

# “[TAKE FROM US OUR] WRETCHED REFUSE”: THE DEPORTATION OF AMERICA’S ADOPTEES

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*“Give me your tired, your poor, Your huddled masses, yearning to breathe free, The wretched refuse of your teeming shore, Send these, the homeless, tempest-tossed to me, I lift my lamp beside the golden door!”*  
~ *Emma Lazarus*

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## I. INTRODUCTION

Children in the United States learn from an early age that America was formed as a “nation of immigrants.”<sup>1</sup> By the time poet Emma

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Lazarus penned *The New Colossus* in 1883, millions of immigrants had entered the new land of opportunity through “the golden door” of Ellis Island.<sup>2</sup> Indeed, the nation’s highest court called the country’s first 100 years “a period of unimpeded immigration.”<sup>3</sup> Yet, the American immigration experience has been as much about exclusion as it has been inclusion.<sup>4</sup> Persistent nativism and polarizing politics have affected immigration policy, so much so that Justice Stevens remarked in 2010 that “[t]he landscape of federal immigration law has changed dramatically over the last 90 years.”<sup>5</sup> The last twenty years, in particular, have seen an increase in immigration enforcement as the list of deportable offenses for noncitizens has expanded under federal immigration law.<sup>6</sup> At the same time, restrictions on judicial review of removal actions<sup>7</sup> have resulted in such harsh consequences that “[t]rial judges adjudicating criminal matters have been divested of a long-standing discretionary power to make recommendations against deportation of noncitizen defendants.”<sup>8</sup>

Foreign-born children adopted by American citizens are subject to U.S. immigration law. Because the Fourteenth Amendment to the U.S. Constitution guarantees American citizenship only to “persons born or naturalized in the United States,”<sup>9</sup> previous immigration law required that children born abroad and adopted by American parents undergo a separate naturalization process before the children received U.S. citizenship.<sup>10</sup> However, many parents did not complete that process and

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1. See JOHN F. KENNEDY, *A NATION OF IMMIGRANTS* 3 (1964) (“There is no part of our nation that has not been touched by our immigrant background.”).

2. ANN BAUSUM, *DENIED, DETAINED, DEPORTED: STORIES FROM THE DARK SIDE OF AMERICAN IMMIGRATION* 9, 92 (2009). Ellis Island opened Jan. 1, 1892, as the New York immigration entry point. *Id.* at 97. In 1910, San Francisco opened Angel Island as a west coast immigration entry point. *Id.*

3. *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (citing C. GORDON & H. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* § 1(2)(a), 5 (1959)).

4. See Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 *YALE L.J.* 2134, 2170–71 (2014); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 *AM. U. L. REV.* 367, 380 (2006).

5. *Padilla*, 559 U.S. at 360.

6. See *infra* Section III.A.

7. The use of “deportation” in this article is deliberate. See *Padilla*, 559 U.S. at 360. “The changes to our immigration law have also involved a change in nomenclature; the statutory text now uses the term ‘removal’ rather than ‘deportation.’” *Id.* at 364 n.6 (citing *Calcano-Martinez v. INS*, 533 U.S. 348, 350 n.1 (2001)).

8. Adriane Meneses, Comment, *The Deportation of Lawful Permanent Residents for Old and Minor Crimes: Restoring Judicial Review, Ending Retroactivity, and Recognizing Deportation as Punishment*, 14 *SCHOLAR* 767, 772 (2012); see also *Padilla*, 559 U.S. at 364 (finding noncitizen defendants who plead guilty to specific crimes are entitled to representation because of the potential penalty of deportation).

9. U.S. CONST. amend. XIV, § 1.

10. Immigration and Nationality Act, 8 U.S.C. § 1431(a)(3) (2012); Kim Bellware, *They’ve*

left their adopted children to reside in the United States as noncitizen immigrants, subject to U.S. Immigration and Customs Enforcement (ICE) action for even minor, nonviolent criminal offenses.<sup>11</sup> Many thus face deportation to their countries of origin—places where they no longer speak the native language nor have meaningful connections—even though America is the only country they call home.<sup>12</sup> And, under the current immigration law regime, judges are all but powerless to intervene.<sup>13</sup>

The United States Congress attempted to fix this problem by passing the Child Citizenship Act of 2000 (Child Citizenship Act),<sup>14</sup> which automatically granted U.S. citizenship to foreign-born children of American citizens adopted from abroad.<sup>15</sup> However, because of political compromise, the Act extended the protection of U.S. citizenship only to those under the age of 18.<sup>16</sup> Congress tried to remedy the problem in 2013. The Senate approved a measure to fix the loophole, but it stalled in the House of Representatives, and U.S. citizenship again proved elusive for this group of adoptees.<sup>17</sup> Recently, legislators introduced the Adoptee Citizenship Act of 2015,<sup>18</sup> to grant citizenship to all foreign-born children adopted by U.S. citizen parents regardless of age, but it stood little chance of passage amid ongoing anti-immigration concerns and polarized politics.<sup>19</sup> Meanwhile, an estimated 18,000 of these children, now adults, either face deportation or live “off the grid” in a de facto stateless status, constitutionally unable to vote, serve on a jury, seek public office, or enjoy other privileges of U.S. citizenship.<sup>20</sup>

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*Lived Their Lives as Americans, But They Can Still Be Deported*, HUFFINGTON POST (Dec. 12, 2015 7:01 AM), [http://www.huffingtonpost.com/entry/adopted-children-deportation-adam-crapser\\_us\\_566a0cd9e4b080eddf57b949](http://www.huffingtonpost.com/entry/adopted-children-deportation-adam-crapser_us_566a0cd9e4b080eddf57b949).

11. 8 U.S.C. § 1431(a)(3); *see infra* Part III.

12. *Id.*

13. *See infra* Section III.B.

14. Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (codified as amended at 8 U.S.C. § 1431 (2012 & Supp. 2014)).

15. 8 U.S.C. § 1431(a)(3).

16. 8 U.S.C. § 1431(a)(2).

17. *See infra* Section IV.C.1.

18. Adoptee Citizenship Act of 2015, S. 2275, 114th Cong. (2015).

19. *See id.* Introduced on November 10, 2015, the bill died in committee without being enacted.  
S. 2275: *Adoptee Citizenship Act of 2015*, GOVTRACK, <https://www.govtrack.us/congress/bills/114/s2275> (last visited Feb. 1, 2017). A companion bill was introduced in the House on June 10, 2016 by Representative Adam Smith (D-Iowa) and Representative Trent Franks (R-Ariz.), Adoptee Citizenship Act of 2016, H.R. 5454, 114th Cong. (2016), but also was not passed.

20. Stumpf, *supra* note 4, at 406; *Acquiring U.S. Citizenship for Your Child*, U.S. DEP’T OF ST., <https://travel.state.gov/content/adoptionsabroad/en/us-visa-for-your-child/acquiring-us-citizenship-for-your-child.html> (last visited Dec. 2, 2016) [hereinafter *Acquiring*].

This Article begins in Part II by developing the history of immigration law against the backdrop of nativism and polarized politics. Part III focuses on the notable expansion of deportable offenses under immigration law and the simultaneous restriction of judicial review. The development of international adoption into a lucrative industry opens Part IV, which also explains the plight of those who, though legally adopted, were never naturalized by their adoptive parents. Part IV also looks at the recent Adoptee Citizenship Acts of 2015 and 2016, introduced to grant citizenship to those adoptees who were over the age of 18 and thus excluded from the protections of the Child Citizenship Act of 2000. Part V examines the current state of immigration law and continuing nativist concerns that stymied the bills' progress and, ultimately, concludes with a call for Congress to pass legislation that would finally grant—to all adult adoptees—U.S. citizenship that is long overdue.

## II. AMERICA: LAND OF SELECTIVE IMMIGRATION

The concept of America as a “melting pot” of immigrants originates from the eighteenth century, when, in 1782, J. Hector St. John de Crevecoeur described the young nation as a land where formerly distinct European nationalities melted into “a new race of man, whose labors and posterity will one day cause great changes in the world.”<sup>21</sup> In his 1908 play, *The Melting Pot*, playwright Israel Zangwill called America, “God’s Crucible, the great Melting-Pot where all the races of Europe are melting and re-forming!”<sup>22</sup> It was a land of assimilation, where Old World distinctions gave way to a new and shared American culture.<sup>23</sup>

Yet, the American immigration experience has been as much about exclusion as it has been inclusion.<sup>24</sup> Cultural pluralism,

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21. GREGORY RODRIGUEZ, *MONGRELS, BASTARDS, ORPHANS, AND VAGABONDS* xvi–xvii (2007).

22. *Id.* at xvii.

23. *Id.* Some attribute the rapid assimilation to the fact that the majority of the new settlers “all belonged to the same race-stock or at least to two branches closely related; namely the Teutonic and Celtic.” EMBERSON EDWARD PROPER, *COLONIAL IMMIGRATION LAWS: A STUDY OF THE REGULATION OF IMMIGRATION BY THE ENGLISH COLONIES IN AMERICA* 84 (1900). Others, such as statesman Henry Cabot Lodge, said this was the case regarding immigration from 1820 to 1880, but noted the “danger of permitting too great an influx of Latin and Slavic races that have formed a very considerable part of our immigration since 1880.” *Id.* at 85 n.1. *But see* KEVIN R. JOHNSON, *THE “HUDDLED MASSES” MYTH* 6 (2004) (noting that the assimilation of Irish and southern and eastern Europeans, now considered to be white, exemplifies that race, like immigration status, is a social construct and not immutable).

24. *See* Collins, *supra* note 4, at 2170–71; Stumpf, *supra* note 4, at 380; *see also* Elk v. Wilkins, 112 U.S. 94, 103 (1884) (denying U.S. citizenship to Native Americans); Allison S. Hartry, *Birthright Justice: The Attack on Birthright Citizenship and Immigrant Women of Color*, 36 N.Y.U. REV. L. & SOC. CHANGE 57, 65 (2012) (citing IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 29–30 (2006) (explaining that Native Americans did not gain American citizenship by birth until

multiculturalism, and the “salad bowl,” which stress the retention of cultural differences and ethnicities in the populace, are a recent phenomenon and still widely debated.<sup>25</sup> Rather, scholars argue that nativism has been the driving force behind much of the nation’s immigration and naturalization laws.<sup>26</sup> Defined as “a sociopolitical policy [that favors] the interests of established inhabitants over those of immigrants,”<sup>27</sup> it is nativism, they argue, that has shaped “membership in the American polity.”<sup>28</sup>

#### A. Economic Fears Drive Nativist Attitudes

The United States has a long history of welcoming immigrants, or of loosening immigration requirements, when needed to satisfy labor demands.<sup>29</sup> Xenophobia sets in, some argue, when immigrants fill those needs, but then “the demographics of the immigrants began to differ from the demographics of the existing population.”<sup>30</sup> In other words, there begins to be a noticeable “them” over “us” mentality, highlighted by the different racial makeup of the laboring class. Others propose that economic fears are the driving force behind much of the nativism and resulting xenophobia.<sup>31</sup> They argue that “successful nativist movements have almost always been linked to more general fears or uneasiness in

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the Nationality Act of 1940 extended citizenship “to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe” born on American soil)).

25. See Bruce Thornton, *Melting Pots and Salad Bowls*, HOOVER INST. (Oct. 26, 2012), <http://www.hoover.org/research/melting-pots-and-salad-bowls>; THE NEW AMERICANS: A GUIDE TO IMMIGRATION SINCE 1965 3–4 (Mary C. Waters et al. eds., 2007); SAMUEL P. HUNTINGTON, WHO ARE WE?: THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY 128–31, 171–72, 184 (2004). The United States has received a net gain of about 47 million immigrants since 1607. THE SOURCE: A GUIDEBOOK TO GENEALOGY 359 (Loretto Dennis Szucs et al. eds., 3d ed. 2006). As late as 1960, 84% of the foreign-born population in the United States was white and traced its heritage back to Canadian or European descent. See Chapter 5: U.S. Foreign-Born Population Trends, PEW RES. CTR. (Sept. 28, 2015), <http://www.pewhispanic.org/2015/09/28/chapter-5-u-s-foreign-born-population-trends/>; THE NEW AMERICANS, at 15.

26. Collins, *supra* note 4, at 2154.

27. Sara Catherine Barnhart, *Second Class Delivery: The Elimination of Birthright Citizenship as a Repeal of “The Pursuit of Happiness,”* 42 GA. L. REV. 525, 527 n.3 (2008) (quoting *Nativism*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2003)).

28. Collins, *supra* note 4, at 2154.

29. See JOHNSON, *supra* note 23, at 96 (noting that “immigration laws have tightened during a severe economic downturn and a diminished demand for labor and have loosened during times of prosperity and an increased demand for labor”); Barnhart, *supra* note 27, at 528 (citing Gilbert Paul Carrasco, *Latinos in the United States: Invitation and Exile*, in IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 190 (Juan F. Perea ed., 1997)).

30. Monique Lee Hawthorne, Comment, *Family Unity in Immigration Law*, 11 LEWIS & CLARK L. REV. 809, 812–13 (2007) (citing MALDWYN ALLEN JONES, AMERICAN IMMIGRATION 185 (2d ed. 1992)).

31. See Barnhart, *supra* note 27, at 528.

American society” that have nothing to do with race.<sup>32</sup> When the economy is booming, and there are plenty of jobs to go around, the anti-immigrant voices quiet. However, when Americans lack confidence in their future, they are not as likely to share that future with others.<sup>33</sup> Thus, “negative attitudes towards immigrants are even more exaggerated in times of economic struggle, with immigrants receiving blame for the country’s economic woes.”<sup>34</sup>

Beginning in the nineteenth and extending through the twentieth century, American immigration and nationality law focused on what one scholar has termed the “categorical exclusion of people of Asian descent,”<sup>35</sup> specifically those of Chinese descent and later those from the “Asiatic zone.”<sup>36</sup> The California gold rush of 1849 brought an influx of people, both United States citizens and foreign immigrants, to the “Gold Mountain” in search of fortune.<sup>37</sup> Among the immigrants were a large number of Chinese prospectors.<sup>38</sup> As gold grew scarce, the California legislature protected California workers by passing the Foreign Miners Tax,<sup>39</sup> which imposed a monthly \$20 tax on each immigrant miner.<sup>40</sup> Effectively forced to stop prospecting, many of the Chinese found work building the Transcontinental Railroad and laboring in menial jobs for low wages.<sup>41</sup> By 1869, however, when the Transcontinental Railroad was joined at Promontory Point, Utah, many Chinese laborers were once more out of work, and Americans again felt threatened by the “yellow peril.”<sup>42</sup> The Chinese immigrants were attacked and driven out of

32. *Id.* (quoting ROGER DANIELS, *COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE* 265 (2d ed. 2002)); JOHNSON, *supra* note 23, at 3 (noting the “unpopularity of—even hatred toward—foreigners among the general population in times of crisis and social unrest”).

33. *See* Barnhart, *supra* note 27, at 528 (quoting DANIELS, *supra* note 32, at 265).

34. *Id.* (citing Carrasco, *supra* note 29, at 190).

35. Collins, *supra* note 4, at 2154–55; *see also* BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850–1990*, at 20–21 (1993).

36. Collins, *supra* note 4, at 2170–71.

37. FRANK F. CHUMAN, *THE BAMBOO PEOPLE: THE LAW AND JAPANESE-AMERICANS* 3 (1976). The Chinese made up a large part of the immigrant population, but the gold rush also attracted immigrants from Germany, Chile, Mexico, Ireland, Turkey, and France. *Aspiration, Acculturation, and Impact, Immigration to the United States: 1789–1930*, HARVARD UNIV. LIBR. OPEN COLLECTIONS PROGRAM, <http://ocp.hul.harvard.edu/immigration/goldrush.html> (last visited Dec. 2, 2016) [hereinafter *Aspiration*].

38. *Aspiration*, *supra* note 37.

39. *See* HING, *supra* note 35, at 20–21.

40. *Aspiration*, *supra* note 37.

41. BAUSUM, *supra* note 2, at 14–15, 17.

42. *Id.* at 14–15, 17, 97. The Union Pacific and the Central Pacific Railroads were joined at Promontory Point, Utah, on May 10, 1869. *Id.* at 97. The term “yellow peril” has been attributed to Kaiser Wilhelm II’s description of an impending Eastern invasion around the turn of the twentieth century. CHUMAN, *supra* note 37, at 73 (citing ROGER DANIELS, *THE POLITICS OF PREJUDICE* 66–71 (1970)).

western towns by American-born workers who vied with the Chinese for scarce jobs.<sup>43</sup>

Similarly, at the turn of the century, when the economy was poor and cheap labor needs high, Japanese immigrants were beckoned to “come to America, the land of opportunity,” for agricultural work in rural California.<sup>44</sup> The Japanese workers in California had increased and prospered to the point that, by 1940, 43% were engaged in some form of farm operation and produced 50 to 90% of many agricultural crops.<sup>45</sup> Additionally, 1,000 Japanese-owned or operated fruit and vegetable stores employed 5,000 workers and enjoyed annual revenues of over \$25 million.<sup>46</sup> They became so successful that they threatened the local growers, who responded with nativist concerns that the Japanese were undermining their way of life.<sup>47</sup> Murmurings of “They’re taking away our jobs, our opportunity,” began bubbling up and down the western coast, and California again passed laws that protected its own by prohibiting Japanese immigrants from owning property or leasing farmland.<sup>48</sup>

Later, high labor needs during World War I and the 1920s encouraged many Mexican immigrants to come to the United States as a “disposable labor force.”<sup>49</sup> In 1942, Congress created the Bracero Program, which allowed nearly one million temporary workers from Mexico to fill jobs created by World War II.<sup>50</sup> Named for the Spanish term “manual labor,” hundreds of thousands of Mexican agricultural workers harvested American fields.<sup>51</sup> Continued demand for agricultural workers resulted in the Migrant Labor Agreement of 1951, which extended the program for more than another decade.<sup>52</sup> Many migrants overstayed their temporary visas, which encouraged many more immigrants to venture north on their own in search of jobs.<sup>53</sup> For years, this was overlooked, as immigrants were willing to perform menial

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43. BAUSUM, *supra* note 2, at 20–21.

44. *Landmark Cases: Korematsu v. United States* (C-Span television broadcast Apr. 2, 2016), <http://landmarkcases.c-span.org/Case/6/Korematsu-v-United-States> (interviewing Karen Korematsu, Fred T. Korematsu Institute Executive Director & Daughter of Fred Korematsu).

45. CHUMAN, *supra* note 37, at 110–11.

46. *Id.*

47. *Landmark Cases*, *supra* note 44 (interviewing Karen Korematsu).

48. *Id.*; CHUMAN, *supra* note 37, at 42–43, 110–11.

49. BAUSUM, *supra* note 2, at 85; JOHNSON, *supra* note 23, at 27, 96.

50. BAUSUM, *supra* note 2, at 87, 99; JOHNSON, *supra* note 23, at 28.

51. BAUSUM, *supra* note 2, at 87, 99.

52. Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 490 (2009).

53. KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAW 125–26 (2007) [hereinafter JOHNSON, FLOODGATES].

labor jobs that Americans disdained.<sup>54</sup> However, when the U.S. economy waned through several recessions in the latter half of the twentieth and into the twenty-first century, nativist fears arose that low-skilled immigrants were flooding the labor market and taking jobs from hardworking Americans.<sup>55</sup> Thus, Americans pressured lawmakers to deal with the immigration problem, which some scholars claimed was creating a national identity crisis and placing “[c]ultural America under siege.”<sup>56</sup>

### *B. Nativism Drives the Formation of U.S. Immigration Law*

The early years of the country generally saw unrestricted immigration.<sup>57</sup> The American colonies and early States generally restricted immigration based only on religion,<sup>58</sup> infirmity,<sup>59</sup> or indigency.<sup>60</sup> However, the resulting arrival of German immigrants into Pennsylvania from 1700 to 1750 was so large—the “most extensive

54. *Id.*

55. David Frum, *Does Immigration Harm Working Americans?*, ATLANTIC (Jan. 5, 2015), <http://www.theatlantic.com/business/archive/2015/01/does-immigration-harm-working-americans/384060/>.

56. HUNTINGTON, *supra* note 25, at 8–12.

57. CHUMAN, *supra* note 37, at 53; PROPER, *supra* note 23, at 11, 56, 59, 64–65. The founders of the colonies, and later the colonial governments, offered land to persons, including children and servants, who immigrated to populate the provinces. PROPER, *supra* note 23, at 11. The colonies also enticed settlers with naturalization, as property could not be held or transferred by an alien under governing English law. *Id.* at 14, 59, 64. England ended all naturalization in the colonies in 1773. *Id.* at 75. The Declaration of Independence expressly charges King George III of trying “to prevent the populating of ‘these states,’ by forbidding naturalization and issuing other restrictive measures.” *Id.* at 76.

