Action for Childhood Arrivals, or DACA. In the short time that I have I'm going to address the five myths surrounding DACA, followed by a brief mention of its political significance.

The first myth that I want to tell you about is the myth that the Obama administration issued an Executive Order. This has been repeated *ad nauseum* by a multitude of media outlets and it's just not the case.

The only thing that happened was that the Secretary of Homeland Security issued a memo, an internal policy memo, which was immediately released to the public, directing subordinate agencies of the Department of Homeland Security to take certain discretionary actions on a case-by-case basis with regard to a certain discrete population of people present in the United States and in Arizona in large numbers who were young people under the age of 31 on the date the immigration memo was issued, who met certain educational requirements, did not have significant criminal records, and who were willing to come forward, get fingerprinted, tell all to the government, and pay a substantial fee, in exchange for which they would simply have their deportation deferred for a period of two years and they would get a work permit. So it was not an Executive Order.

The second myth: people have said this was an enactment of a famous law called the DREAM Act, the Developmental Relief and Education Act for Alien Minors, a bipartisan bill that's been kicking around for 10 years. It used to be bipartisan. It was a product of Orrin Hatch and Richard Durbin way, way, back when. The landscape has shifted. It's no longer seemingly bipartisan, although in recent days that landscape may be changing once again; but the Obama administration's initiative was not an enactment of the DREAM Act. The President obviously cannot enact a statute on his own and President Obama didn't actually do anything; it was the Secretary of Homeland Security who gave this discretionary relief.

Most importantly, the DREAM Act would give people green cards or lawful permanent residence and would let them join the military, become citizens and so forth, take full part in American society. The DACA initiative doesn't do that. They don't get green cards. They don't even get travel permission. They're not allowed to join the military. They get very limited work permits and a promise that their deportation will be deferred for a period of two years, possibly subject to renewal now, especially in light of the events of the election recently. I would hazard a guess that their deferred action will be renewed at least for another couple of years. Most importantly, they don't get a green card and they don't get a path to citizenship.

Third myth: somehow they got visas. This myth was perpetrated by none other than Mitt Romney on the campaign trail. He said that the Obama administration had given visas to young people. In fact, a visa is just a travel document that lets people travel internationally, and nobody got a visa through this program. They simply got their deportation deferred. That's what deferred action means.

The fourth myth that was out there was that this was something radical. People said this is a radical initiative, a revolutionary initiative by the Obama administration. In fact, it's not radical at all. It's been a longstanding secret of the immigration bar that you could get deferred action for your clients simply by writing a letter to the local district director of the INS, or now USCIS, Customs and Border Protection, or Immigration and Customs Enforcement, and under the right circumstances you could get deferred action for your clients. I've done it for numerous clients of mine on a regular basis, predating the Obama administration.

In fact, the first public grant of deferred action to an individual was somebody you're all quite familiar with, a Beatle named John Lennon, who had a little drug problem and his lawyers negotiated a deal with the U.S. government whereby he would not be deported to the United Kingdom but would be allowed to stay in the United States despite his obvious deportability. He was given the first public grant of deferred action, and it was quite a long time ago, during the Nixon administration. Since then, numerous people have been granted deferred action, including the widows of United States citizens, battered spouses, military families.

I might point out to you a letter that numerous members of Congress wrote to Janet Napolitano in July 2010, demanding that she grant deferred action to military spouses, parents, and children. This letter was bipartisan, signed by such luminaries as Mac Thornberry, Mike Pence, Ileana Ros-Lehtinen, Sam Johnson, Michael Turner, Adam Putnam, Lincoln Diaz-Balart, Mario Diaz-Balart, Anh "Joseph" Cao, and numerous Democrats: Howard Berman, Sylvestre Reyes, Zoe Lofgren, Solomon Ortiz, David Price. The list goes on.

They specifically asked Secretary Napolitano to exercise her authority and said: "DHS can join in motions to reopen cases where there may be legal relief available, consider deferred action where there is no permanent relief available but significant equities exist such as deployment abroad, and favorably exercise its parole authority," et cetera. So members of Congress have frequently, over the decades, asked the executive branch to exercise this authority.

What is new and what gives rise to the myth is that the Obama administration has now gone through certain regulatory procedures to make the exercise of this secret remedy known to the public. They've made it relatively transparent. You can now go on the USCIS website and find out about it. You can fill out a form. You can pay a fee and request it formally. It's not just something that only the *cognoscenti* of the immigration world know about.

That brings me to the fifth myth, which is that somehow what the administration has done here is illegal and unconstitutional. There's an article on the Internet that I urge you to take a look at by Robert Delahunty and John Yoo, about the illegality and the unconstitutionality of what the Obama administration has done. Unfortunately, I think the article is an illustration of the dangers of academics delving into a very complex area of the law that they're not familiar with because in the article there are four points made about the Obama administration's initiative that are pretty easy to refute if you're familiar with immigration law.

First, they say that the Take Care Clause has been violated by the Obama administration's initiative. In fact, there are multiple authorities out there in the immigration code and in court decisions that indicate that the Take Care Clause has not been violated whatsoever by this.

There are numerous statutory sources for the authority and I promised to mention *Arizona v. United States* so I'll just point out a quote from *Arizona v. United States* in which the Supreme Court highlighted the role that discretion plays in the immigration framework. The Court said:

"A principal feature of the removal system is the broad discretion exercised by immigration officials. Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all. Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers"—the ones Chris mentioned—"or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service."

That was the Supreme Court in *United States v. Arizona*, affirming what is a longstanding principle of immigration law, that the executive has great authority and Congress has specifically delegated authority to the executive to decide who to deport and who not to deport.

In conclusion, the five myths are just that. They're mythological beasts designed to scare the misinformed. What's not a myth however is that the DACA program has turned out to be politically brilliant for the Obama administration. It may have even won the election for President Obama. As Mitt Romney inartfully acknowledged in the last couple of days, DACA played a major role in the 71 percent voting Democrat. This of course is the Latino vote, the 71 percent of Latinos who said that they supported the Democrats, not because they don't cling to traditional conservative principles, but because immigration is a big part of their lives and they saw the Obama administration as much more friendly to them.

Now, at a Federalist Society event I should close by mentioning whether it might be possible to challenge what the administration has done in court, and the answer there is: unlikely, because Congress has actually foreclosed by law most legal challenges to initiatives like that. I hope we'll get to that in the question and answer, but in the Immigration and Nationality Act, Section 242(g), Congress has insulated decisions like the decision to grant deferred action from judicial review.

I look forward to your questions during the Q&A. Thank you very much.

IV. Criticism of the Supreme Court Decision and the DREAM Act

DR. JOHN EASTMAN: Well, I'm not going to rebut all of the myths. Some of them I agree are myths. Some of them I don't—I wonder how they played the direction that Margaret claims they do. The fact that it's just a memo rather than an Executive Order, puts it on weaker standing rather than stronger for me.