58. PROPER, *supra* note 23, at 17–19, 58–60, 63, 66. “Many of the early charters expressly, or impliedly, forbade the admission of Catholics . . . which were soon, either wholly or partially, embodied in colonial legislation.” *Id.* at 18. Catholic settlers were subject to “a duty on Irish Catholic servants; a positive prohibition of the Roman worship; a double tax on their lands; and the ‘Abjuration Oath,’ which practically excluded members of this faith, unless they chose to break their vows.” *Id.* In an effort to keep out dissenters, the Quaker province in Pennsylvania in 1729 taxed all foreigners coming into the colony. *Id.* at 19. Ironically, legislation had prevented Quakers, with their “accursed tenets,” from settling in the New England and southern colonies. *Id.* at 25, 32–33, 63.

59. *Id.* at 29–30, 52. The 1709 Massachusetts Acts and Resolves denied “lame, impotent, or infirm persons, incapable of managing themselves.” *Id.* at 29. The Act of 1722 aimed to “prevent the importation of poor, vicious and infirm persons,” as did a 1756 act, which “expressly prohibited the landing of sick, impotent or infirm persons.” *Id.* at 30.

60. JOHNSON, *supra* note 23, at 94. Massachusetts Bay colonists complained in 1645 that “they were being burdened with the increasing number of poor and indigent settlers.” PROPER, *supra* note 23, at 24. Puritans were criticized for their denial of “thousands of poor but thrifty settlers” during the first half of the eighteenth century, who later “demonstrated that they needed but the opportunity in order to bring forth abundant wealth from the resources of the country.” *Id.* at 36–37. States disfavored paupers and viewed them as having “no economic benefit to the community.” JOHNSON, *supra* note 23, at 94. Early federal immigration law barred entry to any person without visible means of support and liable to become a public charge. Immigration Act of Mar. 3, 1891, 26 Stat. 1084 (1891).



immigration of colonial times”—that inhabitants began to fear “the possible dangers arising from such a large influx of foreigners.”<sup>61</sup> Residents lamented that “the peace and security of the province” might be “endangered by such numbers of strangers daily poured in,” who were “ignorant of our language and laws” to the point that they made up a large body of a “distinct people.”<sup>62</sup> Indeed, one writer wrote of the Germans that they “settle in communities, and have schools taught, books printed, and even newspapers printed in their own language, thus constituting a foreign colony and likely to continue so for many generations.”<sup>63</sup> Thus bemoaning the “danger of its degenerating into a foreign colony,” several colonies restricted the entry of German immigrants.<sup>64</sup>

The federalization of immigration policy came about because of the uprising nativist attitudes towards Chinese immigrants following a period of unrestricted immigration. As the Chinese population grew close to 60,000 at a time when the nation was heading towards economic crisis,<sup>65</sup> Americans increasingly looked to federal immigration legislation to protect their jobs.<sup>66</sup> The Page Act of 1875<sup>67</sup> had prohibited the entry of “coolie” immigrant laborers to deal with the problem of Chinese laborers on the west coast.<sup>68</sup> In 1882, Congress

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61. PROPER, *supra* note 23, at 19, 46–48, 51–52. From 1720 to 1750, 60,000 German settlers arrived in Pennsylvania. *Id.* at 51. “[T]he cause of this unprecedented immigration into Pennsylvania” was attributed to several factors: “Penn’s travels in Holland and Germany as a Quaker missionary; the broad and liberal invitation which he extended to all Europe; the generous terms on which lands were offered, together with religious and political guarantees, were among some of the attractions; while the unsettled conditions in Europe, especially the wars of Louis XIV, were the repellent forces on the other side.” *Id.* at 46.

62. *Id.* at 48–49.

63. *Id.* at 51–52.

64. *Id.* at 19, 31, 48–49.

65. Walter Coffey, *The Economic Crisis of 1893*, WALTER COFFEY BLOG, <https://waltercoffey.wordpress.com/2012/11/30/the-economic-crisis-of-1893/> (last visited Aug. 28, 2016). “The Panic of 1893 sparked a stock market crash that turned into the worst depression in American history up to that time.” *Id.*

66. BAUSUM, *supra* note 2, at 14–15, 17; JOHNSON, *supra* note 23, at 17. Congress first attempted to exclude people of Chinese descent, both from naturalization and immigration, with the Naturalization Act of 1870, which denied “Chinese immigrants from qualifying for citizenship.” Naturalization Act of 1870, ch. 254, 16 Stat. 254. The statute restricted citizenship to “white persons and persons of African descent.” *Id.* Chinese immigrants were not eligible for citizenship again until 1943. BAUSUM, *supra* note 2, at 96, 100.

67. Page Act, ch. 141, 18 Stat. 477 (1875).

68. *Id.* The law imposed a fine not to exceed \$2,000 and a maximum jail sentence of one year for those convicted of importing a person to the United States from China, Japan, or any other Asian country “without their free and voluntary consent, for the purpose of holding them to a term of service.” *Id.*; see also Hawthorne, *supra* note 30, at 813 n.18 (citing Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641 (2005) (“arguing that the Page Law—passed in 1875, which targeted Chinese prostitutes—was racist and restrictionist because nativists viewed Chinese marriage and sex practices as threatening to traditional American values”)).

went further and introduced the nation's first restrictive immigration law aimed specifically at the Chinese as a class.<sup>69</sup> The Chinese Exclusion Act of 1882<sup>70</sup> suspended all further immigration of Chinese laborers for ten years and prohibited courts from granting U.S. citizenship to the Chinese.<sup>71</sup> The Supreme Court upheld the law,<sup>72</sup> and the Chinese remained on the list of racially excludable people until the Chinese Exclusion Act was finally repealed in 1943.<sup>73</sup>

Likewise, the Japanese faced hostile immigration laws that reflected nativist concerns about the economy. Initially sought as cheap labor for California agricultural needs, Japanese workers came to the United States under an 1894 treaty with Japan that provided for unrestricted Japanese immigration.<sup>74</sup> California passed an "alien land law" to deny Japanese immigrants from owning real property,<sup>75</sup> and segregated Japanese schoolchildren in San Francisco.<sup>76</sup> The growing hostility to the Japanese immigrants resulted in the "Gentleman's Agreement" of 1907–1908, which restricted further Japanese immigration to the United States.<sup>77</sup> Anti-Asian sentiment remained so high that Congress passed the Immigration Act of 1917 (1917 Immigration Act),<sup>78</sup> also known as

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69. See Hawthorne, *supra* note 30, at 813 (citing THOMAS ALEXANDER ALENIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 152 (5th ed. 2003); JONES, *supra* note 30, at 212–14).

70. Chinese Exclusion Act of 1882, ch. 126, § 14, 22 Stat. 58, 61 (repealed 1943).

71. *Id.* The Act mandated that "no State Court or Court of the United States shall admit Chinese to Citizenship." *Id.*

72. *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) (opining that "[t]he power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the [C]onstitution").

73. Magnuson Act, ch. 344, § 3, 57 Stat. 600, 601 (1943); Geary Act, ch. 60, 27 Stat. 25 (1892) (extending the provisions of the Chinese Exclusion Act for another ten years). Attempts to wholly exclude Chinese Americans from the United States were thwarted by the United States Supreme Court in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (invoking the Fourteenth Amendment to deny attempt by U.S. government to bar an American-born man of Chinese ancestry from re-entry upon his return from a temporary trip abroad). Nevertheless, even following *Wong Kim Ark*, Chinese Americans were still regarded as "aliens," and the Bureau of Immigration "urged that though native-born Asian Americans might be 'technical' citizens, they would never become 'real' citizens . . . and should not be treated in the law as genuine Americans." Collins, *supra* note 4, at 2171 n.144 (quoting LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 208–09 (1995)).

74. CHUMAN, *supra* note 37, at 14; Treaty of Commerce and Navigation between U.S. and Japan, 29 Stat. 848 (1894).

75. CHUMAN, *supra* note 37, at 41–43, 46–50, 88–89; JOHNSON, *supra* note 23, at 18.

76. CHUMAN, *supra* note 37, at 19–20, 23–26.

77. *Id.* at 27–37; JOHNSON, *supra* note 23, at 18. In exchange, the Japanese schools were desegregated. CHUMAN, *supra* note 37, at 30–31. The informal, unpublished agreement continued until the Immigration Act of 1924, by which all Japanese were excluded from permanent immigration into the United States, superseded the agreement. *Id.* at 33, 35.

78. Immigration Act of 1917, ch. 29, Pub L. No. 64-301, § 3, 39 Stat. 874, 875–76 (repealed 1952). The Act expanded beyond the Chinese and Japanese to ban immigration from almost the entirety

the Asiatic Barred Zone Act, and followed that with the National Origins Act of 1924,<sup>79</sup> which codified race-based exclusionary immigration laws and also established a quota system that remained in place for thirty years.<sup>80</sup>

When the Japanese bombed Pearl Harbor in December of 1941, there was no immediate call “to deport or intern or round up” Japanese Americans,<sup>81</sup> and when such murmurings surfaced, national newspapers defended the Japanese, stating, “They’re loyal Americans. We don’t need to give in to the fears.”<sup>82</sup> But the west coast Hearst press and politicians took up the nativist cause of the California farmer grower associations and labor unions, and with refrains of “This is white man’s country,” made the Japanese an easy target for legal discrimination.<sup>83</sup> President Roosevelt issued Executive Order 9066,<sup>84</sup> authorizing the internment of nearly 120,000 people of Japanese ancestry, immigrants and citizens alike.<sup>85</sup> Even after the Japanese detainees were released

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of Asia and the Pacific Islands. *Id.* The Japanese were not included in this Act because of the existing Gentlemen’s Agreement. CHUMAN, *supra* note 37, at 55.

79. Johnson–Reed Act, ch. 190, § 11(a), 43 Stat. 153, 159 (1924).

80. BAUSUM, *supra* note 2, at 98–99. The Act sought to reverse unwanted increases in immigration by allowing only 2% of a particular nationality to immigrate, based on the immigration patterns of the 1890 census. *Id.*; JOHNSON, *supra* note 23, at 22; *see also* Hawthorne, *supra* note 30, at 813 (citing DAVID R. ROEDIGER, WORKING TOWARD WHITENESS: HOW AMERICA’S IMMIGRANTS BECAME WHITE 139 (2005)). The Immigration Act of 1921 had created a temporary, one-year 3% quota system, which was extended for two years, until the 1924 Act permanently fixed immigration quotas. BAUSUM, *supra* note 2, at 98–99. The 1924 Act excluded the Chinese and added Japanese to the list of Asians who were ineligible for citizenship. *Id.* at 99. The quotas sought to restrict immigration from Eastern and Southern Europe, Asia, and Africa, at the same time that the Act freely admitted white, Protestant Anglo-Saxon immigrants. JOHNSON, *supra* note 23, at 23–24; Collins, *supra* note 4, at 2155.

81. *Landmark Cases*, *supra* note 44 (interviewing Peter Irons, author of JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES). The U.S. government interned nearly 120,000 Japanese in camps during World War II. CHUMAN, *supra* note 37, at 143.

82. *Landmark Cases*, *supra* note 44 (interviewing Peter Irons).

83. CHUMAN, *supra* note 37, at 148–49; *Landmark Cases*, *supra* note 44 (interviewing Peter Irons).

84. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942). President Gerald R. Ford rescinded the order by Presidential Proclamation No. 2714 on Feb. 19, 1976. CHUMAN, *supra* note 37, at 360 n.36.

85. CHUMAN, *supra* note 37, at 143–44. Over 70,000 were American citizens. *Id.* The order gave the military power “to round up, to exclude, any person, of any ancestry, but only Japanese Americans were singled out.” *Id.* at 159; *Landmark Cases*, *supra* note 44. Congress later followed Executive Order 9066 with an act of Congress that made violation of the Order a criminal offense. Act of March 21, 1942, Pub. L. No. 77-503, 56 Stat. 173; CHUMAN, *supra* note 37, at 161, 185; *Landmark Cases*, *supra* note 44. Upholding the right of the executive to issue orders to deny civil liberties in time of war, the Supreme Court found the order constitutional in *Korematsu v. United States*, 323 U.S. 214 (1944), a case which has never been overturned. *See* Adam Liptak, *A Discredited Supreme Court Ruling That Still, Technically, Stands*, N.Y. TIMES (Jan. 27, 2014), <http://www.nytimes.com/2014/01/28/us/time-for-supreme-court-to-overrule-korematsu-verdict.html>. Justice Scalia contended that *Korematsu* ranks with *Dred Scott* and *Plessy v. Ferguson* as one of the three worst decisions in the history of the Supreme Court. *Id.*; *Landmark Cases*, *supra* note 44.

three years later in 1945, it was not until 1952, with the passage of the Immigration and Nationality Act (INA),<sup>86</sup> that barriers to immigration and naturalization based on race and ethnic background were finally eliminated.<sup>87</sup> Although the racially motivated quota system developed in the 1920s was eventually abolished by the Immigration Act of 1965,<sup>88</sup> the “exclusionary legislation and related administrative regulations and judicial rulings” produced what some scholars have argued is a “body of nationality law that was premised on a firm belief in a natural racial hierarchy.”<sup>89</sup>

The latter half of the twentieth century focused the immigration debate along the country’s southern border, and most legislative efforts dealt with the migrant population from Mexico.<sup>90</sup> The United States repatriated Mexican citizens to reduce welfare rolls during the Great Depression of the 1930s.<sup>91</sup> Later, to fill labor shortages caused by World War II, the United States again welcomed one million temporary Mexican workers through its 1942 Bracero Program.<sup>92</sup> But in the face of another declining economy that led to a recession in 1953, nativism resurfaced.<sup>93</sup> U.S. officials addressed American concerns by deporting over a million Mexican immigrants and U.S. citizens of Mexican ancestry in a 1954 program known as “Operation Wetback.”<sup>94</sup> Still,

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86. Immigration and Nationality Act of 1952 (McCarran–Walter Act), ch. 477, Pub. L. No. 82-414, § 201(a), 205, 66 Stat. 163, 175, 180 [hereinafter INA] (eliminating racial limitations on immigration) (codified at 8 U.S.C. § 1151(b)(2)(A)(i) (2012)). The INA superseded into one comprehensive statute all previous laws and regulations concerning immigration, naturalization, and nationality. CHUMAN, *supra* note 37, at 309. President Harry S. Truman viewed the INA legislation as too restrictive, because it carried forward the old quota system; however, the Act passed over his veto. JOHNSON, *supra* note 23, at 24.

87. BAUSUM, *supra* note 2, at 101; CHUMAN, *supra* note 37, at 309; Collins, *supra* note 4, at 2188.

88. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, § 1, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.) (eliminating the national origins quota system); BAUSUM, *supra* note 2, at 100; Collins, *supra* note 4, at 2188. However, as a compromise, the Act limited immigration to 120,000 from the Western Hemisphere, particularly Latin American countries. JOHNSON, *supra* note 23, at 25.

89. Collins, *supra* note 4, at 2155; *see also* Alicia J. Campi, *The McCarran–Walter Act: A Contradictory Legacy on Race, Quotas, and Ideology*, IMMIGR. POL’Y CTR. (June 2004), <https://www.americanimmigrationcouncil.org/sites/default/files/research/Brief21%20-%20McCarran-Walter.pdf>.

90. JOHNSON, *supra* note 23, at 28.

91. *Id.* at 4, 28–29.

92. *Id.* at 28.

93. *Id.* (quoting Eleanor M. Hadley, *A Critical Analysis of the Wetback Problem*, 21 L. & CONTEMP. PROBS. 334, 344 (1956) (blaming undocumented immigration from Mexico for “displacement of American workers, depressed wages, increased racial discrimination towards Americans of Mexican ancestry, illiteracy, disease, and lawlessness”)).

94. BAUSUM, *supra* note 2, at 100; VICTOR C. ROMERO, *ALIENATED: IMMIGRANT RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA* 165 (2005). Ironically, the Supreme Court rejected the “separate but equal” doctrine in *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954), that same year.

Mexican immigrants continued to cross the border for seasonal field work, a practice that was left relatively unimpeded for a number of years until undocumented workers began to fill jobs wanted by American citizens.<sup>95</sup>

In 1986, Congress passed the Immigration and Reform Control Act (IRCA),<sup>96</sup> its first comprehensive attempt to combat undocumented immigration through the imposition of sanctions on employers.<sup>97</sup> At the same time, IRCA granted amnesty and residency to 2.7 million formerly illegal immigrants, mostly from Mexico, who had arrived before January 1, 1982, and prohibited discrimination on the basis of national origin or citizenship.<sup>98</sup> To many, this simply encouraged future illegal immigration. However, a 1990 reclassification in the nonimmigrant and immigrant visa system, which had led to the entry of a large number of immigrants, resulted in another tightening of restrictions.<sup>99</sup> As many Mexican nationals bypassed the restrictive methods of U.S. immigration and snuck into the country to live as undocumented immigrants, unsympathetic voices suggested that the immigrants “get in line” and come to the country legally, or simply be sent back.<sup>100</sup>

Two separate measures highlight the rising anti-immigration concerns that existed at the time in the country.<sup>101</sup> In 1994, California voters approved Proposition 187, which attempted to restrict access to social services, including education and health care, to illegal immigrants.<sup>102</sup> Two years later, in 1996, Congress tried to do the same with the Mexican border through the Personal Responsibility and Work

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JOHNSON, *supra* note 23, at 16, 29–30.

95. BAUSUM, *supra* note 2, at 88–91.

96. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 [hereinafter IRCA].

97. *Id.*; Keila E. Molina & Lynne Marie Kohm, *Are We There Yet? Immigration Reform for Children Left Behind*, 23 BERKELEY LA RAZA L.J. 77, 82–83 (2013). The law instituted the use of electronic employment verification systems. *Shortfalls of the 1996 Immigration Reform Legislation: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., & Int’l Law of the Comm. on the Judiciary*, 110th Cong. 2 (2007) [hereinafter *Shortfalls*] (statement of Cal. Representative Zoe Lofgren, Chairwoman, Subcommittee on Immigration, Citizenship, Refugees, Border Security, & Int’l Law).

98. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359; BAUSUM, *supra* note 2, at 101.

99. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978; Molina & Kohm, *supra* note 97, at 83.

100. Moni Basu, *Waits for Immigration Status—the Legal Way—Can be Long and Frustrating*, CNN (Sept. 9, 2014), [http://www.cnn.com/2014/09/08/us/immigration-visa-long-waits/index.html?hpt=us\\_r1](http://www.cnn.com/2014/09/08/us/immigration-visa-long-waits/index.html?hpt=us_r1). “In the debate over immigration, there’s a common refrain from people who oppose a path to residency for undocumented immigrants: ‘Why don’t they get in line?’” *Id.*

101. BAUSUM, *supra* note 2, at 100.

102. *Id.*; JOHNSON, *supra* note 23, at 42.

Opportunity Reconciliation Act of 1996,<sup>103</sup> which it called a “welfare reform” bill.<sup>104</sup> Intended to encourage “self-sufficiency” and remove the “extra incentive” for migrating to the United States, Congress reduced access for immigrants to many social services, including food stamps.<sup>105</sup> Both measures were ultimately unsuccessful. Federal courts found the California law to be unconstitutional, and the 1996 Congressional act was repealed because it affected the rights of some American-born children.<sup>106</sup> But both highlighted the nativist sentiment that drove the legislation, as supporters blamed undocumented Mexicans for the economic problems in the country.<sup>107</sup>

To stymie the influx of illegal immigrants, the United States increased its border control efforts. Border Patrol Chief Silvestre Reyes instituted “Operation Hold the Line” and physically placed border agents directly on the border in El Paso, Texas, to visually deter border crossings.<sup>108</sup> Immigration Subcommittee Chairman Lamar Smith (R-Tex.) brought Chief Reyes to testify before Congress, and the Immigration and Naturalization Service (INS) adopted Reyes’ strategy as “Operation Gatekeeper” for implementation in San Diego.<sup>109</sup> Building on “one of [the] most successful border control initiatives ever,” Representative Smith and Senator Alan Simpson drafted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.<sup>110</sup> The act increased the number of border agents to 1,000 a year, provided more technology for border enforcement, and funded more fencing along the southern border.<sup>111</sup> The measures were effective, but had both positive and negative consequences. On the one hand, it became more difficult for immigrants to cross back and forth at the border, ending the practice of circular migration that had previously occurred;<sup>112</sup> on the other, the United States had to deal with more illegal

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103. Act of Aug. 22, 1996, Pub. L. No. 104-193, 110 Stat. 2105. *But see* Act of May 13, 2002, Pub. L. 171 § 4401, 116 Stat. 134, 333 (restoring eligibility for food stamps to immigrants).

104. BAUSUM, *supra* note 2, at 100; President Clinton claimed the Act would “change welfare as we know it.” JOHNSON, *supra* note 23, at 93, 103–04.

105. JOHNSON, *supra* note 23, at 93; *see also* JOHNSON, FLOODGATES, *supra* note 53, at 151.

106. BAUSUM, *supra* note 2, at 100. The Non-Citizen Benefit Clarification Act of 1998 “established that immigrants without citizenship do qualify for some social services, such as economic assistance.” *Id.*

107. JOHNSON, *supra* note 23, at 42–43. Supporters commented, “They come here to get on the California dole,” and, “We’re paying for her care while Americans are homeless and starving in the streets.” *Id.* at 43–44.

108. *Shortfalls*, *supra* note 97, at 3–4 (statement of Representative Steve King, R-Iowa).

109. *Id.* at 4.

110. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 [hereinafter IIRIRA].

111. *Shortfalls*, *supra* note 97, at 1, 4.

112. *Id.* at 2, 4, 6, 10, 31–32. Before the legislation, 80% of illegal immigrants would leave within

immigrants staying in the country.<sup>113</sup>

Professor Douglas Massey has made a compelling argument that harsher border policies merely served to nationalize illegal immigration.<sup>114</sup> For example, in the 1980s, illegal immigrants generally crossed at El Paso and San Diego and remained in those areas.<sup>115</sup> However, the militarization of these known border crossings pushed immigrants into more remote and unwatched zones where apprehension was less likely,<sup>116</sup> but areas that were also less inhabitable.<sup>117</sup> Therefore, migrants traveled farther into the interior of the United States than they had before, and their presence had a greater impact than before.<sup>118</sup> This affected the economy, as immigrants sought work in the face of IRCA’s strict employer sanctions on hiring illegal immigrants.<sup>119</sup> Employers in the “agricultural, construction, custodial services, and non-durable manufacturing” sectors resorted to the use of subcontractors to avoid employer verification systems; however, the use of such middlemen drove up prices and reduced wages of all workers, whether legal or not.<sup>120</sup> Labor economists claimed that illegal immigrants were “displacing” low-skill and minority U.S. workers, and the country cried out for action from Congress.<sup>121</sup>

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a couple of years. *Id.* at 2. However, IIRIRA created three- and ten-year bars to entry to those who had been in the U.S. for more than 6 months or 1 year, so that immigrants tended to stay longer or never leave. *Id.* at 2, 28.

113. *Id.* at 14. “[T]he likelihood of returning to Mexico within 12 months of an undocumented entry fell from around 45% in 1982 to just 25% in 2001.” *Id.* “The ultimate effect of restrictive border policies was to double the net rate of undocumented population growth, making Hispanics the nation’s largest minority years before Census Bureau demographers had projected—not because more Mexicans were coming but because fewer were going home.” *Id.*

114. *Id.* at 9.

115. *Id.* “[A]s late as 1989, only one-third of undocumented migrants crossed outside of San Diego or El Paso, but by 2002, two-thirds were crossing somewhere else.” *Id.*

116. *Shortfalls, supra* note 97, at 1. “As a result, the probability of apprehension plummeted to reach record low levels. American taxpayers were spending billions more to catch fewer migrants.” *Id.* at 13.

117. *Id.* at 9.

118. *Id.* “Before 1993, no more than 20 percent of all undocumented migrants went to States other than the three traditional destinations of California, Texas and Illinois, but by 2002, 55 percent were proceeding to some new State of destination.” *Id.*

119. *Id.* at 15.

120. *Id.*; Steven Greenhouse, *Ideas & Trends, Middlemen in the Low-Wage Economy*, N.Y. TIMES (Dec. 28, 2003), <http://www.nytimes.com/2003/12/28/weekinreview/ideas-trends-middlemen-in-the-low-wage-economy.html>.

121. *The Immigration Debate: Its Impact on Workers, Wages and Employers*, KNOWLEDGE AT WHARTON (May 17, 2006), <http://knowledge.wharton.upenn.edu/article/the-immigration-debate-its-impact-on-workers-wages-and-employers/>.

### III. THE EXPANSION OF DEPORTABLE OFFENSES UNDER U.S. IMMIGRATION LAW

The United States Supreme Court ruled in 1849 that the regulation of immigration was a federal, not state, responsibility,<sup>122</sup> but it was not until 1891 that the Federal Bureau of Immigration was established and charged with responsibility for all immigration matters.<sup>123</sup> That same year, Congress passed the Immigration Act of 1891,<sup>124</sup> which barred from entry to the United States those “convicted of a felony or other infamous crime or misdemeanor involving moral turpitude.”<sup>125</sup> But it did not define what a “crime of moral turpitude” encompassed, and Congress gave courts wide berth in interpretation.<sup>126</sup>

Until recently, the list of deportable offenses was exhaustive and considered a “narrow class.”<sup>127</sup> Early attempts at deportation centered on the President’s ability to deport those immigrants he judged to be “dangerous to the peace and safety of the United States.”<sup>128</sup> Later, the 1917 Immigration Act<sup>129</sup> authorized the deportation of “any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States.”<sup>130</sup> It also authorized the deportation of those who committed two or more crimes of moral turpitude at any time after entry.<sup>131</sup> Five years later, convictions for narcotics and controlled substances were classified as crimes of moral turpitude and added to the

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122. *Passenger Cases*, 48 U.S. (7 How.) 283, 392, 400, 409 (1849) (striking state laws that taxed aliens and passengers arriving from foreign ports).

123. BAUSUM, *supra* note 2, at 97. First overseen by the Treasury Department, the Federal Bureau of Immigration moved to the Department of Labor in 1913, along with a separate Bureau of Naturalization. *Id.* Twenty years later, the two bureaus merged into a joined unit, the Immigration and Naturalization Service (INS), still under the jurisdiction of the Department of Labor. *Id.* at 98. In 1940, Congress relocated the INS to the United States Justice Department, where it would remain until 2003, when the Department of Homeland Security assumed its duties. *Id.* at 97–98.

124. Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084.

125. *Id.*

126. *Id.* (including those “convicted of a felony or other infamous crime or misdemeanor involving moral turpitude” as excludable persons). Congress gave some guidance in the Page Act, which considered as “undesirable” those Asians who were coming to America for forced labor or for prostitution, or convicts from any country. Page Act, ch. 141, 18 Stat. 477 (1875).

127. *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)).

128. An Act Concerning Aliens, ch. 58, 1 Stat. 571 (1798). Passed by the Federalist-controlled Congress as part of the infamous Alien and Sedition Acts, the law was unpopular and expired, non-renewed, after two years. CHUMAN, *supra* note 37, at 53.

129. Immigration Act of 1917, Pub. L. No. 64-301, ch. 29, § 19, 39 Stat. 874, 889.

130. *Id.*

131. *Id.*



list of deportable offenses.<sup>132</sup>

However, without any guidance from Congress, the term “moral turpitude” remains as elusive today as it was one hundred years ago. To determine relief from removal on this ground, courts have settled upon the definition of “an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.”<sup>133</sup> But as immigration matters increasingly have become politically polarized, the “drastic measure” of deportation is “virtually inevitable for a vast number of noncitizens convicted of crimes.”<sup>134</sup> And Congress has all but removed judicial discretion to decide otherwise.<sup>135</sup>

#### A. “Aggravated Felony” Under the 1996 Reforms

As the number of illegal immigrants living in the United States rose to between five and six million by 1996, legislators sought to curb illegal immigration through sweeping immigration reforms.<sup>136</sup> Two laws in particular, both of which amended the Immigration and Nationality Act (INA),<sup>137</sup> impacted immigration as they greatly expanded the range of deportable offenses.<sup>138</sup> In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA),<sup>139</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).<sup>140</sup> The AEDPA significantly expanded the grounds of

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132. 1922 Narcotic Drug Act, ch. 202, 42 Stat. 596 (excluding 30 grams of marijuana); *Padilla*, 559 U.S. at 360.

133. See, e.g., *Gelin v. U.S. Attorney Gen.*, 837 F.3d 1236, 1240 (11th Cir. 2016).

134. *Padilla*, 559 U.S. at 360 (quoting *Fong Haw Tan v. Phelan*, 333 U.S. at 10).

135. See *infra* Section III.B.

136. *Molina & Kohm*, *supra* note 97, at 83; *Shortfalls*, *supra* note 97, at 1.

137. See Immigration and Nationality Act of 1952 (McCarran–Walter Act), Pub. L. No. 82-414, 66 Stat. 163. “The IIRIRA amended virtually every section of title two of the Immigration and Nationality Act. It represented the most comprehensive immigration legislation since the McCarran–Walter Act of 1952.” *Shortfalls*, *supra* note 97, at 27.

138. *Molina & Kohm*, *supra* note 97, at 83.

139. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) [hereinafter AEDPA]. “Although the Antiterrorism Act’s name suggests concerns about combating terrorism, the genesis of the law illustrates that it is a political response to deeper uncertainty in the U.S. political order.” JOHNSON, *supra* note 23, at 58. Passed in the wake of the Oklahoma City Bombing, “AEDPA was intended to deter terrorism, to provide justice for victims, and to provide an effective death penalty.” *Shortfalls*, *supra* note 97, at 6. But the ones most affected have been “‘criminal aliens’ who have nothing whatever to do with terrorism . . . in response to an act of domestic terrorism attributable to U.S. citizens.” JOHNSON, *supra* note 23, at 59.

140. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546; Kim Sung-soo, *Adoptees Deported by US*, KOREA TIMES (Mar. 4, 2012), [http://www.koreatimes.co.kr/www/news/opinion/2012/03/137\\_106204.html](http://www.koreatimes.co.kr/www/news/opinion/2012/03/137_106204.html).

deportability for immigrants with criminal records.<sup>141</sup> The IIRIRA established an expedited removal process and effectively eliminated judicial review for undocumented immigrants with criminal records.<sup>142</sup>

The impact came about because of the law's expansion of the definition of "aggravated felony," the conviction of which subjected noncitizens to detention and deportation. In 1988, Congress passed the Anti-Drug Abuse Act (ADAA),<sup>143</sup> which added as an aggravated felony any conviction for murder, drug trafficking, and firearms offenses.<sup>144</sup> It expanded on the definition of aggravated felony in the Immigration Act of 1990, by adding any "crime of violence" with an imposed sentence of at least five years.<sup>145</sup> However, under the new IIRIRA definition, Congress also included as crimes of violence those punishable by only one year in prison, which accounted for even state misdemeanors such as theft by check and shoplifting.<sup>146</sup>

Rather than race, criminal history became the litmus test for undesirability.<sup>147</sup> The expanded definition of "aggravated felony" also meant that many of the crimes now "fit within the broad immigration law category of 'crimes involving moral turpitude.'"<sup>148</sup> Congress made a single crime of "moral turpitude" a deportable offense under the AEDPA, even though it still declined to define its contours.<sup>149</sup> Further, the 1996 laws changed the definition of "conviction" and "sentence" to include expunged convictions and suspended sentences, so that even suspended sentences of one year have qualified as a one-year prison term and met the definition of aggravated felony.<sup>150</sup> Additionally,

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141. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996); Molina & Kohm, *supra* note 97, at 83.

142. Hawthorne, *supra* note 30, at 814.

143. Anti-Drug Abuse Act of 1988 (Drug Kingpin Act), Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469.

144. *Id.* The definition of "aggravated felony" began as one paragraph in 1988 and now has more than twenty paragraphs with many subsections. ROMERO, *supra* note 94, at 58.

145. Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(3), 104 Stat. 4978, 5048; *see* INA § 101(a)(43)(F)–(G), 8 U.S.C. § 1101(a)(43)(F)–(G) (2012).

146. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009–596; INA § 101(a)(43)(F)–(G), 8 U.S.C. § 1101(a)(43)(F)–(G) (2012); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Law and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939 (2000); Sung-soo, *supra* note 140.

147. *Padilla v. Kentucky*, 559 U.S. 356, 362 (2010); Jason A Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 663–64 (2015).

148. Morawetz, *supra* note 146, at 1940.

149. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 435, 110 Stat. 1214, 1274 (codified at 8 U.S.C. § 1227(a)(2)(A)(i) (2012)); Stumpf, *supra* note 4, at 383 & n.78. Before the 1996 laws, "an immigrant had to be sentenced to at least one year for a 'crime involving moral turpitude' in order to be deportable for a one-time minor offense. As a result of IIRIRA, this deportability ground is applied to any crime that could lead to a year's sentence—even relatively minor crimes for which no jail time was imposed." *Shortfalls*, *supra* note 97, at 35.

150. *See* INA § 101(a)(48), 8 U.S.C. § 1101(a)(48) (2012); *see also* Morawetz, *supra* note 146, at

Congress allowed the definition of “aggravated felony” to be applied retroactively under IIRIRA, so that INS could pursue and remove people for convictions that occurred prior to the statute’s enactment, even relatively minor offenses that were not classified as “aggravated felonies” under immigration law when they were committed.<sup>151</sup>

What started as a one-paragraph definition for “aggravated felony” in 1988 grew in a short time to over twenty paragraphs with multiple subsections.<sup>152</sup> As a result, the number of deportations rose dramatically. In the seven decades leading up to 1980, the United States had deported approximately 56,000 immigrants because of criminal convictions.<sup>153</sup> However, three years after the passage of the 1996 laws, deportations leapt to 63,012 in 1999 alone, and increased to 88,000 in 2004.<sup>154</sup> Upon a challenge in 2006, the United States Supreme Court noted in *Lopez v. Gonzales*,<sup>155</sup> that the definition of “aggravated felony” was founded in federal law even when state offenses were involved.<sup>156</sup> However, just four years later, Justice John Paul Stevens rejected governmental overreach in *Carachuri-Rosendo v. Holder*,<sup>157</sup> finding that, under any construction, “a 10-day sentence for the unauthorized possession of a trivial amount of a prescription drug” did not comport with the ordinary meaning of “aggravated felony” to subject someone to deportation.<sup>158</sup> Even so, the government is still attempting to deport

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1942. This further includes charges that have been dropped after successful participation in a rehabilitation or diversion program. *Shortfalls*, *supra* note 97, at 34.

151. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009–596; *Shortfalls*, *supra* note 97, at 7, 34; Morawetz, *supra* note 146, at 1939; Susan Levine, *A Foreigner at Home: For Children Adopted From Abroad, Lawbreaking Brings Deportation*, WASH. POST (Mar. 5, 2000), <http://www.washingtonpost.com/wp-srv/WPcap/2000-03/05/080r-030500-idx.html>. Such retroactivity is unconstitutional in a criminal matter; however, deportation is a civil action. *Padilla*, 559 U.S. at 362 (stating that deportation is a civil matter but noting it is also an automatic “penalty” for aggravated felons). “As a result, noncitizens are being deported for reasons that had no immigration consequences originally. They never had notice that deportation was possible when, for example, they pled guilty to an offense that was considered too minor to have immigration consequences, but since that time has become a deportable offense.” *Shortfalls*, *supra* note 97, at 46 (statement of Hiroshi Motomura, Kenan Distinguished Professor of Law).

152. ROMERO, *supra* note 94, at 58.

153. Stumpf, *supra* note 4, at 386.

154. *Id.*; Levine, *supra* note 151.

155. *Lopez v. Gonzales*, 549 U.S. 47, 59 (2006) (finding aggravated felony category should not encompass simple possession offenses); *see also* *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004) (finding aggravated felony category should not apply to DUI offenses).

156. *Lopez*, 549 U.S. at 60.

157. *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 566 (2010) (rejecting the government’s argument that two misdemeanor drug convictions, one for the possession of a single Xanax tablet, amounted to an aggravated felony under federal immigration law); Adam Liptak, *Justices Ease Deportation Rule in Minor Drug Cases*, N.Y. TIMES (June 14, 2010), <http://www.nytimes.com/2010/06/15/us/15scotus.html>.

158. *Carachuri-Rosendo*, 560 U.S. at 575.

individuals for similar minor offenses the Court rejected in *Carachuri-Rosendo*.<sup>159</sup>

### B. The Simultaneous Narrowing of Judicial Discretion

For many years, judges were able to counter the “harsh consequences of deportation” with their broad discretionary authority.<sup>160</sup> The 1917 Immigration Act provided for judicial discretion with the incorporation of a procedural safeguard.<sup>161</sup> Employing a Judicial Recommendation Against Deportation, or JRAD, the sentencing judge could make, at the time of or within 30 days of sentencing, a binding recommendation on the Secretary of Labor that “such alien shall not be deported.”<sup>162</sup> Later, when Congress relocated immigration matters to the United States Justice Department, the judge’s recommendation was binding on the Attorney General.<sup>163</sup> Thus, even as deportation was seen as a “radical” punishment, and even as “the class of deportable offenses expanded,” judges also “retained discretion to ameliorate unjust results on a case-by-case basis.”<sup>164</sup>

However, immigration reforms have significantly chipped away at that broad discretionary authority.<sup>165</sup> Congress began curtailing judicial discretion in 1952 with the passage of the INA,<sup>166</sup> which stripped trial judges of their discretion regarding deportation for narcotics offenses.<sup>167</sup> In 1990, Congress eliminated JRAD completely for all deportable offenses.<sup>168</sup> For a while, Congress left intact the Attorney General’s authority to grant discretionary relief from deportation, an avenue that was used to halt the deportation of over 10,000 noncitizens in the five years prior to the 1996 reforms.<sup>169</sup> But even that limited avenue was

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159. *See, e.g.,* *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013).

160. *Padilla v. Kentucky*, 559 U.S. 356, 362 (2010); *Cade*, *supra* note 147, at 663.

161. Immigration Act of 1917, Pub. L. No. 64-301, § 19, 39 Stat. 874, 889-90 (codified in 8 U.S.C. § 1251(b), later transferred to 8 U.S.C. § 1227 (2012)).

162. *Id.*

163. *See Janvier v. United States*, 793 F.2d 449, 452 (2d Cir. 1986) (noting that the statute has been “consistently . . . interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation”).

164. *Padilla*, 559 U.S. at 362. JRAD was available, except for “technical, inadvertent and insignificant violations of the laws relating to narcotics.” *Id.* (quoting *United States v. O’Rourke*, 213 F.2d 759, 762 (8th Cir. 1954)).

165. *Id.*

166. Immigration and Nationality Act of 1952 (McCarran–Walter Act), Pub. L. No. 82-414, 66 Stat. 163 (eliminating racial limitations on immigration).

167. *See id.; Padilla*, 559 U.S. at 362–63 (citing *Dang Nam v. Bryan*, 74 F.2d 379, 380–81 (9th Cir. 1934) (“recognizing that until 1952 a JRAD in a narcotics case ‘was effective to prevent deportation’”).

168. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

169. *Padilla*, 559 U.S. at 362 (citing *INS v. St. Cyr*, 533 U.S. 289, 296 (2001)).

narrowed in 1996 when Congress, through IIRIRA, effectively eliminated discretionary review for offenses related to trafficking of a controlled substance and left little discretion for other crimes.<sup>170</sup>

Critics of IIRIRA argue the law went too far and treated all, even legal permanent residents, the same as dangerous criminals under a “one size fits all” approach to immigration.<sup>171</sup> Before IIRIRA, a person subject to removal could apply to an immigration judge for suspension of deportation and adjustment of status.<sup>172</sup> However, IIRIRA replaced suspension of deportation with “cancellation of removal,” which imposed upon the immigrant the burden to show that the removal would result in “exceptional and extremely unusual hardship” to an immigrant’s spouse, parent, or child, one of whom had to be a U.S. citizen or legally permanent resident.<sup>173</sup> IIRIRA’s expedited removal process largely “eliminated the role of immigration judges in expulsion decisions” involving noncitizens with criminal records; deportation was all but certain for those who met the newly expanded definition of an aggravated felony.<sup>174</sup>

Likewise, IIRIRA limited federal courts in their review of immigration decisions and orders of deportation.<sup>175</sup> Administrative findings of fact made by an immigration judge or the Board of Immigration Appeals (BIA) are “conclusive” and binding on a reviewing court “unless any reasonable adjudicator would be compelled to conclude to the contrary,” essentially stripping courts of *de novo* review.<sup>176</sup> Judges may no longer review the hardship that a deportation might cause to a single undocumented immigrant, even if the individual has been in the country for years and has developed substantial ties to family and community.<sup>177</sup>

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170. *Id.* (citing 8 U.S.C. § 1229b (2012); 8 U.S.C. § 1101(a)(43)(B) (2012); 8 U.S.C. § 1228 (2012)); *Shortfalls*, *supra* note 97, at 27.