But before I turn to the DREAM Act issue I want to take a bit of time to critique, I think, some of the reasoning of the Supreme Court decision itself, particularly with respect to Section 5, the prohibition on Arizona being able to make it a state law crime for seeking employment when you're not lawfully present in the United States.

I think the majority opinion in the case has backed away from a trend in recent years, away from implied preemption doctrine for fear that the Court is substituting its policy judgments when it defines a field or defines the goal of a statute and what constitutes an obstacle to that goal, simply substituting its policy judgments for those of Congress or trying to read into a congressional statute things that are not there in order to do these implied preemptions.

In the *De Canas* case we had a very strong presumption against preemption that I think the Court kind of throws by the wayside in the *Arizona* case and I'll just give one example. Justice Kennedy reads into the congressional statute criminalizing employers but only having civil sanctions against employees, a purpose or a goal of keeping employees free from criminal sanction. He finds this in a line in a legislative history report because it's not in the statute itself. That means that Arizona's effort to criminalize the employees' side as well runs afoul of that goal. It serves as an obstacle to what Congress was setting out.

Well, you could just as easily say Congress realized the immense amount of costs the federal government would incur by treating every employee matter as a criminal rather than a civil action. This, with all of the federal due process requirements that attach, the obligation to appoint counsel, and all of the rest of the things that flow from it, and say: We're not prepared to make that financial commitment but, hey, states, if you want to make that financial commitment on your own, go at it. We'll leave that open.

Those two are equally plausible explanations of the federal statute. In my presumption against preemption I would normally say the states ought to be able to take the step that Arizona took here. Like I said, I think the Court moved away from this recent trend of suspicion toward those implied preemption doctrines to get to the ruling it did. I think Arizona and a number of other states are going to suffer consequences in the meantime.

It's not all lost, though, because there are other provisions of the Arizona law that remain in effect; although, quite candidly, under the reasoning of *Arizona v. United States*, I think they too are more suspect than the district judge and the Ninth Circuit view them. They regulate requirement for checking eligibility, adding sanctions for knowing employment of illegals in Arizona, a separate crime for transporting and harboring, the crime for stopping for day laborers. We all know what that was aimed at, if it impedes traffic. Those are all technically still on the book, but under the reasoning of the case and the broad field preemption and obstacle preemption impetus behind the case, I think those may be open for challenge as well, even though I think they ought not to be.

Now, let me go to the President's —and it's not the President; it's his secretary— the administration's effort here. It's not the DREAM Act; Margaret is right about that. However, it's an awful lot like the DREAM Act and in fact, everybody sold it as the DREAM Act. We basically got the DREAM Act. The goal here is to make it so politically unpalatable to reverse it that we *de facto* get the DREAM Act without ever having an act of Congress and we didn't have an act of Congress.

I'm reminded of that scene in *Man for all Seasons* when Paul Scofield tells me "it's amazing after all this time that on the critical issue before us you would think that I have resolved the issue". We've been fighting for a decade on whether or not to have this kind of DREAM Act amnesty that was both nondeportation but also work authorizations. Then the DREAM Act goes the next step and provides a path to legalization that this clearly does not do.

On the nondeportation and particularly on the work authorizations, that accomplishes a lot of what the DREAM Act sought to do. It seems to me that why we would be fighting over it for so long in Congress if the President had this authority all along is a little bizarre. And I don't think anybody thought at the time that they had this authority. So let's try and piece together where the authority comes from.

The memo from Secretary Napolitano is three pages long. There's not a single citation of authority in it. You can look at the Code of Federal Regulations Section 274a, Subsection 12, and this gives the authority to withhold deportation or removal for a period of time, what have you. The authority for that regulation is 8 USC 1101, 1103, 1324(a), and, very important, 4 USC 1406, which deals with the Mariana Islands, which has nothing to do with that provision.

Now, you go back and look at those particular statutory authorities and you find in some instances the Attorney General or the Secretary does have the authority—and it's not just on the prosecutorial discretion issue—and I will dispute that this was not radical. Yes, we all recognize prosecutorial discretion. What's radical here is the wholesale grant of this exercise of discretion without any individualized assessment.

That's never been done before. Now, maybe that's just a difference in degree and not in kind, but it is a radial difference in degree, if that.

Beyond that, the authority to give a different status to be lawfully here, to get work authorization, has to have some statutory authority. This regulation that says we can give employment upon application for the withholding of deportations has no or precious little authority in the federal statute. You piece through this; some of them, the section dealing with T visas for example, gives the Attorney General and the Secretary of Homeland authority, under very specific circumstances, the ability to give work authorizations to people who have come forward, facilitated prosecution of domestic violence crimes and other crimes. They're able to get that. Very specific definitions of when the secretary is allowed to issue those work authorizations.

However, the notion that the Attorney General or the Secretary gets to do it more broadly than that comes down to one provision in Section 1324(a) of Title 8. You've just got to—there's a whole bunch of stuff of when the Attorney General gets to do this. It says it's unlawful to hire anybody if they're an unauthorized alien, as defined in Subsection (h)(3). Then you go to Subsection (h)(3). "Unauthorized alien" means with respect to an alien, at any particular time they're not lawfully admitted for permanent residence or they're not authorized to be employed by this chapter, and there's no provision in this chapter, or by the Attorney General. This is kind of thrown in there—"or by the Attorney General," as if that phrase means that all of the rest of this careful delineation of when I can give work authorizations is entirely superfluous because we could have done it just unilaterally by the Attorney General at any time we wanted to.

Now, maybe that's what that phrase is there to do, just give unfettered discretion to the Attorney General or now the Secretary of the Department of Homeland Security. I suspect if that was intended, that it might raise nondelegation problems even for Justice Scalia; but to read that much into that one kind of throwaway phrase as the entire authority not to withhold deportation, prosecutorial discretion, but to give the lawful status for work authorization beyond it without the statutory authority I think places a lot on that text. That's what leads to what Margaret characterized as a myth that this was illegal or unauthorized. I think the unfettered discretion that the administration must necessarily claim in order to sustain its argument here has not remotely been proved. Thanks so much.

V. Legislative Reform of the Immigration System

ANA AVENDAÑO:

Good afternoon. First I want to thank the Federalist Society for inviting me to speak to you.

I've been asked to look into the crystal ball and see what is likely to happen in terms of congressional action or legislative reform of the immigration system. Before I answer that question, I want to step back a little bit and reflect on the moment and time where we are right now.

The fact is that elections have consequences, and one of the consequences of this election is that the President and the Congress are going to have to act on immigration. Reform has never been an issue like it is right now, particularly because the Latino vote, as we heard earlier, played a key role in this election. As has been now widely recognized by pundits on both the left and the right, the demographics of the electorate, the changes in the demographics of the electorate, are not just something that happened last cycle. Those changes are here to stay. The electorate is going to keep getting more and more Latino, and the coalition—broad coalition that elected President Obama isn't going away.

So what we see now is that immigration has become a top issue for the Latino electorate. It hasn't always been that way. Immigration has always polled actually around six or five. The top issues for the Latino electorate have always been—education has always been number one; jobs, health care, and immigration was, at the bottom, and actually the Latino electorate had been divided on the issue of immigration. It's now at number two and in some polls it was at number one. I was in large part thanks to SB 1070 and the other state laws that criminalized the community, or at least from the standpoint of the Latino community, immigration became a civil right.

That's what's actually motivating the electorate. It's what we saw in California with Prop. 187 that guaranteed, or at least turned the state of California—thanks to Pete Wilson passing a law that's equivalent to SB 1070—turned that state blue. It's a civil rights issue for this electorate. That's what's really fueling all of a sudden the thirst by everyone—Hannity, Speaker Boehner, everybody wants to actually take on the issue of immigration reform.

Now, what is that likely to look like? We're dealing with here is a situation where in our country today we have anywhere from 8 to 10 to 20 million people who are here without authorization. We don't really know how many because we just don't have that statistic. We do know that the recession hasn't really affected the number of people here who are unauthorized. There's been some reduction, but for the most part, the undocumented population remains—the numbers remain high. What's changing is that the unauthorized are now having kids who are U.S. citizens, that they're establishing deeper and deeper and deeper roots. So the population of people who are here without a democratic voice is actually—the population itself is staying about the same but their impact is growing.

The last time we had comprehensive reform was in 1986. As some of you may remember, President Reagan signed the legislation during the lame duck session and unemployment at that time was at 4 percent. We're at a radically different moment right now than we were in 1986. However, immigration reform has taken on four basic—the modern-day version has basically four components to it. One is border security. The other is interior enforcement, which includes worksite enforcement. There is the legalization, the roadmap to citizenship, however you want to call the legalization and the last is future flow. So these have been the four pillars of immigration reform that have seen different legislative strategies around, in the last decade or so, different versions of those four pillars.

The future flow of workers into the US economy has been one of the most divisive issues for working people because future flow has meant that there has been sometimes bipartisan agreement on growing more and more temporary worker programs. We have temporary worker programs in our law right now, both for the highly skilled workers, the H-1B program, and for the unskilled workforce. For the unskilled, there is— the H-2A program for the agricultural program and the relatively small H-2B program, which is for seasonal unskilled workers. It's only 66,000 workers. It grew somewhat because of the returning visa fix that was done a few years ago, but it still remains relatively small. It is a very contentious issue.

My prediction is that it's very, very difficult to tackle this issue at a time of unemployment hovering around 8 percent. It's very difficult to make the case, as we've seen business try to make and some Republicans try to make, that we need to increase the number of temporary worker programs. Legalization is a tough issue. It's a tough issue because it implicates—it's very emotional. It's divisive. It's divisive on both sides of the aisle. However, I don't think that there's any doubt right now that we have to do something and that it is not a solution to actually turn the entire country into Arizona, because Arizona frankly is a mess.

The concept of legalization is something that is getting strong public support. DACA, the President's action with regard to the DREAMers, has received overwhelming public support. It is very popular with the public at large and the concept of legalization, that we have a population of people that we really need to really give a voice to, that they should be part of civil society; that they've been here, they're contributing to the country, that there should be regulations around that. No one is saying that we have to give everybody blanket amnesty, but that there has to be some regulation about past crimes and that sort of thing. I wouldn't have said this three or four years ago—is I think a pretty safe bet.

The border, again it's a difficult question. There has been the construct of until the border is secure we're not going to see legalization, and the only way that we're going to understand that the border is secure is if the four border governors sign on the dotted line and say that their state's border is secure. That completely ignores the fact that governors are politicians, and I think you would have to be insane to sign anywhere to even say that the border is secure, because the next thing you know, someone is going to get on a plane and try to blow up their underwear or something silly like that, which has happened, and there goes your credibility and your next election. So I think the border will remain an issue of contention, but I think it's very difficult to say today that resources have not been devoted to border security. Resources devoted to border security have been overwhelming.

So looking at the four pieces, what's likely to move? Some version of that. I'm not saying that the four pieces are going to move together this time. There may be different packages but I can almost guarantee that some version of legalization is going to move now and that the President is going to start using the bully pulpit to actually move this issue in ways that he hadn't done in the past. Thanks.

JUDGE STEPHEN WILLIAMS: In our preliminary call about this session, people agreed that after the initial statements, people who felt a need would get an opportunity to respond to things that have been said after they had a chance to talk. I think Margaret is perhaps the most obvious one needing to respond.

VI. Rebuttals

PROFESSOR MARGARET STOCK: All right. Professor Eastman mentioned that there's no statutory authority or it's weak statutory authority for the issuance of deferred action. Actually it's stronger than you might think. Section 103(a)—in parentheses, small "a"—of the Immigration and Nationality Act provides the authority for prosecutorial discretion, by congressional statute.

It says: "The Secretary of Homeland Security shall be charged with the administration and enforcement of this act and all other laws relating to the immigration and naturalization of aliens, except insofar as this act or other such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers, provided however that determination and ruling by the Attorney General with respect to all questions of law shall be controlling."

That's a very broad delegation of authority. It's been upheld by the courts. Under this and under the Chevron doctrine, the Department of Homeland Security and its predecessor agency have issued a multitude of regulations, including the regulation under the work permit provisions of the Immigration and Nationality Act section, saying that people with deferred action are allowed to work.

In addition to that, Congress, in 2004, recognized statutorily the status of deferred action in the REAL ID Act, and said that people who have deferred action are permitted to get drivers licenses in the United States under the federal drivers license regulatory authority that was created in the REAL ID Act.

So it's not the case that there is no authority for what the President did. As I mentioned, all other administrations from 1960 onward have exercised this authority to no complaint from Congress. In fact, the number-one request for deferred action in America today comes from constituent services at congressional representatives' and senators' offices who say: So-and-so is facing deportation and we're not really happy about that, and we think you should exercise your discretion and grant this person deferred action.

There are just literally hundreds of these letters from senators and congressmen on both sides of the aisle in the files of the former INS and in the files of the Department of Homeland Security. That's in recognition of the fact that immigration law today is very, very, very rigid, and Congress and the senators recognize that there has to be some flexibility in the law. This deferred action is something that has gotten longstanding recognition as an appropriate power for the executive to exercise. Now, again, what's new about this is the mass use of this for such a large group of people, but previously the authority was given to the Department of Homeland Security and its predecessor INS to grant deferred action to all battered women who met certain criteria.