171. *Shortfalls*, *supra* note 97, at 29. The Republican-controlled Congress passed IIRIRA in response to the need for tightened national security following the 1992 terrorist attacks on the World Trade Center, while also dealing with increased illegal immigration. *Id.*

172. *Id.* at 28. To qualify, immigrants “had to show they were continuously present for a minimum of 7 years, they were persons of good moral character and their deportations would result in extreme hardship.” *Id.* If granted, the person became eligible to adjust their status to that of an alien lawfully admitted for permanent residence. *Id.* at 36.

173. *Id.* at 36. Only 4,000 immigrants may be granted cancellation of removal in any fiscal year. *Id.* To qualify, the immigrant must also show continual residence in the United States for the 10-year period preceding the date of application. *Id.*

174. Hawthorne, *supra* note 30, at 814. This is an almost impossible burden, as factors such as family separation and economic hardship rarely qualify. *Shortfalls*, *supra* note 97, at 36.

175. *Shortfalls*, *supra* note 97, at 28.

176. *Id.* at 28.

177. *Id.* at 30, 34. “Individual equities—such as longevity in the U.S., the age of the individual, the severity of an offense, how long ago the offense occurred, rehabilitation, employment, payment of taxes, contributions to one’s community and to the church, financial support of U.S. and LPR children,

The sponsors of the 1996 laws reacted negatively to these unintended consequences. In a letter presented to then-Attorney General Janet Reno and INS Commissioner Doris Meissner, more than two dozen congressional leaders, including the bill's sponsor, Lamar S. Smith (R-Tex.), conceded that, "There has been widespread agreement that some deportations were unfair and resulted in unjustifiable hardship."<sup>178</sup> They insisted that, "True hardship cases call for the exercise of such discretion."<sup>179</sup> The agency maintained, however, that the term "aggravated felony" was a "very clear . . . INS-specific term" that required mandatory deportation until Congress decided to change the law.<sup>180</sup> Congress has thus far declined to do so.<sup>181</sup>

#### IV. DEPORTING AMERICA'S ADOPTEES

The Fourteenth Amendment to the U.S. Constitution guarantees citizenship only to "persons born or naturalized in the United States."<sup>182</sup> Thus, for many years, the United States government did not automatically confer American citizenship on intercountry adoptees.<sup>183</sup> Instead, U.S. immigration law required that foreign-born children adopted by U.S. parents enter the country as permanent residents and receive green cards; thus, they did not receive U.S. citizenship until their parents completed the separate naturalization process.<sup>184</sup>

##### *A. Adoption Agencies and the Big Business of Adoption*

The first modern adoption agencies were the outgrowth of philanthropic efforts of prominent society women who sought children for their wealthy friends.<sup>185</sup> However, their efforts were localized, and

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spouses and parents, and the break-up of families—have been put aside in favor of an inflexible, intolerant, punitive approach." *Id.* at 30.

178. Levine, *supra* note 151.

179. *Id.*

180. *Id.* "The law is, fortunately or unfortunately, very clear in this regard. Removal is mandatory for those convicted of aggravated felonies." *Id.* (quoting INS spokesperson Karen Kraushaar).

181. Indeed, in 2005, Congress passed the REAL-ID Act, which eliminated the power of federal district courts to review deportation orders through habeas corpus petitions. Pub. L. 109-13, 119 Stat. 302 (2005). In 2011, the ability of the president and state governors to pardon deportation based on narcotics and firearms crimes was circumscribed in *Judulang v. Holder*, 565 U.S. 42 (2011).

182. U.S. CONST. amend. XIV, § 1.

183. Sung-soo, *supra* note 140.

184. 8 U.S.C. § 1431(a)(3); Bellware, *supra* note 10.

185. DeLeith Duke Gossett, *If Charity Begins at Home, Why Do We Go Searching Abroad? Why the Federal Adoption Tax Credit Should Not Subsidize International Adoptions*, 17 LEWIS & CLARK L. REV. 839, 850 (2013).

their operations small; by the late 1920s, the Boston Children’s Aid Society arranged only five adoptions annually.<sup>186</sup> Orphanages and asylums continued to serve as the country’s main institutions for children’s care when family was lacking.<sup>187</sup> When Children’s Aid Society founder Charles Loring Brace engineered the exodus of destitute children from New York City to the Midwest on his “Orphan Trains,” the children’s actual adoption was only a secondary goal.<sup>188</sup> In many cases, the children were welcomed as another farmhand or house servant, but not as an equal member of the family.<sup>189</sup> Modern adoption, defined “by the severing of the legal relationship between a child and his or her parents, and the transferring of the child’s custody to another parent or set of parents,” did not evolve as a significant means of family creation in the United States until the first decades of the twentieth century.<sup>190</sup> However, as adoption came to be seen as a way of providing more than just a family’s labor needs, newly formed adoption agencies stepped in to facilitate the process, thus creating a lucrative industry in the process.<sup>191</sup>

The commercialization of adoption in the United States is attributed to a woman named Georgia Tann, a social worker who operated the lucrative Tennessee Children’s Home Society from 1923 to 1950.<sup>192</sup> Marketing in nationally syndicated papers and charging adoptive parents large fees, Tann was responsible for the adoption of 5,000 or more children by parents nationwide, including movie stars Dick Powell, June Allyson, and Joan Crawford.<sup>193</sup> Tann amassed a million dollar fortune solely from her adoption efforts, but it was not until her death that the public learned of her unscrupulous dealings.<sup>194</sup> As adoption became

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186. BARBARA BISANTZ RAYMOND, *THE BABY THIEF: THE UNTOLD STORY OF GEORGIA TANN, THE BABY SELLER WHO CORRUPTED ADOPTION* ix (2007).

187. RAYMOND, *supra* note 186, at 56. “The photographs of New York City street children taken by Jacob Riis had led to an outpouring of private, volunteer activities, which resulted in the establishment of Humane Societies, Juvenile Courts, and institutions for orphans. Over 460 orphanages were established in the United States between 1890 and 1910.” *Id.*

188. *See* Gossett, *supra* note 185, at 842.

189. Jacqueline Bhabha, *Lone Travelers: Rights, Criminalization, and the Transnational Migration of Unaccompanied Children*, 7 U. CHI. L. SCH. ROUNDTABLE 269, 275 (2000) (citing LINDA GORDON, *THE GREAT ARIZONA ORPHAN ABDUCTION* 9–10 (Harvard 1999)).

190. ARISSA H. OH, *TO SAVE THE CHILDREN OF KOREA: THE COLD WAR ORIGINS OF INTERNATIONAL ADOPTION* 3–4 (2015). “Stranger adoption—the adoption of an unrelated person—also emerged during this period.” *Id.*

191. *Id.* at 3–4. Oh calls this the “sentimentalization of childhood.” *Id.*

192. Tom Charlier, *Elwood to Honor Victims of Tennessee Children’s Home Society*, WASH. TIMES (Sept. 27, 2015), <http://www.washingtontimes.com/news/2015/sep/27/elwood-to-honor-victims-of-tennessee-childrens-hom/>.

193. RAYMOND, *supra* note 186, at ix–x; Charlier, *supra* note 192.

194. Charlier, *supra* note 192. She died of cancer three days after articles about her dealings were published in the local newspaper. RAYMOND, *supra* note 186, at 5; Charlier, *supra* note 192. “Many

more accepted and the demand for healthy white infants increased,<sup>195</sup> Tann began stealing children, usually from poor, uneducated, single white women who had no recourse,<sup>196</sup> and placing them in families of “elevated” means, screened only for their wealth.<sup>197</sup> Tann utilized her connections with Memphis political boss E.H. Crump and bribed family judges, sheriffs, and deputies to carry out her scheme.<sup>198</sup> To cover her tracks and thwart the possibility of children someday learning of their kidnapping, she became the first to falsify birth certificates and instead show the names of the adoptive parents as the children’s birth parents, a practice that became widely accepted in the United States and remains the subject of a current nationwide debate.<sup>199</sup>

The baby boom following World War II added to the demand for healthy white infants for those who wanted but could not conceive children, sending many people abroad seeking children for adoption.<sup>200</sup> From the 1940s until the mid-1960s, wealthy American Catholics furtively adopted thousands of children from Ireland.<sup>201</sup> Continuing in

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professed unawareness of the desperate, futile habeas corpus suits that were reported in the local press, and of her Home’s expulsion from the Child Welfare League of America.” RAYMOND, *supra* note 186, at 3. Tennessee Governor Gordon Browning acknowledged Tann’s crimes at a Sept. 12, 1950 press conference, but only asked the welfare department to recover the monies her Children’s Home Society had failed to share with the state; he mentioned no redress for the individual adoptees nor their birth parents. *Id.* at 5–7, 9.

195. OH, *supra* note 190, at 3–4.

196. Charlier, *supra* note 192. Tann “approach[ed] them while they still were groggy from anesthesia. She manipulated them into signing papers that ostensibly authorized her to take and care for the babies temporarily. Instead, the mothers never saw the babies again.” *Id.*

197. RAYMOND, *supra* note 186, at ix, 53. Tann, the daughter of a judge, considered poverty to be the worst possible condition in which a child could be raised; she believed that poor people were “trashy” and “incapable of proper parenting.” *Id.* at 44, 53, 55. “When a young mother begged for the return of the three children Georgia had stolen in 1939, Georgia told her that her appropriation of them was for their welfare, that they’d receive ‘good homes [and] splendid educations.’” *Id.* at 55. Hundreds of stories of unethical practices by adoption agencies, including the “theft and sale of babies from birthparents who desperately wanted to keep them,” became part of the testimony on abusive adoptive practices in 1955 before the U.S. Senate Judiciary Committee, led by Tennessee Senator Estes Kefauver. Maureen Hogan, *Why the Federal Government Must Regulate Adoption*, AM. ADOPTION CONG., [http://www.americanadoptioncongress.org/federal\\_regulate\\_adoption.php](http://www.americanadoptioncongress.org/federal_regulate_adoption.php) (last visited Dec. 2, 2016).

198. Charlier, *supra* note 192. Her accomplices included “politicians, legislators, judges, attorneys, doctors, nurses, and social workers who scouted child victims, wrongfully terminated birth parents’ rights, and falsely informed mothers that their babies had been stillborn. Deputy sheriffs tore screaming toddlers from their mothers’ arms.” RAYMOND, *supra* note 186, at 5.

199. RAYMOND, *supra* note 186, at ix–x; Charlier, *supra* note 192. All fifty states ultimately falsified adoptees’ birth certificates because legislators believed “it would spare adoptees the onus of illegitimacy.” RAYMOND, *supra* note 186, at x. Adoptees in Tennessee won access to their adoption records and original birth certificates in 1999. *Id.*

200. OH, *supra* note 190, at 3–4.

201. *Id.* at 4–5. This was despite the fact that Ireland had no formal law allowing international adoption until 1952. *Id.* “[T]housands of Irish children who had been placed for adoption in the United States, on the condition that they be placed with Catholic families, were actually auctioned off to the highest bidders by American adoption providers. In some instances, children were placed in homes that



the Tann tradition, most of the children were taken forcibly from their unwed mothers, who were wards of the infamous Magdalene laundries.<sup>202</sup> But even as those adoptions occurred, international adoption primarily served to provide a haven for refugee children displaced by war, not to supply children for families.<sup>203</sup>

It was not until after the Korean War that international adoption began to play such a significant part in the building of U.S. families.<sup>204</sup> In a country that emphasized racial purity,<sup>205</sup> Korean society rejected, and many mothers abandoned, mixed-race G.I. babies.<sup>206</sup> Responding to the U.S.-created crisis,<sup>207</sup> Congress passed the 1953 Refugee Relief Act, which authorized four thousand visas for the immigration of adopted Korean children into the United States, setting into place the beginnings of the Korean–U.S. adoption system.<sup>208</sup> But it was an Oregon farmer named Harry Holt who would eventually transform that initial opening into the system of international adoption recognized today.<sup>209</sup> Establishing the Holt Adoption Program in 1956, Holt placed 211 orphaned Koreans with American families and began lobbying for changes in federal immigration law to allow the unrestricted entry of the

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had not even been homestudied.” Hogan, *supra* note 197.

202. Carol Ryan, *Seeking Redress for a Mother’s Life in a Workhouse*, N.Y. TIMES (Feb. 6, 2013), <http://www.nytimes.com/2013/02/07/world/europe/seeking-redress-in-ireland-over-magdalene-laundry.html>.

203. BAUSUM, *supra* note 2, at 101; OH, *supra* note 190, at 5; The Displaced Persons Act of 1948 established the nation’s first program for refugees, and allowed the adoption of 1,600 post-war immigrant orphans by American families. The majority of the children came from Greece, Germany, Italy, and Poland, without regard for quotas. BAUSUM, *supra* note 2, at 101; OH, *supra* note 190, at 5.

204. OH, *supra* note 190, at 53.

205. *Id.* at 7, 53, 72. “Under Korean law, citizenship passed from father to child; as illegitimate children without Korean fathers, GI babies were stateless nonpersons who would never find legal or social acceptance.” *Id.* at 7, 53, 72. “Because their racial mixture threatened Korea’s nationalistic ideas of racial purity [they were] stoned, chased, beat, and otherwise persecuted [by] children and adults alike. President Rhee acknowledged the ostracism awaiting these children, stating that they ‘will never have any real place in Korean society.’” *Id.* at 23, 51.

206. *Id.* at 51–52. “GI babies were found in every place conceivable—at missions, churches, and orphanages, ‘in train stations, shops . . . public toilets, the market place, [and] on doorsteps.’ In the most desperate cases, the babies were left to die in garbage dumps or on mountainsides, or worse: ‘some little blonde-haired babies were washed up on the seashore.’” *Id.*

207. *Id.* at 23. “These GI babies constituted a tiny portion of the postwar orphan population—of an estimated 100,000 orphans, approximately 1,500 were of mixed race—but they suffered a disproportionate amount of hostility and abuse on the basis of their illegitimacy, racial mixture, and assumptions that their mothers were prostitutes.” *Id.*

208. *Id.* at 53. In addition to the Korean visas, the 1953 Refugee Relief Act allowed entry to almost 200,000 immigrants, with no regard for quotas. *Id.* This was followed by the 1957 Refugee-Escapee Act, which allowed more people to claim refugee status. BAUSUM, *supra* note 2, at 100.

209. OH, *supra* note 190, at 74–75. Holt’s method for selecting adoptive parents solely on the basis of their faith was not without criticism by professional social workers. *Id.* at 14. Many of the adoptive parents had been rejected by states “for wise and good reasons” before they turned to international adoption and were accepted by Holt. *Id.* at 65.

Korean children as legally adopted children.<sup>210</sup> In response, the United States revised its laws in 1961 to allow international adoptions into the United States to continue permanently, and not merely as a relief effort.<sup>211</sup> The Korean government reacted by revising its adoption and emigration laws and by establishing a state-supported child-placement agency.<sup>212</sup>

The Holt Adoption Program, later called Holt International Children's Services, became a leader in international adoption and created a global industry in the process.<sup>213</sup> Holt implemented practices that facilitated a number of adoptions: first, he instituted "proxy adoptions," which removed the requirement that American parents travel to Korea for adoption; and, second, he utilized "baby lifts," charter flights to transport large groups of children to the United States.<sup>214</sup> These made international adoptions both cheaper and faster and enabled Korea to send upwards of 100,000 children to the United States by the end of the twentieth century.<sup>215</sup> The U.S.–Korean adoption system garnered criticism for relieving the Korean government of any responsibility for child welfare,<sup>216</sup> but the program was successful and, by the 1970s, Holt used the same model to place children orphaned by the war in Vietnam.<sup>217</sup> By 1981, there were fifty agencies in the United States handling international adoptions.<sup>218</sup> As they expanded into dozens of

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210. *Id.* at 8, 80.

211. *Id.* at 8, 81.

212. *Id.* at 8; *see also* Eleana Kim, *Working Paper Series: The Origins of Korean Adoption: Cold War Geopolitics and Intimate Diplomacy* 7, 9, 11–12, U.S.-KOREA INST. AT SAIS (Oct. 2009), [http://uskoreainstitute.org/wp-content/uploads/2010/02/USKI\\_WP0909\\_KimAdoptee.pdf](http://uskoreainstitute.org/wp-content/uploads/2010/02/USKI_WP0909_KimAdoptee.pdf).

213. JEAN NELSON ERICHSEN, *INSIDE THE ADOPTION AGENCY: UNDERSTANDING INTERCOUNTRY ADOPTION IN THE ERA OF THE HAGUE CONVENTION* 6 (2007); OH, *supra* note 190, at 8. At one point, Bethany Christian Services advertised itself as "the nation's largest adoption agency." Pam Belluck, *In Lawsuit on Adoption, Focus is on Disclosure*, N.Y. TIMES (Apr. 27, 2010) <http://www.nytimes.com/2010/04/28/us/28adopt.html?pagewanted=all>.

214. OH, *supra* note 190, at 8, 80–81.

215. *Id.* at 2, 74–75. "By 1955, an estimated five hundred orphanages housed approximately fifty-three thousand children, more than double the comparable figures when the war began; the number of orphanages would remain above five hundred until well into the 1970s." *Id.* at 57–58.

216. *Id.* at 13, 48. "Profound economic and political instability in Korea made international adoption an attractive and viable solution to the interlocking problems of overpopulation, poverty, and child abandonment." *Id.* at 9. In time, the proportion of mixed-race children sent abroad for adoption declined, and the amount of "full" Korean children sent abroad increased. *Id.* "From 1953 to 1956, foreign relief aid constituted the entirety of the Korean government's spending on social welfare, and the majority of social welfare spending for the rest of the decade." *Id.* at 60.

217. ERICHSEN, *supra* note 213, at 6. Operation Babylift was responsible for the removal of hundreds of children from South Vietnam after the fall of Saigon. *Id.* at 55. The U.S. State Department reported that "4,017 children, mainly Asian, were immigrated by U.S. citizens in 1973." *Id.* at 53. Children's Home Society of Minnesota, which traced its origins to Charles Loring Brace's "Orphan Trains," facilitated many of the adoptions. *Id.* at 8–10; *see also supra* notes 188–89 and accompanying text.

218. ERICHSEN, *supra* note 213, at 4. Most agencies then were either faith based or had handled

other countries, the adoption agencies emulated the procedures Holt had established in Korea, moving children “almost exclusively from the developing to the developed world.”<sup>219</sup>

Until 1995, Korea remained the leading sending country of children to the United States for adoption;<sup>220</sup> more than 100,000 adopted Korean children made up the largest demographic within the international adoptee community.<sup>221</sup> Due to Holt’s efforts, “the Korean orphan underwent a profound legal and cultural transformation, from a waif who entered the country under refugee laws to a family member who entered under immigration laws.”<sup>222</sup>

In the process, international adoption became a very lucrative endeavor, as wealthy adoptive parents proved willing to pay agencies large sums of money to adopt a child.<sup>223</sup> Adoption agencies capitalized on this, spending hundreds of thousands of dollars to hire marketing firms and design advertising campaigns to draw in prospective parents.<sup>224</sup> By 2006, there were 3,000 adoption agencies in the United States, an increase of 5900% from 1981,<sup>225</sup> and the United States led the world as the largest receiving country.<sup>226</sup> International adoption became an unregulated, multibillion dollar industry, with some U.S. agencies reaping revenues of \$15 million annually.<sup>227</sup>

However, many complained that the adoption agencies, which realized tremendous remuneration for their pre-placement efforts, were only concerned with profits. They contended that, once the children were secured in their American homes and the agencies had received their fees, the agencies did very little to help with post-placement

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adoptions for many years. *Id.* at 8.

219. *Id.* at 10–11; OH, *supra* note 190, at 9, 11; *see also infra* notes 223–27 and accompanying text.

220. OH, *supra* note 190, at 2. China and Russia took over as the leading sending countries in 1995. *Id.*

221. Alyssa Jeong Perry, *Korean Adoptee in Immigration Battle Fights to Remain in his Country—the US*, GUARDIAN (Apr. 3, 2015), <http://www.theguardian.com/us-news/2015/apr/03/adam-crapser-deportation-korean-adoption-system-immigration>.

222. OH, *supra* note 190, at 14.

223. *Id.* at 11.

224. ERICHSEN, *supra* note 213, at 15.

225. *Id.* at 4.

226. *See* DeLeith Duke Gossett, *Take off the [Color] Blinders: How Ignoring the Hague Convention’s Subsidiarity Principle Furthers Structural Racism Against Black American Children*, 55 SANTA CLARA L. REV. 261, 263 & n.6 (2015) [hereinafter Gossett, *Take off the [Color] Blinders*].

227. Hogan, *supra* note 197. As one interviewed agency worker admitted, “We need babies to make money, which is a horrible way to look at it, but that’s the reality of how you keep your doors open in adoption. . . . It is an industry at the end of the day.” Liz Raleigh, Keynote Address at the St. John’s University–Montclair State University Ninth Biennial Adoption Initiative Conference: Staying Afloat in a Perfect Storm: The Uneasy Coexistence of Customer Service and Social Service in Private Adoption (June 11, 2016) (quoting agency worker “Nicole”).

services—such as ensuring U.S. citizenship for the children.<sup>228</sup>

### *B. Lack of Citizenship for Thousands of Adoptees*

Under former immigration law, obtaining U.S. citizenship for foreign-born children required the adoptive parents to complete a two-step process. First, the parents had to comply with state laws regarding the finalization of their adoption.<sup>229</sup> The parents then had to apply to INS to naturalize the child as a U.S. citizen.<sup>230</sup> The naturalization process took an average of two or three years for INS to complete.<sup>231</sup> The separate application and paperwork required documents from both parents and children, “including birth and marriage certificates, photo identifications, immigrant cards and certified English translations of documents written in other languages.”<sup>232</sup> Many parents, either intentionally or through oversight, did not complete the process, and the children lost their legal status upon expiration of their green cards.<sup>233</sup> Some adoption agencies, particularly smaller ones with fewer resources, did not follow up with the parents post-adoption to ensure that parents completed the naturalization process.<sup>234</sup>

Meanwhile, the number of international adoptions increased each year as agencies continued to expand into new territories. Central and South American countries supplied thousands of babies for adoptions in the

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228. See Maggie Jones, *Adam Crapser’s Bizarre Deportation History*, N.Y. TIMES (Apr. 1, 2015), [http://www.nytimes.com/2015/04/01/magazine/adam-crapser-bizarre-deportation-odyssey.html?\\_r=0](http://www.nytimes.com/2015/04/01/magazine/adam-crapser-bizarre-deportation-odyssey.html?_r=0). “If you look at adoption from a business perspective, agencies get money for the upfront work of placing children. So you have all this staff on the front end and just one or two providing post-adoption services.” *Id.* (quoting Kevin H. Vollmers, Executive Director of Gazillion Strong).

229. ROMERO, *supra* note 94, at 51.

230. *Id.*

231. *75,000 Adopted Kids Become U.S. Citizens*, ABC NEWS (Feb. 27, 2001), <http://abcnews.go.com/US/story?id=93989> [*75,000 Adopted Kids*]. A 1999 survey conducted of 1000 U.S. families from 49 states and overseas found that over 60% waited more than 6 months for citizenship from the date of filing, 40% waited a year or more, and others waited more than two years. *Adopted Orphan Citizenship Act and Anti-Atrocity Alien Deportation Act: Hearing on H.R. 2883 and H.R. 3058 Before the Subcomm. on Immigration and Claims of the Comm. on the Judiciary*, 106th Cong. 33–34 (2000) [hereinafter *Subcomm. Hearing*] (statement of Maureen Evans, Executive Director of The Joint Council on International Children’s Services from North America (JCICS)).

232. Eric Schmitt, *75,000 Adoptees Gaining Automatic Citizenship*, CHI. TRIB. (Feb. 27, 2001), [http://articles.chicagotribune.com/2001-02-27/news/0102270198\\_1\\_adoption-process-child-citizenship-act-naturalized; 75,000 Adopted Kids, supra note 231](http://articles.chicagotribune.com/2001-02-27/news/0102270198_1_adoption-process-child-citizenship-act-naturalized; 75,000 Adopted Kids, supra note 231).

233. Bellware, *supra* note 10; Jones, *supra* note 228; Kristin R. Pak, Caitlin Kee & Jennifer Kwon Dobbs, *Deporting Adult Adoptees*, FOREIGN POL’Y IN FOCUS (July 4, 2012), [http://fpif.org/deporting\\_adult\\_adoptees/](http://fpif.org/deporting_adult_adoptees/); *75,000 Adopted Kids, supra* note 231. Some did not pay the mandatory \$125 application fee and viewed the naturalization process as a “bureaucratic and psychological hurdle for parents who may well have waited years and paid up to \$25,000 for international adoptions.” Schmitt, *supra* note 232.

234. Jones, *supra* note 228.

United States.<sup>235</sup> In 1989, the well-publicized fall of the Ceausescu dictatorship in Romania sent agencies rushing to Bucharest to establish adoption channels there.<sup>236</sup> The collapse of the Soviet empire and the Iron Curtain saw the number of international adoptions from Russia surge, and the numbers increased further when China opened its borders to international adoption.<sup>237</sup>

Yet, many of these same adoptees were later stunned to learn that they did not have U.S. citizenship—in fact, they were living in the country illegally despite their legal adoptions—because they had never been naturalized.<sup>238</sup> Some were made aware of their lack of citizenship only when they attempted to participate in routine activities such as applying for a job or a passport, or registering to vote.<sup>239</sup> Other adoptees realized their status only after being flagged for deportation back to their countries of origin—places to which they had no connection since birth—following even minor, nonviolent criminal convictions.<sup>240</sup>

Deportation to countries where the adopted children had no meaningful connections often led to tragic results.<sup>241</sup> One such adoptee, Joao Herbert, was found murdered in the slums of Campinas, near Sao Paulo, four years after his deportation following a conviction and sentence of probation and community treatment for a first-time offense of selling 7.5 ounces of marijuana.<sup>242</sup> Adopted by American parents who did not complete the naturalization process and raised in Ohio, the 22-year-old did not know the Portuguese language and tried to survive in Brazil as an English instructor.<sup>243</sup> News of his murder reached former Representative William Delahunt (D-Mass.), who called on Congress to take action on behalf of other non-naturalized adoptees who were facing

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235. ERICHSEN, *supra* note 213, at 10. Chile, Peru, Bolivia, Paraguay, Ecuador, Guatemala, El Salvador, Honduras, Panama, Brazil, and Colombia were some of the countries that partnered with American agencies to supply children for adoption. *Id.* at 11–13, 66. Americans adopted so many babies from Colombia that Colombian novelist Gabriel Garcia Marquez exclaimed, “Americans are importing Colombian babies like bags of coffee.” *Id.* at 68 (quoting July 19, 1974 article in the *Times of the Americans* newspaper). Many of these adoptions were facilitated by employing Holt’s method of proxy adoptions. *Id.* at 12; *see supra* note 214 and accompanying text.

236. ERICHSEN, *supra* note 213, at 12–13 (noting how the television documentary *Shame of a Nation* exposure of the conditions of Romanian orphanages contributed to the influx of adoption agencies).

237. *Id.* at 13, 53. Ukraine and Bulgaria also sent children to the United States. *Id.* at 53. China reopened its program in 1994 after briefly opening in 1992 and closing in 1993. *Id.*

238. *Acquiring*, *supra* note 20; Sung-soo, *supra* note 140.

239. *Acquiring*, *supra* note 20; Bellware, *supra* note 10; Sung-soo, *supra* note 140.

240. *Acquiring*, *supra* note 20; *see Pak et al.*, *supra* note 233.

241. *See Pak et al.*, *supra* note 233.

242. Jones, *supra* note 228; Levine, *supra* note 151; Pak et al., *supra* note 233. According to one newspaper account, a gang of drug dealers killed Herbert after he offered to help them smuggle guns so he could raise money to return to the United States. Jones, *supra* note 228.

243. Levine, *supra* note 151; Pak et al., *supra* note 233.

similar situations.<sup>244</sup> Speaking before the House of Representatives, he urged, “No one condones criminal acts, Mr. Speaker; but the terrible price these young people and their families have paid is out of proportion to their misdeeds. Whatever they did, they should be treated like any other American kid. They are our children, and we are responsible for them.”<sup>245</sup>

### C. Child Citizenship Act of 2000

Congressman Delahunt thus began to advance a bill that would accomplish for adoptees what their parents and agencies had neglected.<sup>246</sup> An adoptive parent himself, Delahunt had adopted an infant daughter from Vietnam as part of the Operation Babylift program.<sup>247</sup> He was surprised to find that many people, including his congressional colleagues, were “totally unaware that a child adopted from overseas does not become a citizen automatically.”<sup>248</sup> About the same time that Delahunt led this work in the House, then-Senate Assistant Majority Leader Don Nickles (R-Okla.) had begun a similar push in the Senate.<sup>249</sup> He had learned that his legislative counsel, J.

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244. Pak et al., *supra* note 233.

245. 146 CONG. REC. 18,492 (2000); Pak et al., *supra* note 233. Similarly, 25-year-old John Gaul was adopted at the age of four by American parents, but was never naturalized. Schmitt, *supra* note 232. He was deported to Thailand in 1999 after being convicted of car theft and writing bad checks, even though he had never been back to Thailand, spoke only English, and had no Thai relatives. *Id.*

246. Child Citizenship Act of 2000, H.R. 3667, 106th Cong. (2015). Representative Lamar Smith (R-Tex.) had earlier introduced the Adopted Orphans Citizenship Act, H.R. 2883, 106th Cong. (2015). However, members of Congress, along with representatives from the State Department, INS, and the adoption community, testified that the bill’s provision that granted citizenship retroactively to birth might produce inequities between adopted and biological children and other naturalized citizens. *Subcomm. Hearing, supra* note 231. Rejecting the “legal fiction” that the child would be “deemed always to have been a United States citizen,” which Smith’s bill would create, they suggested instead Delahunt’s language that conferred automatic citizenship on the date when the statutory criteria were met. *Id.* at 12-14 (testimony of Gerri Ratliff, Director of Business Process and Reengineering, Immigrations Services Division) (“While after the adoption it is entirely fitting and proper that the adopted child be considered equal to the adoptive parents’ natural children for citizenship and other purposes, we do not believe it is appropriate to attempt to extend the claim retroactively back to birth.”). On July 26, 2000, an amendment substituted the first four sections of Delahunt’s bill, H.R. 3667, for the text of Smith’s bill, and H.R. 2833 was renamed the Child Citizenship Act of 2000. H.R. REP. NO. 106-852, at 6 (2000).

247. ROMERO, *supra* note 94, at 60–61; Press Release, Congressman Bill Delahunt, Historic Citizenship Celebration Set for February 27: Marks US Citizenship for 75,000 International Adoptees (Feb. 15, 2001), <http://www.holtinternational.org/infoupdates/pdfs/delahunt0227pr.pdf> [hereinafter Delahunt Press Release]. His daughter, Kara, was 26 when Congress passed the Child Citizenship Act of 2000, but he had secured her American citizenship within a few years of her adoption. Schmitt, *supra* note 232; *75,000 Adopted Kids, supra* note 231. Another co-sponsor of the Child Citizenship Act, Representative Janice Schakowsky (D-Ill.), had two adopted relatives from Korea. ROMERO, *supra* note 94, at 61.

248. Delahunt Press Release, *supra* note 247.

249. Alexandra Starr, *Supporters Aim to Protect Adult Adoptees From Deportation*, NPR (May

McLane Layton, had adopted three children from Eastern Europe in 1995, only to learn they were not granted automatic U.S. citizenship upon completion of their adoptions because they had not been born in this country.<sup>250</sup> Senator Nickles tasked Layton with drafting legislation that would grant automatic citizenship to those who were born abroad but adopted by an American citizen parent.<sup>251</sup> When proposing the newly drafted companion legislation to the Senate, Sen. Nickles urged his colleagues: “Lawmakers and the public need to understand that these adoptees were adopted by American citizens, were brought to this country legally, [and] were raised in American society;” he garnered the unanimous consent of the Senate.<sup>252</sup> Upon the bill’s passage, Senator Leahy remarked, “Given the severe curtailment of noncitizens’ rights under the immigration laws we passed in 1996, it is all the more important to extend the right to American parents and their adopted children.”<sup>253</sup>

### 1. Automatic and Retroactive Citizenship for [Some] Adoptees

Unanimously supported by Congress, and signed by former President Bill Clinton in October 2000, the Child Citizenship Act of 2000 (Child Citizenship Act)<sup>254</sup> amended the Immigration and Nationality Act and granted American citizenship to most children born abroad and adopted by U.S. citizens.<sup>255</sup> No longer did parents have to go through a separate naturalization process to secure their citizenship. The Child Citizenship Act automatically granted U.S. citizenship to foreign-born children upon the finalization of their adoptions.<sup>256</sup>

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19, 2015), <http://www.npr.org/2015/05/19/407868110/supporters-aim-to-protect-adult-adoptees-from-deportation>.

250. Delahunt Press Release, *supra* note 247; Starr, *supra* note 249. Layton later founded Equality for Adopted Children, an advocacy group. *EACH: Founder Biography*, EQUALITY FOR ADOPTED CHILDREN, [http://www.equalityforadoptedchildren.org/about\\_each/founder\\_biography.html](http://www.equalityforadoptedchildren.org/about_each/founder_biography.html) (last visited Dec. 2, 2016).

251. Delahunt Press Release, *supra* note 247; Starr, *supra* note 249; *see also* Jones, *supra* note 228.

252. Adopted Orphans Citizenship Act, H.R. REP. NO. 106-852 (2000); *Subcomm. Hearing*, *supra* note 231; *see also* Jones, *supra* note 228; Starr, *supra* note 249.

253. 146 CONG. REC. 22,780 (2000); *see also supra* Part III.

254. Child Citizenship Act of 2000, Pub. L. No. 106-395, 11 Stat. 1631 (2000) (codified at 8 U.S.C. § 1431 (2012 & Supp. 2014)). It was first introduced as the Adopted Orphans Citizenship Act in September 21, 1999, but revised to also include certain foreign-born biological children. ROMERO, *supra* note 94, at 55.

255. Child Citizenship Act of 2000, Pub. L. No. 106-395, 11 Stat. 1631 (2000) (codified at 8 U.S.C. § 1431 (2012 & Supp. 2014)); ROMERO, *supra* note 94, at 55; Pak et al., *supra* note 233; *75,000 Adopted Kids*, *supra* note 231. After only one hearing, the bill passed both the House and the Senate just five months after its introduction. ROMERO, *supra* note 94, at 55.

256. ROMERO, *supra* note 94, at 51.

As enacted, the law prospectively and automatically conferred U.S. citizenship on children adopted by U.S. citizens who were born abroad and coming to the United States on IR-3 visas, given when the child's adoption was formalized in the country of origin.<sup>257</sup> The Child Citizenship Act required that the child be under 18 and living in the legal and physical custody of at least one American citizen parent.<sup>258</sup> The child had to be admitted into the United States as an immigrant for lawful permanent residence, and the adoption had to be final.<sup>259</sup> For children arriving on IR-4 visas, given in cases where the adoptions were not formalized in the country of origin, citizenship attached when the parents finalized the adoption by readopting the children in their state of residence.<sup>260</sup>

In either case, under the Child Citizenship Act, the parents no longer had to go through a separate and lengthy naturalization process to secure citizenship for their newly adopted children.<sup>261</sup> In addition to granting automatic citizenship to future adoptions, the Child Citizenship Act also provided for retroactive citizenship for foreign-born children who were adopted by U.S. parents but who did not acquire citizenship through naturalization before they reached the age of 18.<sup>262</sup> This gave automatic

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257. *Acquiring*, *supra* note 20.

258. *Id.*

259. *Id.*; see also Pak et al., *supra* note 233; Sung-soo, *supra* note 140; *75,000 Adopted Kids*, *supra* note 231. The Child Citizenship Act of 2000 was enacted prior to the ratification of the Hague Convention on Intercountry Adoption in 2008. If the adoption is finalized in a Hague member country, the adopted child is issued an IH-3 visa, "which is issued for children with full and final adoptions from a Hague Convention country. With an IH-3 visa, a child automatically acquires U.S. citizenship if the child enters the United States before his or her eighteenth birthday and resides with his or her adoptive parents in the United States (or overseas if parents are U.S. government or military personnel assigned abroad)." Elaine Schwieger, *Getting to Stay: Clarifying Legal Treatment of Improper Adoptions*, 55 N.Y.L. SCH. L. REV. 825, 845 & n.97 (2010/2011); see also *Before Your Child Immigrates to the United States*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/adoption/your-child-immigrates-united-states> (last updated Feb. 17, 2016).

260. *Acquiring*, *supra* note 20; see also Pak et al., *supra* note 233. The IR-4 "is issued to a child who is coming to the United States to be adopted after being adopted abroad by only one parent, if married, and was not seen by the parents prior to or during the adoption. With an IR-4 visa, a child does not automatically acquire U.S. citizenship upon entry to the United States, but becomes a permanent resident (green card holder) and automatically acquires citizenship on the date of his or her adoption in the United States, as long as the adoption occurs before the child's eighteenth birthday." Schwieger, *supra* note 259, at 845 & n.97. The Child Citizenship Act of 2000 was enacted prior to the ratification of the Hague Convention on Intercountry Adoption in 2008. If the adoption is from a Hague member country but is not finalized in that country, the adopted child is issued an IH-4 visa, "which is issued for children coming to the United States from a Hague Convention country. With an IH-4 visa, a child does not automatically acquire U.S. citizenship upon entry to the United States, but becomes a permanent resident (green card holder) and automatically acquires citizenship on the date of his or her adoption in the United States, as long as the adoption occurs before the child's eighteenth birthday." *Id.*; see also *Before Your Child Immigrates to the United States*, *supra* note 259.

261. *Acquiring*, *supra* note 20; Schmitt, *supra* note 232.

262. Sung-soo, *supra* note 140.



citizenship to qualified adoptees on the enforcement date of February 27, 2001, and an estimated 75,000 adoptees under 18 became citizens overnight.<sup>263</sup>

However, adopted children who turned 18 on or after February 27, 2001, and who were not previously naturalized, were excluded from U.S. citizenship under the Act.<sup>264</sup> Though hailed as “a rare example of bipartisanship on immigration legislation,”<sup>265</sup> the Child Citizenship Act’s passage only came about because of a political compromise that resulted in the omission of those age 18 and over from retroactive citizenship.<sup>266</sup> Simply put, Congress had taken a “tough on crime” stance, and Delahunt’s original version of the bill failed to gain traction as long as it included citizenship for adult adoptees who sometimes had already committed crimes.<sup>267</sup> Advocates were willing to accept the compromise to get the bill passed; they hoped to fix the omission following the Act’s passage.<sup>268</sup>

In passing the Child Citizenship Act and protecting children under 18 from deportation, Congress “expressed the belief that deportation should not be visited upon persons convicted of minor crimes who have already been punished for the misdeed.”<sup>269</sup> But by not providing citizenship to adult adoptees age 18 and over, the omission “simultaneously created a loophole by removing a second deterrent and punishment, that of deportation.”<sup>270</sup> Generally speaking, it ensured that adult adoptees were

263. Pak et al., *supra* note 233; Laura Wides, *Parents Celebrate Adoptee Citizenship Law*, L.A. TIMES (Feb. 28, 2001), <http://articles.latimes.com/2001/feb/28/local/me-31339>; *75,000 Adopted Kids*, *supra* note 231. However, Representative Delahunt claimed the estimated number was conservative and did not include “tens of thousands of children born to U.S. citizens living abroad, who also automatically receive citizenship under the law.” Delahunt Press Release, *supra* note 247; *75,000 Adopted Kids*, *supra* note 231.

264. Jones, *supra* note 228; Sung-soo, *supra* note 140; Wides, *supra* note 263. The act also did not apply to foreign-born children who were under 18 but whose families lived outside of the country. *A Nation Adopts its New Children*, CHI. TRIB. (Feb. 27, 2001), [http://articles.chicagotribune.com/2001-02-27/news/0102270137\\_1\\_foreign-born-adoptees-child-citizenship-act-stars-and-stripes](http://articles.chicagotribune.com/2001-02-27/news/0102270137_1_foreign-born-adoptees-child-citizenship-act-stars-and-stripes). *Acquiring*, *supra* note 20; Pak et al., *supra* note 233; *75,000 Adopted Kids*, *supra* note 231.

265. Schmitt, *supra* note 232.

266. Pak et al., *supra* note 233; Alexandra Salomon, *Adoptees in Chicago Take on a Different Kind of Immigration Fight*, DONALDSON ADOPTION INST. (Dec. 9, 2015), <http://www.adoptioninstitute.org/news/adoptees-in-chicago-take-on-a-different-kind-of-immigration-fight/> (originally found on WBEZ); Starr, *supra* note 249.

267. ROMERO, *supra* note 94, at 60, 64; Starr, *supra* note 249. Because of stereotypes based on “race, gender, class, and citizenship,” the stories told on the House floor about the experiences of John Gaul (from Thailand) and Joao Herbert (from Brazil) may have worked to their detriment, causing them to be seen as having “crossed the line from child to criminal.” ROMERO, *supra* note 94, at 62.

268. Salomon, *supra* note 266. The bill did provide relief from deportation for those over 18 who innocently voted as noncitizens, but did not grant citizenship to them. ROMERO, *supra* note 94, at 60.