Just to close, I want to mention that this is not a wholesale grant without individualized assessments, as John said. In fact, each individual has to go through an individualized assessment where they submit a packet, form, supporting documentation. So far 5,000 people approximately have gone though this process and have been granted deferred action. This is well under the estimates that people had for the number of people who are expected to apply for it, but the rules that have been laid out are very complicated and a lot of people are finding they can't qualify for it, or they're afraid to apply for it, so they're not actually applying. So it is not the case that it's a wholesale grant. It is case by case and an individualized assessment.

DR. JOHN EASTMAN: Let me just respond, Margaret. I think you misunderstood my—

JUDGE STEPHEN WILLIAMS: But briefly, so—

DR. JOHN EASTMAN: Yeah, real briefly, I think you misunderstood. I don't dispute that there's discretion to give the deferred action. The point there was this is broader than has ever been done before, which I think you acknowledge.

My point was that there's not the further statutory authorization for using that as a basis for giving the wholesale work authorization permits. That's what's not in the statutes. The regulation sets it up but none of the statutes it cites provide that, except for that one little phrase that I think reads way too much into the discretion given to the Attorney General that we're also going to convey lawful status to be an authorized alien, not just using my prosecutorial discretion not to prosecute. That's what I don't find statutory authority for.

JUDGE STEPHEN WILLIAMS: Do you agree that little phrase is what the work authorization turns on?

PROFESSOR MARGARET STOCK: Well, no, I think it turns on this wholesale concept that the Attorney General and the Department of Homeland Security get to decide who gets to work in America, and that's been recognized and they put it in a regulation. They subject that to the Administrative Procedures Act. They publish a notice saying the following people are going to get, you know, permission to work in the United States. Deferred action has been in there for decades as an authorized work status, without challenge.

JUDGE STEPHEN WILLIAMS: Okay, unless other panelists are burning with a desire to refute other panelists, I'll turn to people in the audience. Any questions? I underscore "questions" not lectures.

VII. Questions and Answers

TODD GOZIANO: Todd Goziano. I want to thank you all and I just want to follow up on the last exchange, first of all in defense of my friends John Yoo and Robert Delahunty. I think you slightly mischaracterized their argument. They admitted the Take Care Clause is not an easy one, but I think their—I recommend their paper on SSRN.

Following from that argument, to sort of follow up on it's not wholesale because they have to apply, we could imagine two hypotheticals that have already been in the literature on this. One is if Romney were elected and he issued an order, IRS, for everyone who wants not to pay the capital gains tax or not to pay the Obama mandate tax, since it's only sustainable on the tax, they have to prove they're not a criminal or something like that, and then everyone who submits the paperwork is exempt from the capital gains tax, exempt from the Obama—would you, Professor Stock, say that that satisfies normal prosecutorial discretion, that's what's in the President's authority, because there have been a lot of Republican Presidents who have wanted to eliminate certain taxes.

PROFESSOR MARGARET STOCK: Well, I think one stark difference between the tax arena and the immigration arena is that in the tax field Congress does not have plenary power and neither does the President. Immigration is unique and distinctive in that the Supreme Court has long held that Congress does have plenary power over immigration and Congress has in turn frequently delegated its plenary power to the executive branch without complaint from anyone.

Congress has also limited starkly the judicial review that you get, so the courts often can't review things that Congress and the executive branch have done in the field of immigration. So I think you'd have a lot more arguments in the tax field to work with because it's just not a field where there's plenary power.

TODD GOZIANO: Okay. Well, at least it sounds like we agree to the question whether they did something.

PROFESSOR MARGARET STOCK: Well, I will point out, though, that there are lots of fields where the executive does things like that and they get away with it; not just immigration.

JUDGE STEPHEN WILLIAMS: I have to say that congressional power over taxes had always seemed to me pretty darn plenary.

PROFESSOR MARGARET STOCK: Well, I think you get a lot more judicial review, is my impression, from having, at one point in my career, been a little bit of a tax lawyer.

ATTENDEE: I think she also means that states can tax too, right? I wish it weren't. I'm from California, as is John here, and actually my question is about California's Prop. 187, which really is not an SB 1070. Long ago it was an attempt to public services to illegal aliens, not to criminalize them.

I guess my question is, as we increase our unemployment in this environment—I know John knows this very much and I'd be happy if he would enlighten us—the resolution of Prop. 187 in California kind of stalled. It never really made it up to the Supreme Court. I was wondering if there's any way—if anybody sees that sort of policy, the denial of public benefits to illegal aliens, ever making any sort of serious political run ever again, or even maybe reviving Prop. 187 legally.

JUDGE STEPHEN WILLIAMS: Would the panelists like to respond on that?

DR. JOHN EASTMAN: Yeah, let me take it up and also broaden it a little bit to a point that Ana made that I want to address, because I think it creates a barrier to a resolution of the problem that we all recognize we need comprehensive immigration reform. It's just the issue is what it's going to look like, and I think Prop. 187 was an attempt to go after one of the issues.

If you're going to legalize people who have been, with an eyewink and a nod, allowed to come here out of some compassion or sense of justice or, you know, moral certainty to settle the thing, you want to make sure that that doesn't become a magnet for an even bigger illegal immigration wave, because our problem is not immigration—and very few people in this country are restrictionists that don't want any immigration. The problem is illegal immigration and all of the consequent damages that flow from that.

Yet, getting a legal immigration solution that's more efficient and broad is barred because of the size of the illegal immigration problem and the concerns that flow from that. So you have to come up with a comprehensive plan that addresses that. That means you've got to address the magnets that created illegal immigration in the first place. One of them is benefits. I have people on the stump tell me all the time, illegal immigrations are not entitled to benefits. Yeah, but nobody ever checks before they give the benefits, and there are millions of people that are getting benefits illegally because we don't check when we ask.

The other big magnet is of course employment. If you don't address those things, no matter what kind of immigration—generous immigration, lawful immigration policy you come up with, unless you're going to throw the border open entirely, there will be people who do not qualify under that policy who will seek to come here illegally, and the size of that magnet matters.

So then to tie this back to what Ana said, immigration is now being viewed as a civil right, and I think there's some truth to that. In fact, in the academic literature it's increasingly being defined as a human right, which suggests that no nation would be able to have any restrictions on lawful immigration to its country whatsoever, because if it's a human right to immigrate wherever I choose, then anytime a country decides to have limits on that, it will violate that human right. Literally there is a new trend in the academic literature, and books and articles being written about it, to make just that point.

I don't think—however much we're starting to view this as a civil right, I don't think our country has gone that far yet. If we've not, then it seems to me any comprehensive immigration plan has to include enforcement and reduction of the magnet so that we don't end up with another wave. You know, revival of something like a Prop. 187 with clear lines, border enforcement, interior enforcement, what have you, would have to be part of it. Otherwise you buy into this notion that we don't get to control the borders at all because it's an international human right.

JUDGE STEPHEN WILLIAMS: Ana, would you like to respond on the magnet issue?

ANA AVENDAÑO: Yeah, I want to just respond quickly.

On the issue of Prop. 187, I wasn't saying that it's what exactly SB 1070 is. It was the equivalent. On the standpoint of the Latino electorate, what happened in

California with Prop. 187 is exactly what happened this last cycle. It's an issue that people see as attacking them because they're skin is brown, because they are Latino.

So it's a civil rights issue for the people who are living through this crisis. It has become an issue that actually motivates people to vote. So from just a smart political standpoint—and I think that, you know, the pundits on the right are recognizing it—is that adopting more and more of these kinds of laws are just alienating the Republicans from the electorate that, like I said, is here to stay.

I totally agree with the issue of interior enforcement. That has to be one of the pieces that gets fixed. The IRCA did not do that. We're here today because the IRCA failed at actually requiring employers to legitimately and genuinely verify the work authorization of the workers who they employ.

The solutions we've seen up to now have not worked. There is a strong push to E-Verify, for example, which is basically an Internet-based system to check the status of workers, and that that will fix the problem. Well, Arizona has mandatory E-Verify and we know that Arizona has not fixed the problem.

If we were serious about limiting future illegal immigration, we would actually implement a worksite authorization mechanism that would have strict liability and have some kind of biometric, tamper-proof identification. Now, what would hold employers really accountable for actually verifying that the worker population that they employ is authorized to work? The IRCA does not do that. It's a negligent standard and it's an easily, easily bypassed standard.

So I don't know what the viability, the political viability is of actually getting something does that has strict liability and a tamper-proof biometric identifier.

JUDGE STEPHEN WILLIAMS: Let me push back a little on that because the question I think related the question related not so much to access to work as to access to benefits of other kinds. I think just in terms of—I mean, my sense—I haven't done a poll—my sense is the ordinary person probably is most sympathetic to the undocumented worker who comes in and gets a job and least sympathetic to the undocumented nonworker who comes in and gets various other benefits. I understand from your professional point of view, obviously the work is more central, but what about the other aspect of it?

ANA AVENDAÑO: Well, it's a really interesting question and I think that one, like voter fraud, really has been the creation of some sort of myth. I remember—when was it, three, four years ago, maybe a little longer—Congressman Tancredo had a hearing on this issue. He wanted to produce people or evidence or testimony about people who were actually getting benefits and had come here to get benefits, and he wasn't able really to produce, I don't think, a single person for that hearing. I'm not saying that doesn't happen. Of course it happens but it is not the crisis that it is being made out to be.

I think what brings people here, if you look at the undocumented population, it is poor people that are coming here to work. Some, their U.S.-born kids get benefits, that's true, but I think what's really driving—the magnet here, has been employment.

JUDGE STEPHEN WILLIAMS: Fair enough.

PROFESSOR MARGARET STOCK: I'd like to address that too. One thing John said was that nobody checks. In fact, the federal government does have a database system that they share with all the states called the SAVE system, Systematic Alien Verification for Entitlements. It's a system that allows every state that hands out benefits of any kind to check the immigration status of the person applying for the benefits.

They're supposed to do this. They do it in California. They do it in every state that I'm aware of. When somebody comes in and applies for TANF or, you know, unemployment insurance or any sort of benefit that the government is handing out, they will run a check through this federal database to see if they're eligible for those benefits.

That doesn't mean people don't get them because they're presenting false documents. They might pretend to be, you know, Chris, for example, and use his driver's license and Social Security number to apply for the benefits, but for the most part there is a system in place. It's been in place since the Welfare Reform Act that was passed during the Clinton administration. So there is a system to check.

What's interesting on the benefits issue is that the trend now is actually to grant benefits at the state level to people who are out of status. The state DREAM Act proposals have been popular. In this last election, a number of them, you know, got strong support. Maryland, you know, passed one, and California has led the way on that.

There's also litigation going on with regard to bar membership where some unauthorized immigrants who have gone to law school are trying to become members of the bar. Some might even apply for membership in the Federalist Society, which I think doesn't check people's status.

JUDGE STEPHEN WILLIAMS: I'm glad you recognize that as a major benefit.

PROFESSOR MARGARET STOCK: Litigation is going on right now.

CHRISTOPHER BARTOLOMUCCI: I wanted to follow up on that. One area with respect to benefits where states have gotten some traction from a legal point of view is with respect to licensing.

Alabama enacted a law that made it unlawful for illegal aliens to apply for a license plate, a drivers license, a professional license, including a bar membership, or a business license, and that case went to the 11th Circuit after the Arizona decision came out, and the 11th Circuit said that is likely not preemptive and declined to enjoin that provision. So licensing seems to be a fertile area for state regulations, setting aside whether that's good politics or policy.

JUDGE STEPHEN WILLIAMS: Yes?

ATTENDEE: You mentioned, Ana, that today is very different from when we last had our immigration reform—4 percent unemployment versus 8 percent and stagnant wage growth. You're also right that it's a lot of poor people coming in to get work, but doesn't that depress wages of American workers, and particularly, for example, union members in the construction trades?

How does the AFL-CIO balance your obvious advocate for immigration reform with the fact that having 6 million, 12 million illegal aliens in the country working does hurt American wages, which is something AFL-CIO has also said for a very long time?

ANA AVENDAÑO: So I'm really happy to hear the Federalist Society express concern for the wages of American workers.

You're right; having the broken immigration system has had a very detrimental impact on wages in particular industries such as construction. If we go back to the IRCA, one of the flaws of the IRCA is actually that it doesn't require—it only requires employers to verify the work authorization of their employees. It's created a whole economic push for contractors to—for construction companies to misclassify their workers in sort of trying to avoid the IRCA altogether.

What really depresses wages today, just like it did in the early '80s, is the fact that there is a large undocumented population and that legalization in and of itself is a worker protection. Wages rose anywhere from 6 to 15 percent after the IRCA. The problem back then was that we didn't do what we've talked about today. We didn't fix the system for the long term. We fixed the system for the short term then.

So just to answer your question, it is a difficult issue. The undocumented population in the construction industry is not—generally, save for one or two unions, there is very little overlap between union membership and the undocumented population, especially in construction.

DR. JOHN EASTMAN: Let me ask a follow up, though, Ana, because—I mean, I think we've got on the table here some common ground for solutions. What I don't see is how those solutions, if proposed by Republicans, don't get demagogued if

Republicans were to come up with—to propose a more strict interior enforcement that would immediately be characterized as anti-Latino. Just as we saw in the last cycle, any effort to insist that you be a U.S. citizen before you vote and that we're going to check your ID for that was characterized as anti-Latino and it was demagogued to death.