269. ROMERO, *supra* note 94, at 64.

270. *Id.*

treated no differently than illegal aliens and terrorists.<sup>271</sup>

Soon after the Act was passed, the nation was forced to deal with the fear and aftermath of the September 11, 2001, terrorist attacks by radical Islamist jihadists, and immigration laws continued to greatly expand the list of crimes that could result in deportation from the United States.<sup>272</sup> Under the stringent AEDPA and IIRIRA 1996 immigration laws, noncitizens could be deported if convicted of any type of “aggravated felony,” which had been expanded to include even state misdemeanors under federal immigration law.<sup>273</sup> Because adult adoptees were left out of the Child Citizenship Act’s protection, they were classified as noncitizen immigrants and subjected, as any other noncitizen alien, to deportation for even minor, nonviolent crimes.<sup>274</sup> The U.S. government started enforcing this law vigorously after September 11.<sup>275</sup>

To fix the loophole, the Senate approved the 2013 bipartisan Citizenship for Lawful Adoptees Amendment.<sup>276</sup> Attached to a Senate immigration reform bill, it sought to amend the Child Citizenship Act and the Immigration and Nationality Act to provide automatic citizenship to all foreign-born adoptees of American citizen parents.<sup>277</sup> The bill specifically targeted those adoptees who were 18 or over and thus precluded from U.S. citizenship when the Child Citizenship Act was enacted, and sought “to ensure that children adopted internationally by American citizen parents receive automatic citizenship, treating them the same as biological children.”<sup>278</sup> Its sponsor, Senator Mary L. Landrieu (D-La.), posited that “[s]ome adopted children, through no fault of their own, endure a precarious legal status, which can result in the horror of being deported to a country they don’t remember at all, where they don’t have any ties or even speak the language.”<sup>279</sup> An

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271. Bellware, *supra* note 10; Frances Kai-Hwa Wang, *A Push to Protect Adult Adoptees from Deportation*, NBCNEWS.COM (Mar. 12, 2015), <http://www.nbcnews.com/news/asian-america/retroactive-citizenship-adult-adoptees-n318581> [hereinafter Wang, *Deportation*].

272. *See supra* Part III.

273. *Id.* Under the law’s expansion, even “battery, forged checks, and selling drugs” earned aggravated felony status. Jones, *supra* note 228.

274. Bellware, *supra* note 10; Starr, *supra* note 249; Wang, *Deportation*, *supra* note 271; Perry, *supra* note 221.

275. Perry, *supra* note 221; Salomon, *supra* note 266. Afterwards, immigration issues became increasingly “difficult.” *Id.* (quoting Susan Soon-Keum Cox, vice president of policy and external affairs for Holt International adoption agency).

276. Amendment to the Border Security, Economic Opportunity, and Immigration Modernization Act, S. Amdt. 1222 to S. 744, 113th Cong. (2013–2014).

277. *Id.* The bill was attached to the Border Security, Economic Opportunity, and Immigration Modernization Act. S. 744, 113th Cong. (2013).

278. *Id.*

279. *Senator Landrieu Passes Amendment to Help Adopted Children Secure Citizenship*, HOLT ALUMNI BLOG (June 19, 2013), <http://holtinternational.org/holtalumni/blog/?p=461> (quoting Sen. Landrieu). Senators Dan Coats (R-Ind.), Amy Klobuchar (D-Minn.), and Roy Blunt (R-Mo.) co-

adoptive parent herself, the Senator recognized that adoptees who committed misdemeanors or felonies should be punished “with the full penalties against them,” as would any other U.S. citizen—but not with deportation.<sup>280</sup> The Senate approved the measure to fix the loophole; however, it stalled in the House of Representatives, and adoptees over the age of 18 again were left without U.S. citizenship.<sup>281</sup>

## 2. Unintended Consequences: Adoptee Deportations

Even though the Child Citizenship Act aimed to eliminate extra steps and costs to make U.S. citizenship easier to obtain, it omitted a whole segment of the adoptee population: those who were not naturalized and had already turned 18 on or before the Act’s passage.<sup>282</sup> Because the parents of the adoptees had not completed the naturalization process, the adoptees’ entry visas that allowed them to live in the United States legally had usually expired.<sup>283</sup> But in the wake of the September 11, 2001, terrorist attacks, green card applications typically generated a background investigation by the Department of Homeland Security,<sup>284</sup> so that trying to remedy the situation oftentimes garnered unwanted attention from the U.S. Immigration and Customs Enforcement Agency.<sup>285</sup> Thus, because the entry visas of the adoptees by that time had generally lapsed, a previous criminal record could subject an adoptee to deportation proceedings.<sup>286</sup>

Dozens of adoptees either have faced deportation charges or have actually been deported back to their countries of origin.<sup>287</sup> The number of those who have already been removed cannot be accurately determined, however, because “there is no categorical means by which to identify and track” them.<sup>288</sup> But as critical adoption studies scholar Bert Ballard suggests, if even 1% of the hundreds of thousands of children that came to the United States through adoption were not naturalized before the Child Citizenship Act came into effect, the

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sponsored the bill. *Id.*

280. 159 CONG. REC. S4435-44 (daily ed. June 13, 2013). “[Deportation] may be an option for illegal immigrants but not children who have been adopted by American citizens.” *Id.*

281. The House companion bill was introduced on Oct. 2, 2013, but was not enacted. H.R. 15, 113th Cong. (2013).

282. *Acquiring*, *supra* note 20.

283. *Bellware*, *supra* note 10.

284. *Id.*; *Jones*, *supra* note 228.

285. *See Bellware*, *supra* note 10.

286. *Id.*

287. *Pak et al.*, *supra* note 233.

288. *Id.*

current deportation policy potentially affects thousands of people.<sup>289</sup> Ballard's forecast is in line with other estimates that place up to 18,000 adoptees, the majority of them Korean, without U.S. citizenship.<sup>290</sup>

Because they were never naturalized, and thus lack U.S. citizenship, these adoptees are classified as noncitizen immigrants and are subject to deportation to a place that they do not remember, have no meaningful family ties or connections, and do not speak the language.<sup>291</sup> This is despite the fact that both the sending country and the United States legally agreed to the adoption, officially cutting the adoptee's ties with the former country and allowing the adoptee to form new family connections in the United States.<sup>292</sup> In other words, upon deportation, the adoptees become de facto stateless: they are no longer claimed by the adopting country, and they are being sent back to a country that gave up all claims to them decades before.<sup>293</sup>

Of these, Adam Crapser has become the most recent and visible representative of those caught in the stateless limbo—adopted, yet not naturalized—before he was deported to a country to which he has had no connection since he was a small child.<sup>294</sup> Adopted from South Korea nearly 40 years ago, when he was three, by a family that kept him for six years before they decided they no longer wanted him, he bounced between foster homes and a boys' home before his adoption by a second family.<sup>295</sup> Tragically, he endured abuse from both homes, and neither family completed the naturalization process that would have made him a U.S. citizen.<sup>296</sup> Already in his twenties when the Child Citizenship Act was passed, his efforts to regain legal resident status were thwarted by crimes he had committed.<sup>297</sup> Adding to his troubles, ICE recently seized

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289. *Id.* Ballard suggests that the State Department and U.S. Citizenship and Immigration Services “cross-reference the number of children who entered the United States on visas issued for the purpose of adoption and the number of these adopted children who were naturalized.” *Id.*

290. Press Release, NAKASEC, Adam Crapser's Hearing on December 10th (Dec. 11, 2015), <http://nakasec.org/4995/update-from-adam-crapser-hearing-on-december-10th/> [hereinafter NAKASEC Press Release].

291. Schmitt, *supra* note 232.

292. Rebecca Walsh, *Meth, Adoption, Deportation*, SALT LAKE TRIB. (July 27, 2008), [http://archive.sltrib.com/story.php?ref=/news/ci\\_10011361](http://archive.sltrib.com/story.php?ref=/news/ci_10011361). For example, India has refused to admit U.S. deportees. *Id.*

293. *Id.*

294. *Adam Crapser Deported: Man was Adopted from South Korea at Age 3*, OREGONIAN (Nov. 17, 2016), [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/11/adam\\_crapser\\_deported\\_man\\_was.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/11/adam_crapser_deported_man_was.html); Wang, *Deportation*, *supra* note 271.

295. Bellware, *supra* note 10; Jones, *supra* note 228.

296. Jones, *supra* note 228. Thomas and Dolly Crapser, who had as many as 10 foster care and adopted children at one time, were later convicted in 1992 of several counts of criminal mistreatment and assault, and Thomas was convicted of sexual abuse. *Id.*; Bellware, *supra* note 10.

297. Jones, *supra* note 228. Crapser served 25 months in prison for burglary charges arising out of breaking in to his adopted parents' house to retrieve his personal effects. Upon his release from

and detained him for new criminal activities, and an immigration court denied his final appeal to remain in the United States.<sup>298</sup> Many adoptees who were in similar situations and have been deported to Korea have struggled to adjust to their new homes. NGOs have reported on deported adoptees who are now homeless and in need of medical attention, and many have sought help from agencies like Global Overseas Adoptees' Link in Seoul.<sup>299</sup>

Even when deportation orders are not enforced, adoptees must still navigate life without citizenship.<sup>300</sup> For example, Kairi Shepherd faced deportation after she was convicted of writing forged checks, which now counts as an aggravated felony under immigration law.<sup>301</sup> Adopted from India, she was never naturalized because her adoptive mother died from breast cancer before she filed the completed application for citizenship.<sup>302</sup> An immigration judge rejected her claim that she was a U.S. citizen under the Child Citizenship Act and ordered her removal.<sup>303</sup> On appeal, the United States Court of Appeals for the Tenth Circuit dismissed Shepherd's petition for review, holding that Shepherd was an alien and not a citizen, despite proof of her entry visa and subsequent adoption decree,<sup>304</sup> because she was over 18 and had not been naturalized when the Child Citizenship Act became effective.<sup>305</sup> Even though ICE ultimately declined to follow through with Shepherd's removal, she still lacks U.S. citizenship and now lives in a “legal limbo,” allowed to live in the country, but unable to secure a green card to work, acquire a driver's license, or obtain a passport to travel outside of the country.<sup>306</sup>

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prison, he also was convicted for unlawful firearm possession, an assault conviction for a fight with a roommate, and violation of a restraining order for trying to contact his son. *Id.*

298. *Adam Crapser Deported*, *supra* note 294; Choe Sang-Hun, *Korean Mother Awaits a Son's Deportation to Confess Her 'Unforgivable Sin,'* N.Y. TIMES (Nov. 16, 2016), <http://www.nytimes.com/2016/11/17/world/asia/korea-adoption-adam-crapser.html>; NAKASEC Press Release, *supra* note 290.

299. Sang-Hun, *supra* note 298; Pak et al., *supra* note 233; Walsh, *supra* note 292.

300. Jones, *supra* note 228.

301. Pak et al., *supra* note 233; Walsh, *supra* note 292.

302. *Id.*

303. *Shepherd v. Holder*, 678 F.3d 1171, 1183 (10th Cir. 2012). In two previous removal proceedings, Shepherd successfully claimed automatic citizenship under the Child Citizenship Act. *Id.* at 1174. At the first, the government did not contest her citizenship claim. *Id.* The next day, the government sought removal again, contesting her citizenship under the Act. *Id.* However, the judge ruled that issue preclusion barred reconsideration of his initial ruling. *Id.* The government then appealed to the Board of Immigration Appeals (BIA), which held that that collateral estoppel did not apply. *Id.* The BIA remanded the case to the immigration law judge, who subsequently ordered removal. *Id.*

304. *Id.* at 1175.

305. *Id.* at 1183–85.

306. *See generally* Jones, *supra* note 228; *see also* *Schultz v. Gonzales*, 221 F. App'x 726 (10th

### *D. Adoptee Citizenship Acts of 2015 and 2016*

Although the number of Korean adoptions has declined in recent years,<sup>307</sup> Korean adoptees comprise one of the largest adoptee communities in the country and are disproportionately affected by the loophole created by the Child Citizenship Act.<sup>308</sup> Its members mobilized to support Adam Crapser and to lobby for legislation that would finally provide redress to him and the approximately 18,000 other adoptees without U.S. citizenship.<sup>309</sup>

To finally close the gap left by the 2000 Child Citizenship Act, and to make all adoptees U.S. citizens, regardless of their age, Senator Amy Klobuchar (D-Minn.), co-chair of the Congressional Coalition on Adoption, proposed the bipartisan Adoptee Citizenship Act of 2015.<sup>310</sup> Introduced on November 10, 2015, the bipartisan legislation sought to

Cir. 2007) (upholding deportation order of 25-year-old, who was adopted from India at age three but never naturalized, upon his conviction for felony car theft).

307. Chris Fuchs, *As Decades of Korean Adoptions Dwindle, Identity Issues Remain*, NBCNEWS (Oct. 22, 2014), <http://www.nbcnews.com/news/asian-america/decades-korean-adoptions-dwindle-identity-issues-remain-n217631>. U.S. Department of State statistics show that “Korean adoptions have dropped from 1,994 in 1999 to a mere 138 in 2013 . . . . The decline is largely a consequence of South Korea’s reaction to criticism that it exports orphans to other countries, as well as Korean government policies designed to encourage its citizens to adopt domestically.” *Id.* The commodification of children by adoption agencies resulted in corruption in many countries, and the international community responded by enacting the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, which sought to curb abuses by favoring in-country placement efforts over international adoption. See Gossett, *Take off the [Color] Blinders*, *supra* note 226, at 290-92. The Universal Accreditation Act extended Hague requirements to agencies doing business in non-Hague countries. David M. Smolin, *The Corrupting Influence of the United States on a Vulnerable Intercountry Adoption System: A Guide for Stakeholders, Hague and Non-Hague Nations, NGOs, and Concerned Parties*, 2013 UTAH L. REV. 1065, 1122, 1128 (2013). Because of the tighter regulations, nearly 400 adoption agencies ceased operations rather than comply. David Smolin, *The Intercountry Adoption Debate is Over*, FLEAS BITING BLOG (July 7, 2015), <http://fleasbiting.blogspot.com/2015/07/the-intercountry-adoption-debate-is-over.html>.

308. Fuchs, *supra* note 307.

309. Frances Kai-Hwa Wang, *Bill Would Provide Retroactive Citizenship for all International Adoptees*, NBCNEWS (Nov. 13, 2015), <http://www.nbcnews.com/news/asian-america/bill-would-provide-retroactive-citizenship-all-international-adoptees-n462151> [hereinafter Wang, *Bill*]; see generally Jaeran Kim, *Support the Adoptee Citizenship Act—S. 2275*, JAERAN KIM BLOG (Nov. 13, 2015), <https://jaerankim.com/2015/11/13/support-the-adoptee-citizenship-act-s-2275-4/>. Gazillion Strong Executive Director Kevin H. Vollmers noted that:

When it passes, thousands of international adoptees—who were promised their citizenship when they were brought into the U.S. as infants and children by the U.S., their adoptive parents, and adoption agencies—will finally be able to participate in rights and privileges that they should have had from the beginning: vote, open bank accounts, get driver licenses and passports, pursue employment and promotions, and the like.

Wang, *Bill* (quoting Kevin H. Vollmers).

310. Adoptee Citizenship Act of 2015, S. 2275, 114th Cong. (2015). The bill was co-sponsored by Senators Dan Coats (R-Ind.), Jeff Merkley (D-Or.), Kirsten Gillibrand (D-N.Y.), Brian Schatz (D-Haw.), Mazie Hirono (D-Haw.), and Patty Murray (D-Wash.), and was referred to the Committee on the Judiciary. *Id.*

amend section 320(b) of the Immigration and Nationality Act<sup>311</sup> “to grant automatic citizenship to all qualifying children adopted by a U.S. citizen parent, regardless of the date on which the adoption was finalized.”<sup>312</sup>

Specifically, the bill provided for automatic citizenship of all persons born outside of the United States but adopted before age 18 by a U.S. citizen parent.<sup>313</sup> For the Act to apply, the adoptee had to be physically and lawfully present in the United States, and in the legal custody of the citizen parent before age 18.<sup>314</sup> For persons residing outside of the United States on the Act’s date of enactment, citizenship became automatic once the person lawfully entered and was physically present in the United States.<sup>315</sup> The Adoptee Citizenship Act of 2015 also proposed to “create a clear pathway for adoptees who have been deported for minor crimes and have served their sentences to come back to the U.S.”<sup>316</sup> Persons outside of the country seeking a visa were subject to a criminal background check and, in conjunction with law enforcement agencies, U.S. Department of Homeland Security, and U.S. Department of State, any outstanding criminal issues had to be resolved.<sup>317</sup> This provided an avenue for adoptees who have been deported for minor crimes and have served their sentences to obtain U.S. citizenship and to return home to the country where they were raised.<sup>318</sup>

In advancing the bill’s passage, Senator Klobuchar noted the struggle that many of these adoptees encounter, as they are continually subjected to a life where they cannot advance without the ability to obtain an education or a job.<sup>319</sup> She stated, “We’re dealing here with adoptees, who grew up in American families, who went to American schools, who led American lives, and are still leading them. . . . And the constant threat to the life that they know is really unjust.”<sup>320</sup>

Legislative efforts continued, and on June 10, 2016, Representative Adam Smith (D-Iowa) and Representative Trent Franks (R-Ariz.) introduced a House companion bill that tracked the Senate bill language

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311. 8 U.S.C. § 1431(a)(3).

312. Adoptee Citizenship Act of 2015, S. 2275, 114th Cong. (2015).

313. *Id.*

314. *Id.* The individual must not have acquired U.S. citizenship before the date of the enactment of the Act, and the individual must be lawfully residing in the United States pursuant to a lawful admission on the date of the enactment of the Act. *Id.*

315. *Id.*

316. Wang, *Bill*, *supra* note 309.

317. Adoptee Citizenship Act of 2015, S. 2275, 114th Cong. (2015).

318. Wang, *Bill*, *supra* note 309.

319. Doualy Xaykaothao, *For Adopted Kids, Having American Parents Doesn’t Always Mean U.S. Citizenship*, MPRNEWS (Apr. 12, 2016), <http://www.mprnews.org/story/2016/04/12/adult-adoptee-citizenship-bill>.

320. *Id.*

identically.<sup>321</sup> In a press release, Representative Franks called the omission of adoptees aged 18 and over from the Child Citizenship Act an “arbitrary oversight.”<sup>322</sup> Acknowledging that the adoptees had “lived their entire lives knowing only the United States as home,” he emphasized that, “[a]dopted individuals should not be treated as second class citizens just because they happened to be the wrong age when the Child Citizenship Act of 2000 was passed.”<sup>323</sup>

## V. IMMIGRATION REFORM DURING THE MODERN NATIVIST MOVEMENT

It has been said that in the United States, “public and political attitudes toward immigrants have always been ambivalent and contradictory, and sometimes hostile, [and] this has been reflected in U.S. immigration policy.”<sup>324</sup> Indeed, the years of the Obama administration were marked by fierce hostility to President-backed initiatives such as Obamacare,<sup>325</sup> gay marriage equality,<sup>326</sup> and race-based equality in law enforcement.<sup>327</sup> But just as contentious—and some say more so—was the strong opposition to any suggestion of immigration reform or “pathway to citizenship” proposal for the millions of undocumented residents living in this country.<sup>328</sup> This was not a new phenomenon; nativism is “more likely to succeed when Americans do not have confidence in their future.”<sup>329</sup>

The modern nativist movement has been led by the political far right, which saw many of President Obama’s policies as threatening to

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321. Adoptee Citizenship Act of 2016, H.R. 5454, 114th Cong. (2016).

322. Press Release, United States Congressman Trent Franks, Congressman Smith and Congressman Franks Introduce Bipartisan Legislation to Secure Citizenship for Adopted Children (June 14, 2016), <https://franks.house.gov/media-center/press-releases/congressman-smith-and-congressman-franks-introduce-bipartisan>. Representative Franks serves as co-chair of the Congressional Coalition on Adoption. *Id.*

323. *Id.*

324. Molina & Kohm, *supra* note 97, at 78 (citing WALTER A. EWING, IMMIGRATION POLICY CENTER, OPPORTUNITY AND EXCLUSION: A BRIEF HISTORY OF U.S. IMMIGRATION POLICY 1 (2012)).

325. Steve Chaggaris, *Could GOP Hostility to Obamacare Force a Government Shutdown?*, CBSNEWS (Sept. 13, 2013), <http://www.cbsnews.com/videos/could-gop-hostility-to-obamacare-force-a-government-shutdown/> (interviewing RealClearPolitics Political Reporter Caitlin Huey-Burns).

326. Jeremy W. Peters, *G.O.P. Hopefuls Denounce Marriage Equality Ruling*, N.Y. TIMES (June 26, 2015), <http://www.nytimes.com/2015/06/27/us/gop-hopefuls-denounce-marriage-equality-ruling.html> [hereinafter Peters, *G.O.P.*].