Any of these solutions that we all recognize need to be done if there's going to be any long-term viable solution to the illegal immigration problem are going to get demagogued. That's been the biggest hurdle in getting this thing through, and I don't see a way out of that. They're more your friends than mine that are doing the demagoguing. Do you see a way to stop that?

ANA AVENDAÑO: Yeah, I think that the way to stop that is to actually—for Republicans to support legalization. Every single one of the other solutions that you've mentioned didn't come with legalization. So enforcement only of course is seen as an attack, because it doesn't have any actual relief. So if Republicans come forward with a legalization plan that makes sense, I think you're going to find bipartisan—you should—I mean, it's really crazy for us not to be able to find a solution to this.

JUDGE STEPHEN WILLIAMS: It became an issue in the campaign that President Obama, in the early period when he had a filibuster majority in the Senate and a majority in the House, made no proposals on immigration reform.

ANA AVENDAÑO: That's right.

JUDGE STEPHEN WILLIAMS: Do you care to venture a prediction for the second term?

ANA AVENDAÑO: I think that the White House is going to take up this issue seriously. The President has already given several indications that it's one of the top issues on his agenda. That wasn't the case four years ago. I don't think that it would be a secret—it's not a secret or would surprise anyone in this room that we were deeply disappointed that the President didn't take up immigration reform, but we haven't ever heard from the White House what we're hearing now in terms of actually moving something.

JOHN BAKER: John Baker. Sorry to interrupt a judge, but in a way I enjoy doing it.

JUDGE STEPHEN WILLIAMS: This reminds me of arguing in the Supreme Court—one justice on the end and you can't see the other.

JOHN BAKER: Yeah, exactly. But there's another reason, because the prior question actually took part of my question, but I'd like to follow up on it with Ms. Avedaño.

You talked about support for legalization of those who are here, but I want to ask about expanding legalized immigration generally, because historically in all of the immigration fights, the labor movement has been the main obstacle to increase legal immigration.

Talking about bipartisanship, do you expect that the AF of L and the U.S. Chamber will get together on increased legal immigration, because it would seem to me that that would create real tensions within the labor movement. Would you comment, please?

ANA AVENDAÑO: Yeah, of course. I referenced that a little bit in my opening remarks, and there's a difference here about what—you know, what are we talking about, legal immigration in the future? We're not talking about changing the system that—the cornerstone of the American immigration system, which is family reunification. We're talking about a very small segment of all visas that are allocated annually that go to employment. We have an employment system that really doesn't make sense.

I mean, if you think about it, we have a system of allocating visas for employment that was negotiated politically. So one chamber said, oh, how does 200,000 sound? Well, that's too many. How does 120,000 sound? Not enough. Okay, 140,000, you got it. That's essentially the employment-based system for visas that we have right now. That hasn't been changed. It hasn't been changed in decades.

What's happening is that the substitute for actually taking that issue on and fixing it, in a way that makes sense so that employers have the workers that they need when they need them, is that there has been an increase in temporary visas. That is the issue that the labor movement has been strongly opposed to allowing more and more temporary workers in to do work that's not temporary in nature.

Now, in many ways it doesn't matter if you substitute the kind of employment work that—whether Kelly Services does it or it's done through an H-2B program, the ultimate impact on workers and their wages is the same. So our opposition has been in the past to increasing the number of temporary worker programs. That, I would propose to you, is a difficult thing; that, i.e., increasing the number of temporary workers, right now in this economy, is impossible or nearly impossible.

It is not impossible to try to actually fix the employment-based system. There has not been any willingness on either side to actually tackle that issue. We're doing it piecemeal. We're looking at STEM, and we're looking at H-2A, and we're looking at H-2B. We would be happy to join in that discussion.

JUDGE STEPHEN WILLIAMS: Can I just follow that up? You aren't saying that a replacement of all the temporary workers with visas for an exact equivalent number of permanent residents would be all right with the labor movement, or are you?

ANA AVENDAÑO: No. What I'm saying is that we need to have a system that the visas that are allocated for the workers who are coming in for work actually match the job that they're doing. So does it make sense to have teachers who are H-1B visa holders, teachers who are in temporary positions who are not—teaching is not a temporary job. So we have a mismatch right now between what our immigration system allows and the kinds of jobs that workers are getting these visas for.

What we're suggesting is that that system needs to be changed, so that if I need crane operators, for example—there's a predicted shortage of crane operators to come in the next two decades, 250,000—then I should be able to bring in workers to be crane operators. However, those workers should come in with a visa that matches their job, which is a permanent job. They should come in with a green card or the concept of a green card, which is a permanent settlement visa. It doesn't make sense, I mean, from a worker's standpoint, to give temporary visas to those workers who are going to be doing, essentially, permanent jobs.

JUDGE STEPHEN WILLIAMS: He's ahead of you, right?

ATTENDEE: It seems like discretion in this context really seems like an exception to the rule of law. I'm just wondering, how can any interpretation of the rule of law encompass discretionary enforcement for illegal immigrants with certain traits or who can get a senator to write a letter on their behalf? And is there an immigration solution that you can envision that would be consistent with the rule of law that would be fair for the people who have been waiting in line for years and years and years?

JUDGE STEPHEN WILLIAMS: I take it that's directed mainly to you.

PROFESSOR MARGARET STOCK: Well, I guess the short answer would be if they allowed judicial review you might have more rule of law. They don't allow judicial review, or it's very limited in the immigration context, and a lot of scholars have argued that additional judicial review would lead to more rule of law and the immigration context would force Congress to do its job and not give untrammeled discretion to the executive branch.

JUDGE STEPHEN WILLIAMS: One thing judges don't have authority to do, after *American Trucking*, is to require that statutes be nondiscretionary.

PROFESSOR MARGARET STOCK: Yes.

DR. JOHN EASTMAN: Margaret, just to be clear, the lack of judicial review exists on the decision to suspend deportation. It's not on the—there's no provision eliminating judicial review on questions of the work authorizations. Am I right about that? The 242(g) section you're talking about is in challenges to the deferred action.

PROFESSOR MARGARET STOCK: Well, what I'm talking about is Section 242(g), the provision that basically forecloses judicial review in a large portion of cases. There's also foreclosure of certain habeas review. There's certain foreclosure of review of consular decisions. When a consulate decides to deny a visa to somebody, you get very limited rights to go into court and challenge that at all.

Regarding expedited removal orders, I litigated the case in the Ninth Circuit and we attempted to argue that, even though the government was completely wrong on their determination, a Chinese businesswoman had committed fraud. The court said, sorry, we just can't review that even though the government admits they're wrong and, you know, they're just acting arbitrarily, capriciously, and irrationally. Congress said we can't get a review of that.

So it's a complicated framework but this is a field in which, compared to other fields of law, there's much less judicial review possible. I think that if Congress were to restore some of that, it might bring back some rule of law, because what's happened is essentially a system where Congress doesn't want to grapple with these tough political issues. They just delegate lots of authority to the executive and say, you know, go away; you guys deal with it. They don't fund a lot of the laws that they pass.

So one of the key issues that came up in Arizona was, as Chris was telling you, there are 400,000 undocumented immigrants in Arizona. The whole entire budget of the Department of Homeland Security to deport, nationwide, undocumented immigrants covered 400,000 people. So to make Arizona happy, DHS was essentially going to have to take all of its enforcement efforts and send them all to Arizona and leave nobody in California, Alaska—yes, we do have illegal immigrants in Alaska—Maine, Florida, New York. Basically all the force and power that was funded by the federal government was going to have to go to Arizona if, in fact, the laws were to be enforced the way that Arizona wanted.

This has been an ongoing problem where Congress just doesn't want to deal with these issues so they punt. They say, executive, you handle them, and then they write the letters to try to undermine the laws that they already passed when they don't like the result in a particular case. This has been going on forever in the immigration field, we're used to it, and it results from the Supreme Court's plenary power doctrine.

ATTENDEE: Immigration law seems to be very messy.

PROFESSOR MARGARET STOCK: Very.

ATTENDEE: We've talked about the law, various provisions of the law, and we've talked a little bit about the economics, and we've talked a little bit about the politics of it, but we haven't talked about the culture of it. What I want to suggest is that maybe not all immigrants are the same. So, as an American I ask the question, what kind of immigrants are good for America?

I wonder if the panel could reflect a little bit on beyond economics, what's legally expeditious, and what's politically advantageous. What, in terms of building a society over the years that is a constitutional society of limited government, strong families, pride, loyalty, honesty, what kind of immigrants, what source of immigrants will be the best for us? There has been opposition to Italian immigrants in the past. There was opposition to Irish immigrations. There's been opposition to any ethnicity you want to pick. Where should America get its immigrants and how should that figure into the immigration reform that you've been talking about the future of?

JUDGE STEPHEN WILLIAMS: I think that's an open field for responses.

DR. JOHN EASTMAN: I think the best answer to that ever given was by Abraham Lincoln in a 4th of July oration when he talks to a group of immigrants who were celebrating the 4th of July. He says: You don't have the same connection to that document that other people in this country who—and yet you feel it in your heart. It is the father of all moral principle within us. You are as much American as if you were blood of the blood and the flesh of the flesh of those who fought that war and gave us that document.

The best answer is, anybody who is willing to subscribe to the universal principles of our Declaration of Independence ought to be welcomed into this country with open arms, no matter what their race, their creed, their ethnic background is. When we start populating this thing and segmenting it by race and whatever, as our laws have done for far too long, we undermine that very basic proposition that is the heart of who we are as Americans.

JUDGE STEPHEN WILLIAMS: Other –

ANA AVENDAÑO: I think we've found common ground, right?

ANA AVENDAÑO: I do want to reflect on, just quickly, it is true we are a nation of immigrants but we're also a nation of schizophrenia, because if you look throughout history it has been both welcoming the immigrants and at the same time sort of shutting the door. I love what you just said. I think that's absolutely right. As a value, that's exactly what we—how we should be thinking about this issue.

PROFESSOR MARGARET STOCK: Well, I think John is going to be called an open borders advocate here shortly but I did want to mention a special group of immigrants, of whom I have personal knowledge, and two whom I think we should open our doors.

I mention this group because I formerly worked at the Pentagon on a project called Military Accessions Vital to the National Interest, MAVNI. This was a program started under the Bush administration and I was the project officer, the one who thought up the idea initially and got to brief it to the military leadership. At the time, the Department of Defense was facing severe shortages of certain people, including U.S.-licensed health care professionals.

It turns out that our legal immigration system is so broken that doctors working at the Veterans Administration can be here for decades on temporary visas and never get a green card because many of them are from India. Because they're from India, they're subject to a per-country quota from India in the worker categories, which prevents them from immigrating for 10 or 15 years. They can't get a green card.

So they continue to work at the VA year after year after year but they can't serve in the United States military because the military does not take unauthorized immigrants, and had also not taken immigrants on temporary visas. You had to have a green card. By the time they get a green card, they're too old to join the military, even though they've been working for the VA and treating our American soldiers as VA doctors.

So we came up with a program that capitalized on the dysfunctional, broken immigration system. We got authorization from the Secretary of Defense to recruit people who were legally present in the United States for long periods of time on temporary visas, such as U.S.-licensed health care professionals working at the Veterans Administration. In exchange for serving in the United States military for an eight-year statutory period, they would get U.S. citizenship. Congress had already authorized this; but nobody in the executive branch had ever exercised the authority.

So we went ahead and decided we were going to recruit a thousand people. We got 15,000 applications for these 1,000 slots in the military for these jobs. The year we ran this as a pilot program; 47 percent of the vacancies in the Army Reserve in the medical health care professional field were filled with these folks, who were just beating down the doors to join the United States military. I'm proud to say one of them became the United States Army Soldier of the Year this year, meaning he was the top soldier in the United States Army in a competition, a fair and free fight, over three days at one of our forts here in the United States.

So I throw that out as an example of the kind of immigrants that we should be, allowing to get green cards or allowing a path to citizenship; people who have complied with our laws, who are trying to comply with our laws; who will contribute to our society, participate in our national defense, fill the shortage occupations we have in the STEM field—science, technology, engineering, and math. Those folks are out there and they want to become part of our society, but our legal immigration system doesn't let them do that. It is broken. It's disfunctional and everyone recognizes that. We need to fix that today.

ATTENDEE: I'm wondering the extent to which Ms. Avedaño and Professor Eastman might actually agree on the immigration policies and practices that Newt Gingrich advocated in the Republican primaries.

ANA AVENDAÑO: Which are?

ANA AVENDAÑO: I'm sorry; I don't follow Newt Gingrich.

ATTENDEE: I can't blame you for not watching the debates but what drew most interest and divided Republicans is Newt's proposal that we ought to have a sort of a triage system and that actual deportation decisions should be made either by, or on the strong recommendation of, local boards, like we used to have local draft boards.

PROFESSOR MARGARET STOCK: I think it's a good idea.

DR. JOHN EASTMAN: Yeah, I'm all for devolving as much of this to the local states like Arizona as we can.

ANA AVENDAÑO: You know, I don't know that I can give you a sort of thoughtful answer because it's a complicated issue. I mean, we strongly believe that immigration should be a federal issue but that communities should have some say in how systems are managed. So I don't know. It's interesting. Sorry. I'll think about it. I'm happy to send you an e-mail.