327. *See generally* Steve Benen, *GOP Candidates Blame Obama for Police Shootings, Cite No Evidence*, MSNBC (Sept. 3, 2015), <http://www.msnbc.com/rachel-maddow-show/gop-candidates-blame-obama-police-shootings-cite-no-evidence>.

328. *See* Cade, *supra* note 147, at 663; Peters, *G.O.P.*, *supra* note 326; Michael D. Shear, *Obama, Daring Congress, Acts to Overhaul Immigration*, N.Y. TIMES (Nov. 20, 2014), <http://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html> (America’s 11 million Video).

329. Barnhart, *supra* note 27, at 528.



negatively dismantle American society.<sup>330</sup> “Like many of the economic concerns that animated Tea Party supporters,” one commentator noted, “immigration issues play to people’s anxieties about their financial well-being and the future.”<sup>331</sup> President Trump’s supporters believe that “immigrants weaken America;” thus, his recent rise has been attributed “to the xenophobia and racism of Americans angry over their declining power.”<sup>332</sup> Embraced by alt-right Steve Bannon, the former chairman of the provocative Breitbart News,<sup>333</sup> Trump’s call for the mass deportation of immigrants, rather than seen as a lack of humanitarianism, is justified because it prevents immigrants from stealing jobs and resources.<sup>334</sup> Like the earlier movements against Asian and Mexican immigrants that produced racist and restrictive immigration laws,<sup>335</sup> today’s Americans are fearful of “the slow, disconcerting evolution of a mostly white, Christian country to a more secular, patchwork nation,” and seek to preserve the status quo.<sup>336</sup> In other words, the concerns are nativist driven.<sup>337</sup>

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330. Those who share this political view consider the term nativist to be pejorative and prefer the more positive term, “patriot,” instead. OEZGUER DINDAR, AMERICAN NATIVISM AND ITS REPRESENTATION IN THE FILM “L.A. CRASH” 297 (2010).

331. Jeremy W. Peters, *After Obama’s Immigration Action, a Blast of Energy for the Tea Party*, N.Y. TIMES (Nov. 25, 2014), [http://www.nytimes.com/2014/11/26/us/obamas-immigration-action-reinvigorates-tea-party.html?\\_r=0](http://www.nytimes.com/2014/11/26/us/obamas-immigration-action-reinvigorates-tea-party.html?_r=0) [hereinafter Peters, *Obama*]. “What started five years ago as a groundswell of conservatives committed to curtailing the reach of the federal government, cutting the deficit and countering the Wall Street wing of the Republican Party has become a movement largely against immigration overhaul.” *Id.*; see also Craig Andresen, *Amnesty for Millions—Tyranny for All*, TEA PARTY TRIB. (Nov. 21, 2014), <http://www.teapartytribune.com/2014/11/21/amnesty-millions-tyranny/>.

332. Evans Osnos, *The Fearful and the Frustrated*, NEW YORKER (Aug. 31, 2015), <http://www.newyorker.com/magazine/2015/08/31/the-fearful-and-the-frustrated>; see also Nicholas Confessore, *How the G.O.P. Elite Lost its Voters to Donald Trump*, N.Y. TIMES (Mar. 28, 2016), [http://www.nytimes.com/2016/03/28/us/politics/donald-trump-republican-voters.html?\\_r=0](http://www.nytimes.com/2016/03/28/us/politics/donald-trump-republican-voters.html?_r=0).

333. Benjy Sarlin, *Analysis: Breitbart’s Steve Bannon Leads the ‘Alt Right’ to the White House*, NBCNEWS (Nov. 14, 2016), <http://www.nbcnews.com/politics/white-house/analysis-breitbart-s-steve-bannon-leads-alt-right-white-house-n683316>.

334. *Trump in History: This Land is Our Land*, ECONOMIST (Nov. 28, 2015), <http://www.economist.com/news/united-states/21679163-current-spasm-nativism-far-unique-may-be-some-consolation-what-lies>. “With the motto “#WAR,” Breitbart under Bannon was also known for its feuds against so-called “globalist” Republicans who favor free trade and a relaxed immigration policy” and was “once described as the ‘fringe’ by critics.” Sarlin, *supra* note 333. Trump’s immigration plan, rolled out on Aug. 16, 2015, “called for the government to deport large segments of the undocumented population, seize money that these immigrants attempt to send home, and, contravening the Fourteenth Amendment to the Constitution, deny citizenship to their U.S.-born children.” Osnos, *supra* note 332.

335. See *supra* Part II.

336. *Trump in History*, *supra* note 334. Trump reflects “an unconscious vision that white people have—that their grandchildren might be a hated minority in their own country. I think that scares us.” Osnos, *supra* note 332 (quoting Richard Spencer, president and director of the National Policy Institute, “dedicated to the heritage, identity, and future of European people in the United States and around the world”).

337. See *supra* Part II.

### A. Partisan Politics Reveal Nativist Concerns

Following the September 11, 2001, terrorist attacks, “security concerns began to dominate immigration policy and gave rise to the present political stalemate in reaching comprehensive immigration reform.”<sup>338</sup> Muslims were viewed with heightened suspicion, and Congress responded to American fears with promises of tighter border security.<sup>339</sup> Legislative measures, such as the Border Protection, Antiterrorism, and Illegal Immigration Reform Act of 2005,<sup>340</sup> took precedence over the migration of immigrant families and family reunification efforts lost their foothold.<sup>341</sup> Accordingly, immigration reform efforts became “stymied [by] very, very macro political forces . . . even under a Democratic president.”<sup>342</sup>

During the Obama Administration, an event that highlighted the political division surrounding immigration concerns was the arrival in 2014 of an unprecedented number of unaccompanied children at the southern border. By the end of that summer, more than 57,000 unaccompanied minors from Guatemala, Honduras, El Salvador, and other Central American countries had crossed the southern border into the United States.<sup>343</sup> They fled from gang violence and poverty, and many sought refugee status under an act passed during the Bush administration.<sup>344</sup> Conservatives blamed the Obama administration for the surge of incoming children, saying its policies such as Deferred Action for Childhood Arrivals (DACA)<sup>345</sup> “enticed” children to come to the United States illegally.<sup>346</sup> Conservatives wanted money “targeted”

338. Molina & Kohm, *supra* note 97, at 83; *see also* BAUSUM, *supra* note 2, at 100.

339. BAUSUM, *supra* note 2, at 100; Molina & Kohm, *supra* note 97, at 83.

340. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005).

341. Molina & Kohm, *supra* note 97, at 83.

342. Lorelei Laird, *The Passionate Pragmatist*, 102 ABA J. 48, 55 (Feb. 1, 2016) (quoting Carlos Holguin, the immigration rights attorney who argued *Reno v. Flores*, 507 U.S. 292 (1993), before the Supreme Court to improve the lives of detained immigrant children).

343. Rick Jervis, *Women, Children Detained—Instead of Released—While Cases Are Processed*, USA TODAY, Aug. 4, 2014, at 7A; P.J. Tobia, *No Country for Lost Kids*, PBS NEWSHOUR (June 20, 2014), <http://www.pbs.org/newshour/updates/country-lost-kids/>. This was more than double the number from the previous year and triple the number from 2012. *Id.*

344. Tom Cohen, *Unintended Consequences: 2008 Anti-trafficking Law Contributes to Border Crisis*, CNN (July 16, 2014), [http://www.cnn.com/2014/07/15/politics/immigration-unintended-consequences/index.html?iid=article\\_sidebar](http://www.cnn.com/2014/07/15/politics/immigration-unintended-consequences/index.html?iid=article_sidebar). Contributing to the surge of child migrants from Central America is the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, which requires that children coming from countries other than Mexico and Canada not be deported without first consulting with an advocate and appearing at an immigration hearing. *Id.* Signed by President Bush with bipartisan support and almost no opposition, the law intended to protect immigrant children brought to the U.S. by sex traffickers. *Id.*

345. *See infra* Section V.B.

346. *Why So Many Migrant Children are Braving the Journey Across the U.S. Border Alone*, PBS

to deport the immigrant children quickly,<sup>347</sup> and encouraged practices like that of Texas Governor Rick Perry sending Texas Army National Guard troops to border towns at Texas taxpayer expense.<sup>348</sup> Former Republican presidential candidates Mike Huckabee and Rick Santorum, both outspoken in their defense of traditional marriage because of the effect on children,<sup>349</sup> adopted the party line that decried helping the children at the border,<sup>350</sup> and former Representative Michele Bachmann (R-Minn.) did the same, calling the immigrant children arriving at the border an “invasion.”<sup>351</sup> When pressed as to whether she was actually calling the children “invaders,” Bachmann responded with nativist language, arguing that foreign nationals were taking American jobs, a claim that resonated with many Americans.<sup>352</sup>

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NEWSHOUR (June 20, 2014), <http://www.pbs.org/newshour/bb/many-migrant-children-braving-journey-across-u-s-border-alone/> (“There is this perception that the executive branch of the federal government is not enforcing the law because of talks about easing deportations.”) (quoting Sen. John Cornyn (R-Tex.)).

347. Sean Kennedy, *Bachmann: Hundreds of Thousands of Foreign Nationals ‘Invaded the U.S.’ in Last Four Months*, CNN (July 15, 2014), <http://politicalticker.blogs.cnn.com/2014/07/15/bachmann-hundreds-of-thousands-of-foreign-nationals-invaded-the-u-s-in-last-four-months/>.

348. Rick Jervis, *Texans Mixed Over Troops*, USA TODAY, Aug. 1, 2014, at 3A. Militarizing the border cost more than \$12 million a month to Texas taxpayers. *Id.* But the troops were only state-ordered and could only enforce state laws, a move that many criticized as unnecessary. *Id.* Perry and other Texas officials said the National Guard could help because “drug runners, human smugglers and other criminals are sneaking into the USA while the Border Patrol is distracted by the crisis.” *Id.* Others called Perry’s move unnecessary “political theater,” stating, “There is no public-safety crisis here[.] These are not drug dealers. These are not terrorists. These are human beings looking for something better than what they had.” *Id.* (quoting Hidalgo County Judge Ramon Garcia).

349. Paul Strand, *Protesters: ‘Every Child Deserves a Mom and Dad,’* CBNNEWS (Sept. 8, 2014), <http://www.cbn.com/cbnnews/us/2014/June/Protesters-Every-Child-Deserves-a-Mom-and-Dad/>. At the previous year’s National March for Marriage, Huckabee and Santorum joined supporters of traditional marriage, who carried signs reading, “Every Child Deserves a Mom & a Dad.” *Id.*

350. *Meet the Press Transcript—July 13, 2014*, NBC NEWS (July 13, 2014), <http://www.nbcnews.com/meet-the-press/meet-press-transcript-july-13-2014-n154716>. *But see* Suzanne Hamner, *Huckabee Takes Liberal Stance on Immigration*, FREEDOM OUTPOST (Aug. 24, 2015), <http://freedomoutpost.com/huckabee-takes-liberal-stance-on-illegal-immigration/> (later conceding nativist concerns by saying “people are not angry about immigration because they hate immigrants, but because they see their way of life threatened. ‘They see their jobs just disappearing, going to Mexico, to China, to Indonesia . . .’”).

351. Kennedy, *supra* note 347. Bachmann is an international adoption advocate and co-sponsored the Children in Families First Act, H.R. 4143, 113th Cong. (2014), legislation that sought to bring more children to the United States. *See* Gossett, *Take off the [Color] Blinders*, *supra* note 226, at Section II.C.2. In all, about 25,000 Guatemalan children were adopted by Americans from Guatemala, so that it became a top sending country, and children became that nation’s second largest export after bananas. *See* Gossett, *supra* note 185, at 869–72. Americans paid \$30,000 for each Guatemalan child, a large sum in a country where citizens only made \$5 a day. *Id.* This led to documented corruption, and children were being kidnapped and sold to satisfy American demand, leading the State Department to shut down adoptions from there. *Id.* It shows America will go to great lengths to procure the children it wants through international adoption (even through nefarious means, and even if it means the splitting up of families), but it will turn around and demand that the “invaders” go home, despite their demonstrated need, if they are not the children it wants. *Id.*

352. Kennedy, *supra* note 347; Arturo Garcia, *Michele Bachmann Calls Immigrant Children*

The treatment of Syrian refugees also divided the country politically, as Republican lawmakers capitalized on American fears of more Muslims entering the country.<sup>353</sup> As millions of people fled from the conflict in the Middle East and Africa and sought refuge in Europe, President Obama responded to the crisis and pledged to allow up to 10,000 refugees into the United States.<sup>354</sup> Over thirty governors, all Republican except one, opposed the entry of the refugees and said they would refuse to cooperate with settlement efforts in their states.<sup>355</sup> In July 2015, Representative Brian Babin (R-Tex.) introduced the Resettlement Accountability National Security Act of 2015,<sup>356</sup> which sought to “suspend the admission into the United States of refugees in order to examine the costs of providing benefits to such individuals.”<sup>357</sup> The measure gathered the support of eighty-six co-sponsors, all Republican.<sup>358</sup> Senator Ted Cruz (R-Tex.) introduced the State Refugee Security Act,<sup>359</sup> produced solely to allow governors to “opt out” of accepting refugees.<sup>360</sup> Texas Governor, Republican Greg Abbott, sued

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*‘Invaders’ and Compares Them to Rapists*, RAWSTORY (July 15, 2014), <http://www.rawstory.com/2014/07/michele-bachmann-calls-immigrant-children-invaders-and-compares-them-to-rapists/> (quoting Bachmann) (“Don’t scapegoat the American people right now who are losing jobs.”).

353. *Texas Again Denied Request to Bar Syrian Refugees*, ALJAZEERA AM. (Feb. 9, 2016), <http://america.aljazeera.com/articles/2016/2/9/judge-again-denies-texas-request-to-bar-syrian-refugees.html> [hereinafter *Texas*]. Oppositionists argued that receiving more Syrian refugees posed a risk of having extremists enter the country, especially after it was revealed that one of the suspects in the Paris terrorist attacks of November 2015 had entered Europe under a false Syrian identity. *Id.*

354. *Id.* After 250,000 died since the war began in 2011, half of Syria’s 22 million residents left their homes, making Syrians the world’s largest refugee population. Ashley Fantz & Ben Brumfield, *More Than Half the Nation’s Governors Say Syrian Refugees Not Welcome*, CNN (Nov. 19, 2015), <http://www.cnn.com/2015/11/16/world/paris-attacks-syrian-refugees-backlash/>.

355. Fantz & Brumfield, *supra* note 354.

356. Resettlement Accountability National Security Act of 2015, H.R. 3314, 114th Cong. (2015).

357. *Id.*

358. *Id.* It also garnered the support of the Republican base: “With Obama seeking to fundamentally remake America during his final 18 months in office, and with the increasing pressure to bring in more Muslim refugees from Syria, Representative Brian Babin (R-Tex.) has stepped up to the plate by introducing the first piece of legislation to reinsert the people’s voice into the refugee process.” Daniel Horowitz, *Texas Rep Offers Bill Temporarily Halting Refugee Resettlement*, CONSERVATIVE REV. (July 31, 2015), <https://www.conservativereview.com/commentary/2015/07/texas-rep-offers-bill-temporarily-halting-refugee-resettlement>. Particularly concerning to the author was that “in recent years there’s been an explosion in refugees belonging to the Muslim faith.” *Id.*

359. State Refugee Security Act of 2015, S. 2363, 114th Cong. (2015); State Refuge Security Act of 2015, H.R. 4197, 114th Cong. (2015).

360. Emma Margolin, *Ted Cruz Introduces New Measure to Limit Syrian Refugees*, MSNBC (Dec. 8, 2015), <http://www.msnbc.com/msnbc/ted-cruz-measure-limit-syrian-refugees>. Introduced December 8, 2015, this bill died in committee and was not enacted, *S. 2363: State Refugee Security Act of 2015*, GOVTRACK, <https://www.govtrack.us/congress/bills/114/s2363> (last visited Feb. 1, 2017), as did its companion in the House, H.R. 4197, which had 49 Republican co-sponsors, *H.R. 4197: State Refugee Security Act of 2015*, GOVTRACK, <https://www.govtrack.us/congress/bills/114/hr4197> (last visited Feb. 1, 2017).

to block the resettlement of Syrians into Texas;<sup>361</sup> however, U.S. District Judge David Godbey found that Republican leaders behind the resettlement opposition failed to show that “Texas would suffer irreparable harm,” and denied the temporary restraining order application to bar their entry.<sup>362</sup> A federal court likewise dismissed a similar suit filed by Alabama Governor, Republican Robert Bentley, and that action is currently being appealed to the Eleventh Circuit Court of Appeals.<sup>363</sup>

The ongoing nativist attitudes towards immigrants were showcased more recently by the 2016 U.S. presidential campaign, and most visibly by the Republican Party Presidential nominee and now current President, Donald Trump. Known for his outspoken—some would say outrageous—views, the real estate developer and reality show host defied expectations to lead the pack of once-seventeen Republican presidential hopefuls.<sup>364</sup> Denouncing illegal immigrants as “drug-runners and rapists,” he promised to build a “huge wall” along the southern border—and make Mexico pay for it.<sup>365</sup> He followed that with a call to shut down certain mosques and ban the immigration of all Muslims, favorably comparing that idea to President Franklin Roosevelt’s decision to authorize the internment of Japanese-Americans after the Japanese attack on Pearl Harbor.<sup>366</sup> Some Republican leaders

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361. *Texas*, *supra* note 353.

362. *Id.* The court found the Commission failed “to show by competent evidence that any terrorists actually have infiltrated the refugee program, much less that these particular refugees are terrorists intent on causing harm.” *Tex. Health & Human Servs. Comm’n v. United States*, 166 F. Supp. 3d 706, 711 (N.D. Tex. 2015).

363. *Alabama v. United States*, No. 2:16-cv-00029-JEO, 2016 WL 4070146 (N.D. Ala. July 29, 2016); Mike Cason, *Gov. Robert Bentley Announces Appeal of Federal Lawsuit over Refugees*, AL.COM (Aug. 30, 2016), [http://www.al.com/news/index.ssf/2016/08/gov\\_robert\\_bentley\\_announces\\_a.html](http://www.al.com/news/index.ssf/2016/08/gov_robert_bentley_announces_a.html); Michael F. Haverluck, *Alabama Follows Texas, Sues Obama Over Refugees*, ONENEWSNOW (Jan. 9, 2016), <http://www.onenewsnow.com/legal-courts/2016/01/09/alabama-follows-texas-sues-obama-over-refugees>.

364. Jamelle Bouie, *How Trump Happened*, SLATE (Mar. 13, 2016), [http://www.slate.com/articles/news\\_and\\_politics/cover\\_story/2016/03/how\\_donald\\_trump\\_happened\\_racism\\_against\\_barack\\_obama.html](http://www.slate.com/articles/news_and_politics/cover_story/2016/03/how_donald_trump_happened_racism_against_barack_obama.html).

365. Daniel Gonzalez & Dan Nowicki, *Is Donald Trump’s Success Good for Immigration Reform?*, USA TODAY (Mar. 13, 2016), <http://www.usatoday.com/story/news/politics/elections/2016/03/13/donald-trumps-success-good-immigration-reform/81652440/>; Mary Anastasia O’Grady, *Trump’s Crumbling Wall Plan*, WALL ST. J. (Apr. 10, 2016), <http://www.wsj.com/articles/trumps-crumbling-wall-plan-1460320010>. *But see* Hunter Walker, *Donald Trump Just Released An Epic Statement Raging Against Mexican Immigrants and “Disease,”* BUS. INSIDER (July 6, 2015), <http://www.businessinsider.com/donald-trumps-epic-statement-on-mexico-2015-7> (claiming his remark that “Mexico is ‘sending people that have lots of problems’ to America including rapists, drug runners, and other criminals” was “deliberately distorted by the media”).