ATTENDEE: I favor it and just to influence you, the tea party hates it, so keep that in mind.

PROFESSOR MARGARET STOCK: Yes, the Canadians do something like that, by the way. That might be where he got the idea.

JUDGE STEPHEN WILLIAMS: Yes, and to the extent the draft boards are a model, they operated under federal statutes and regulations, so allocating the authority—

ANA AVENDAÑO: Yes, that's interesting.

JUDGE STEPHEN WILLIAMS: —to local boards is not inconsistent with—but there's actually federal control.

DR. JOHN EASTMAN: To address the uniformity issues at the federal level you'd have to have some pretty clear guidelines, and then making individual judgment on who qualifies under those guidelines could be delegated.

Part of the reason the tea party opposed it was because they have this model of "sanctuary city" San Francisco that just completely ignores any of the existing laws. I think that was part of the troubling aspect of it.

GREGORY GRISHAM: Yes, sir, I'm Greg Grisham from Memphis. I have a question. Last year Tennessee enacted a law that basically required Tennessee employers, pretty much all of them, to either be involved with E-Verify, be part of that, or adopt their own documentation program, or else be subject to fines. Actually, any citizen of Tennessee could report this to the Tennessee Department of Labor.

My question is twofold. Number one, do you see other states around the country enacting these types of laws? and secondly, given the Supreme Court's decision in the *Arizona* case, are there any preemption issues that potentially could come into play with those laws?

CHRISTOPHER BARTOLOMUCCI: Well, it actually sounds like a case that went to the Supreme Court before *Arizona*, the *Whiting v. Chamber of Commerce* case. And the Supreme Court said that that Arizona law was valid and not preempted. So I think that's an area where states do have authority to require employers to use mechanisms like E-Verify.

PROFESSOR MARGARET STOCK: Yes. Interestingly, though, the employment verification systems have become a windfall for the federal government.

CHRISTOPHER BARTOLOMUCCI: What a surprise.

PROFESSOR MARGARET STOCK: Yes. The federal government is now spending enormous amounts of resources going around and fining employers for technical paperwork violations, making hundreds of thousands of dollars from small businesses and even bigger businesses, people that aren't even employing unauthorized workers but cannot comply—you know, have technical noncompliance with the technical regulations, which are very complicated.

There are now lawyers who specialize just in employment compliance with these regulations who charge lots of money to small businesses and bigger businesses to make sure their paperwork is all in order so when the feds come to inspect you, which will inevitably happen, you won't get that $200,000 fine; you'll only get a $25,000 fine.

JUDGE STEPHEN WILLIAMS: It seemed to me that Ana laid out the issues that have to be addressed, and I guess what I'd be interested to know is, can anyone imagine a coalition that puts together some sort of deal that, A, is acceptable to the majority of Congress and gets the signature of the President and at least compromises all those criteria on some semi-reasonable basis? What does such a coalition look like?

ANA AVENDAÑO: Well, it's been tried. In 2006, 2007 there was a coalition of business, some civil society organizations, some immigrant rights groups, and some labor unions that tried to get a bill passed. It went past the Senate and failed the House.

It's hard because these four pieces are together. They bring out a lot of opposition. I think what we might see is parents. So we may see legalization and a much tougher E-Verify type of program. We may see the border and interior enforcement move together and those sort of separate pieces bring in a coalition that can support them much easier than if we put all four together. I really do think it can be done. We just haven't had really the political will to do it yet.

DR. JOHN EASTMAN: I think it's even more difficult than just the problem of pairing. If that was all it was, I think we could do it, because there's a political overlay here, the demagoguing issue that I pointed out earlier.

It kind of reminds me of the fight over admission of new states before the Civil War. You could never get any Northern state in unless you didn't get a Southern state in equally because they were all concerned about upsetting the status quo balance. If you let a lot of potential union workers in to join ranks with a side that is heavily politically allied with one of the political parties, if there's not a countervailing balance on the other side, that kind of political concern is going to make it impossible to get any deal through. I write that one. There are lots of examples that I could make on the other side as well.

The politic overlay, unless you can find a way to make it a balanced go forward so that both sides either oxen are equally gored or equally find some benefit, you're going to find it intensely difficult to get this thing through.

JUDGE STEPHEN WILLIAMS: Any other—no questions? Everyone knows as much about immigration problems as they need to know?

JUDGE STEPHEN WILLIAMS: Oh, we have a question.

ATTENDEE: I think I heard you say a few minutes ago that any solution needed legalization, and my question is, where is the care, sympathy, whatever, for the people that are in the foreign countries that have applications pending? I mean, from an equitable standpoint it seems—I mean, that's kind of the elephant in the room, isn't it? You have a lot of people who have done what they're supposed to do who are not let in because of these quotas, so the legalization seems unfair to them. I'm wondering what people feel about that.

ANA AVENDAÑO: That's a great question and it comes up a lot. You're absolutely right that a comprehensive fix, or a fix to the system, has to recognize that the legal immigration system, as Professor Stock just talked about, is badly broken, and that system as a whole needs to be fixed.

So there has to be some relief for people in that position. I mean, it is the inequity of do we legalize everyone who's here without authorization and leave people who, you know, have been waiting for 20 years to wait another 20 years, and the answer is no, we can't do that. We have to find something that actually balances these interests.

ATTENDEE: Does that square with a sort of a world of limited resources?

ANA AVENDAÑO: Yes. No, that's something that makes it much harder. You know, working in this field is kind of guaranteed job security.

ANA AVENDAÑO: These questions come up all the time and they're difficult. These balances and compromises have to be made along the way.

PROFESSOR MARGARET STOCK: Yes, one of the things people I think might not be aware of if you don't work in the field is that the people waiting in line, a lot of them are actually here. The VA doctor that I mentioned is a line but it's a 15-year line. The doctor is here on J status and keeps renewing it, or goes to H-1B or just keeps moving around. So he's in line; he just can't get to the front of the line because there's a really long quota.

For the family-based immigration, a lot of them are here in undocumented status and they're waiting for their quota number to come up. They're hoping the law will change because in 1996 we passed this crazy law that says if they leave the U.S. they're banned from coming back for 10 years. They often can't get waivers of that so they don't leave to go get their visa that they stood in line for so long to get, because if they go to get it then they're banned for 10 years from coming back.

So a lot of the people that are waiting in line are actually waiting here because the system is broken and they expect that if they fix something to do with the people that are waiting here, the lines would actually clear up, a lot of the lines that are out there that everybody is worried about.

JUDGE STEPHEN WILLIAMS: Well, for myself I've learned a tremendous amount. I think the panelists have been fantastic and I hope you'll join me in thanking them.