366. Lindsey Bever, *Internment Camps? ‘I Certainly Hate the Concept,’ Donald Trump Says.*, WASH. POST (Dec. 8, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/12/08/trump-on-internment-camps-i-certainly-hate-the->

took to social media to denounce him, with Senator Lindsey Graham (R-S.C.) tweeting, “[Donald Trump] has gone from making absurd comments to being downright dangerous with his bombastic rhetoric.”<sup>367</sup> Florida Governor Jeb Bush expressed over the same medium, “Donald Trump is unhinged. His ‘policy’ proposals are not serious.”<sup>368</sup> The Republican establishment, “aghast at Donald Trump’s bigoted statements about Muslims, Syrian refugees, Hispanics, and other people of color,” proclaimed he is “‘un-American’” and that his views do not represent “American values.”<sup>369</sup> Indeed, House Speaker Paul Ryan denounced Trump’s comments that a federal judge ruled against him in a civil suit because he was a “Mexican,” as “textbook” racism.<sup>370</sup>

But Trump did not stand alone in his sentiments. Former presidential candidate Senator Cruz, who earned the support of the largest Tea Party group in America,<sup>371</sup> also called for the deportation of all illegal

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concept/?utm\_term=.3aacc6bd45e; Michael Scherer, *Exclusive: Donald Trump Says He Might Have Supported Japanese Internment*, TIME (Dec. 8, 2015), <http://time.com/4140050/donald-trump-muslims-japanese-internment/>. “Corey Lewandowski, Trump’s campaign manager, told The Associated Press that the ban would apply to ‘everybody,’ including Muslims seeking tourist visas. Last month, Sen. Rand Paul (R-Ky.), one of Trump’s rivals for the GOP presidential nomination, introduced a similar proposal that would prevent refugees from obtaining tourist and immigration visas if they are from one of about 30 countries with a ‘significant jihadist movement.’” Igor Bobic, *Donald Trump Calls For ‘Complete Shutdown’ Of Muslims Entering U.S.*, HUFFINGTON POST (Dec. 7, 2015), [http://www.huffingtonpost.com/entry/donald-trump-muslim-immigration-us\\_5665f75de4b072e9d1c7252b](http://www.huffingtonpost.com/entry/donald-trump-muslim-immigration-us_5665f75de4b072e9d1c7252b); see also *supra* notes 84–85 and accompanying text. *But see* Chas Danner, *Donald Trump Rules Out Internment Camps for Muslim Americans*, N.Y. MAG. (Mar. 27, 2016), <http://nymag.com/daily/intelligencer/2016/03/trump-rules-out-us-muslim-internment-camps.html>.

367. Bobic, *supra* note 366.

368. *Id.*

369. Chauncey Devega, *Donald Trump’s Racism is as American as Apple Pie*, SALON (Dec. 11, 2015), [http://www.salon.com/2015/12/11/donald\\_trumps\\_racism\\_is\\_as\\_american\\_as\\_apple\\_pie/](http://www.salon.com/2015/12/11/donald_trumps_racism_is_as_american_as_apple_pie/).

370. Jennifer Steinhauer et al., *Paul Ryan Calls Donald Trump’s Attack on Judge ‘Racist,’ but Still Backs Him*, N.Y. TIMES (Jun. 7, 2016), [http://www.nytimes.com/2016/06/08/us/politics/paul-ryan-donald-trump-gonzalo-curiel.html?\\_r=0](http://www.nytimes.com/2016/06/08/us/politics/paul-ryan-donald-trump-gonzalo-curiel.html?_r=0). Trump attacked United States District Judge Gonzalo P. Curiel as biased in the civil case against Trump University because of the judge’s Mexican heritage. When pressed, Trump continued to defend his comments against Judge Curiel, who was born in Indiana, claiming he made “rulings that people can’t even believe” that were “a conflict of interest” because he was “building a wall,” and the judge was a Mexican and proud of his Mexican heritage. Theodore Schleifer, *Trump Defends Criticism of Judge with Mexican Heritage*, CNN POLITICS (June 5, 2016), <http://www.cnn.com/2016/06/03/politics/donald-trump-tapper-lead/>. Trump later said his remarks had been “misconstrued,” but many in his party still distanced themselves from him. Allen Rappeport, *Donald Trump Says His Remarks on Judge Were ‘Misconstrued,’* N.Y. TIMES (June 7, 2016), <http://www.nytimes.com/2016/06/08/us/politics/trump-university-judge.html>. Trump later settled the pending lawsuit for \$25 million. Steve Eder, *Donald Trump Agrees to Pay \$25 Million in Trump University Settlement*, N.Y. TIMES (Nov. 18, 2016), <http://www.nytimes.com/2016/11/19/us/politics/trump-university.html>.

371. CR Wire, *Largest Tea Party Group in America Endorses Ted Cruz*, CONSERVATIVE REV. (Jan. 31, 2016), <https://www.conservativereview.com/commentary/2016/01/tea-party-patriots-endorses-cruz>. *But see* Debbie Dooley, *Tea Party Founder: An Open Letter to Ted Cruz*, BREITBART (Mar. 11, 2016), <http://www.breitbart.com/big-government/2016/03/11/exclusive-tea-party-founder-an-open->

immigrants and promised to build a wall to secure the United States southern border.<sup>372</sup> And while not calling for an all-out ban on Muslim immigration, as did Trump, Cruz took similar controversial stances regarding Muslims. In November 2015, he argued that the United States should “shut its doors” to Muslim refugees from Syria and allow entry only to Christian refugees seeking asylum.<sup>373</sup> The next month, he introduced the legislation to allow governors to opt out of the resettlement of Syrian refugees in their states.<sup>374</sup> Following the March 2016 terrorist attack in Brussels, Cruz stated that police needed to “patrol and secure” Muslim neighborhoods in America “before they become radicalized,” a proposal that Trump said he supported 100% because of the fact that “Islam hates us.”<sup>375</sup>

The remarks by Trump and Cruz generated predictable reactions from the field of presidential candidates. Ohio Governor and Republican hopeful John Kasich called the remarks “knee-jerk” that “would unnecessarily alienate the Muslim community.”<sup>376</sup> Democratic Party Presidential nominee Secretary Hillary Clinton went further, calling Cruz’s proposal “dangerous” and denouncing Trump’s remarks entirely.<sup>377</sup> The singling out of an entire group of people, coupled with his earlier remarks about Japanese internment camps, led some to question Trump on whether he intended to put American Muslims in internment camps.<sup>378</sup> Although Trump said he would not, he did indicate that the United States would have to remain “very vigilant.”<sup>379</sup> However, this legal validation of racial discrimination is the exact scenario feared by the dissent in *Korematsu v. United States*, when Justice Jackson wrote, “This principle then lies about like a loaded

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letter-to-ted-cruz/ (explaining how Cruz’s characterization of Tea Partiers as “low information voters” factored into her shift in allegiance to Donald Trump).

372. Victor Morton, *Ted Cruz Toughens Immigration Stance, Says He’d Deport All Illegals*, WASH. TIMES (Feb. 22, 2016), <http://www.washingtontimes.com/news/2016/feb/22/ted-cruz-says-hed-deport-all-illegal-immigrants-us/>.

373. Jeremy Diamond, *Ted Cruz: Police Need to “Patrol and Secure” Muslim Neighborhoods*, CNN (Mar. 22, 2016), <http://www.cnn.com/2016/03/22/politics/ted-cruz-muslim-neighborhoods/>.

374. State Refugee Security Act of 2015, S. 2363, 114th Cong. (2015); *see also* Margolin, *supra* note 360 and accompanying text.

375. Diamond, *supra* note 373. Trump agreed with this plan, calling it a “good idea.” *Id.* Former Democratic National Committee Chairwoman Debbie Wasserman Schultz more bluntly labeled it as “fear-mongering.” *Id.* Trump did not distinguish the Islamic religion and radical Islamic terrorism, saying, “[I]t’s very hard to define. It’s very hard to separate. Because you don’t know who’s who.” Theodore Schleifer, *Donald Trump: “I Think Islam Hates Us,”* CNN (Mar. 10, 2016), <http://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/>.

376. Nora Kelly, *Political Traction for Anti-Muslim Proposals*, ATLANTIC (Mar. 29, 2016), <http://www.theatlantic.com/politics/archive/2016/03/trump-cruz-muslims/475779/>.

377. *Id.*

378. Danner, *supra* note 366.

379. *Id.*

weapon ready for the hand of any authority that can bring forward a plausible claim of urgent need.”<sup>380</sup> Yet, a recent poll showed that the views expressed by Trump and Cruz towards Muslims have gained traction among an “unsteady” mainstream America, with a majority of Republicans indicating that “‘things in the country’ have ‘pretty seriously . . . gotten off on the wrong track.’”<sup>381</sup> Indeed, Trump’s stunning Electoral College victory over Secretary Clinton to secure the presidency showed many believed his promise to “Make America Great Again.”<sup>382</sup>

Some have attributed Trump’s unaccountable rise to establishment politics that no longer understand the economic realities of their bases.<sup>383</sup> The fact is that Trump won with the support of those in small-town America with modest middle-class incomes: “teachers, police officers, small-business owners, and city employees.”<sup>384</sup> According to a Washington Post/ABC News poll, the “broad majority” of Trump’s supporters lacked a college degree.<sup>385</sup> It is no secret that the “middle class has been losing ground for a long time, and there are few jobs for people without college degrees—or at least, few jobs that hold a path to mobility.”<sup>386</sup> Still, the Republican elite continued to push economic

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380. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

381. Kelly, *supra* note 376.

382. Matt Flegenheimer & Michael Barbaro, *Donald Trump Is Elected President in Stunning Repudiation of the Establishment*, N.Y. TIMES (Nov. 9, 2016), [http://www.nytimes.com/2016/11/09/us/politics/hillary-clinton-donald-trump-president.html?\\_r=0](http://www.nytimes.com/2016/11/09/us/politics/hillary-clinton-donald-trump-president.html?_r=0). “[I]t was a decisive demonstration of power by a largely overlooked coalition of mostly blue-collar white and working-class voters who felt that the promise of the United States had slipped their grasp amid decades of globalization and multiculturalism.” *Id.* Upon assuming the presidency, Trump wasted no time in implementing through executive order a “travel ban” that “suspended worldwide refugee entry into the United States. It also suspended travel from seven Muslim-majority nations — Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen — for 90 days.” Adam Liptak, *What’s Next for Trump’s Travel Ban? Justice Dept. and States Weigh Options*, N.Y. TIMES (Feb. 13, 2017), [https://www.nytimes.com/2017/02/13/us/politics/trump-travel-ban-courts.html?\\_r=0](https://www.nytimes.com/2017/02/13/us/politics/trump-travel-ban-courts.html?_r=0). However, federal district Judge James L. Robart enjoined the order as causing “significant and ongoing” harms that adversely affected “areas of employment, education, business, family relations and freedom to travel,” *Washington v. Trump*, No. 2:17-cv-00141-JLR, 2017 WL 462040, at \*2 (W.D. Wash. Feb. 3, 2017), a decision that was upheld by the Ninth Circuit Court of Appeals, No. 17-35105, 2017 WL 526497 (9th Cir. Feb. 9, 2017) (per curiam).

383. Bouie, *supra* note 364.

384. *Id.* “In the Michigan primary, for example, Trump won most of his votes from voters with incomes less than \$50,000; in New Hampshire, he dominated among voters making less than \$100,000.” *Id.*

385. Osnos, *supra* note 332.

386. Bouie, *supra* note 364. “Between 1979 and 2013, pay for men without a college degree fell by twenty-one per cent in real terms; for women with similar credentials, pay rose by three per cent, thanks partly to job opportunities in health care and education.” Osnos, *supra* note 332. “Even in places where new factories have cropped up, unions are sparse and wages are low, following a race-to-the-bottom among the towns and cities that vie for the remaining manufacturing jobs.” Bouie, *supra* note 364.



programs that create tax cuts for the wealthy and curtail social programs like Medicare and Social Security, even as the working-class base of the party is facing the loss of jobs, cuts in wages, and fears concerning retirement.<sup>387</sup> At the same time, Democrats were criticized for becoming “a party of coastal elites completely disconnected from the rest of America” who were out of touch with “hurting industrial areas.”<sup>388</sup>

Under both scenarios, it is easy to see how this “disorienting economic and cultural change has led a substantial group of Americans to turn to someone who disdains feckless politicians and pledges to restore the country’s strength.”<sup>389</sup> As Samuel Huntington cautioned:

White elites dominate all major American institutions, yet millions of nonelite whites have very different attitudes from those of the elites, lack their assurance and security, and think of themselves as losing out in the racial competition to other groups favored by the elites and supported by governmental policy. Their losses do not have to exist in reality; they only have to exist in their minds to generate fear and hatred of the rising groups.<sup>390</sup>

“American populism has always combined nativism with economic grievance.”<sup>391</sup> Described as the “Perfect Populist,” Trump boasted that he created a movement and, indeed, he found a following among many former “Reagan Democrat” voters who believed he shared their white working-class values.<sup>392</sup> Trump’s willingness “to say what most

387. Confessore, *supra* note 332; Mara Liasson, *Nativism and Economic Anxiety Fuel Trump’s Populist Appeal*, NPR (Sept. 4, 2015), <http://www.npr.org/sections/itsallpolitics/2015/09/04/437443401/populist-movement-reflected-in-campaigns-of-sanders-and-trump> (noting that Trump “highlight[s] the growing division between the Republican Party’s establishment wing and its base”).

388. Mark A. Thiessen, *‘Hamilton’ and the Implosion of the American Left*, WASH. POST (Nov. 21, 2016), [https://www.washingtonpost.com/opinions/hamilton-and-the-implosion-of-the-american-left/2016/11/21/acc6a45c-aff8-11e6-be1c-8cec35b1ad25\\_story.html?utm\\_term=.edeed6c2f4eb](https://www.washingtonpost.com/opinions/hamilton-and-the-implosion-of-the-american-left/2016/11/21/acc6a45c-aff8-11e6-be1c-8cec35b1ad25_story.html?utm_term=.edeed6c2f4eb).

389. Bouie, *supra* note 364.

390. HUNTINGTON, *supra* note 25, at 314. “The most powerful stimulus to white nativism, however, is likely to be the threat to their language, culture, and power that whites see coming from the expanding demographic, social, economic, and political roles of Hispanics in American society.” *Id.* at 315-16. Indeed, CNN commentator Van Jones called the election results a “whitelash.” Josiah Ryan, *‘This was a Whitelash’: Van Jones’ Take on the Election Results*, CNN (Nov. 9, 2016), <http://www.cnn.com/2016/11/09/politics/van-jones-results-disappointment-cnntv/> (“This was a whitelash against a changing country.”).

391. Liasson, *supra* note 387. In the late nineteenth century, American farmers suffered losses because of industrialization that led to the creation of “agrarian protest groups, including the Populist movement, the Grange, the Non-Partisan League, and the American Farm Bureau Federation.” HUNTINGTON, *supra* note 25, at 314.

392. Michael Lind, *Donald Trump, the Perfect Populist*, POLITICO MAG. (Mar. 9, 2016), <http://www.politico.com/magazine/story/2016/03/donald-trump-the-perfect-populist-213697>.

Americans think” spoke to “the fearful and the frustrated,”<sup>393</sup> which is to say, the rhetoric—and result<sup>394</sup>—of the 2016 political campaign reflected current nativist concerns.

### *B. Obama’s Deportation Priorities*

For years, President Obama declined to take executive action to overhaul the “broken immigration system.”<sup>395</sup> Instead, he deferred to Congress as the only entity that could provide the permanent protection needed for immigrants.<sup>396</sup> His reticence angered the Latino community, to whom he made campaign promises of immigration reform.<sup>397</sup> However, Congress repeatedly failed to pass comprehensive immigration reform, and years of Congressional deadlock broke his resolve.<sup>398</sup>

In 2012, through a memorandum by the Department of Homeland Security, President Obama implemented a program called Deferred Action for Childhood Arrivals (DACA),<sup>399</sup> which provided a means for the 1.2 million young immigrants brought to the United States as children before June 15, 2007, to apply for deferral of deportation for two years.<sup>400</sup> It incorporated much of the same criteria previously

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393. Osnos, *supra* note 332. He “is willing to say what most Americans think: it’s time to deport these people.” *Id.* (quoting the DAILY STORMER, America’s popular neo-Nazi news site, which endorsed Trump).

394. Matt Vespa, *Make America Great Again: Electoral College Makes Trump’s 2016 Win Official, Clinches 304 Votes*, TOWNHALL (Dec. 19, 2016), <https://townhall.com/tipsheet/mattvespa/2016/12/19/make-america-great-again-electoral-college-makes-trump-win-official-n2261378>. The result was controversial, because Secretary Clinton won the popular vote by 2.9 million votes. Gregory Krieg, *It’s Official: Clinton Swamps Trump in Popular Vote*, CNN (Dec. 22, 2016), <http://www.cnn.com/2016/12/21/politics/donald-trump-hillary-clinton-popular-vote-final-count/>.

395. Shear, *supra* note 328 (Obama’s Immigration Address video).

396. *Id.*

397. Mike Coronas, *Tracking Obama’s Deportation Numbers*, REUTERS (Feb. 25, 2015), <http://blogs.reuters.com/data-dive/2015/02/25/tracking-obamas-deportation-numbers/>. President Obama called himself the “champion in chief” of immigration law reform. However, according to ICE data, the Department of Homeland Security carried out 438,421 deportations in 2013 and followed that with 414,481 in 2014. *Id.*

398. *What Is President Obama’s Immigration Plan?* N.Y. TIMES (Nov. 20, 2014), <http://www.nytimes.com/interactive/2014/11/20/us/2014-11-20-immigration.html> [hereinafter *Obama’s Plan*]. House Republicans blocked a comprehensive reform bill passed by the Democratic-led Senate because it included a “path to citizenship for unauthorized immigrants,” and many members of the Republican-controlled House refused to support any measure that included a path to citizenship. *Id.*

399. Memorandum from Janet Napolitano, Sec’y, Dep’t of Homeland Sec., to David Aguilar, Acting Comm’r, U.S. Customs & Border Prot., et al. 1 (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [hereinafter DACA Memo].

400. Tim Cohen, *Obama Administration to Stop Deporting Some Young Illegal Immigrants*, CNN (June 16, 2012), [http://www.cnn.com/2012/06/15/politics/immigration/index.html?hpt=hp\\_t1](http://www.cnn.com/2012/06/15/politics/immigration/index.html?hpt=hp_t1)

proposed under the DREAM Act,<sup>401</sup> an immigration reform bill specifically aimed at young people and supported by President Obama, but never passed by Congress.<sup>402</sup> The directive instructed ICE officials to exercise prosecutorial discretion in a “sensible manner” when dealing with the deportation of certain undocumented persons who came to the United States as children.<sup>403</sup> Republicans were outraged and claimed the measure amounted to executive “amnesty,” which usurped congressional authority.<sup>404</sup> House Judicial Chairman Bob Goodlatte (R-Va.) accused the President of “abus[ing] his authority and unilaterally refus[ing] to enforce our current immigration laws.”<sup>405</sup>

President Obama followed that action<sup>406</sup> with another Memorandum issued on November 20, 2014, that allowed undocumented parents of U.S. citizen or legal resident children to work legally in the United States and shielded them from deportation.<sup>407</sup> The initiative, called

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[hereinafter Cohen, *Obama*]. “Under the new policy, people younger than 30 who came to the United States before the age of 16, pose no criminal or security threat, and were successful students or served in the military can get a two-year deferral from deportation, Homeland Security Secretary Janet Napolitano said.” *Id.*

401. Development, Relief, and Education for Alien Minors, S. 1291, 107th Cong. (2001). First introduced in 2001, the bill went through several revisions before its ultimate defeat in 2010.

402. Kori Schulman, *President Obama on the DREAM Act: “My Administration Will Not Give Up,”* WHITE HOUSE BLOG (Dec. 8, 2010), <https://www.whitehouse.gov/blog/2010/12/18/president-obama-dream-act-my-administration-will-not-give>. Perhaps signaling his intent to rule by executive order following the Act’s defeat, President Obama stated, “It is disappointing that common sense did not prevail today. But my administration will not give up on the DREAM Act, or on the important business of fixing our broken immigration system. The American people deserve a serious debate on immigration, and it’s time to take the polarizing rhetoric off our national stage.” *Id.*

403. DACA Memo, *supra* note 399. The directive tracked in part a 2011 memo from ICE Director John Morton that asked ICE employees not to target undocumented immigrants with close family ties to U.S. citizens or those who came to the United States as young children, among other factors. Memorandum from John Morton, Director, U.S. Dep’t of Homeland Sec.: U.S. Immigration & Customs Enf’t (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

404. Cohen, *Obama*, *supra* note 400. President Obama specifically noted, “This is not amnesty. This is not immunity. This is not a path to citizenship. It’s not a permanent fix . . . This is a temporary stopgap measure.” *Id.*

405. Laura Hayes, *Obama Issues Directive to Stop Deporting Undocumented Parents of Minors*, IMMIGRATION BLOG (Aug. 26, 2013), <http://www.visanow.com/obama-issues-directive-to-stop-deporting-undocumented-parents-of-minors/>. He claimed that Obama directed “U.S. Immigration and Customs Enforcement agents to stop removing broad categories of unlawful immigrants.” *Id.*

406. Susan Davis, *House Republicans Delay Recess to Finish Border Funding Bill*, USA TODAY, Aug. 1, 2014, at 3A. The unaccompanied minor crisis in 2014 resulted in further congressional deadlock. *Id.* After Senate Democrats could not agree on a solution, House Republicans postponed their August recess to work on a \$659 million emergency spending bill. *Id.* Some claimed this was merely “optics” because the proposals included sending National Guard troops to the border and revising the William Wilberforce Act so that it would be “easier to return children home to Central America.” *Id.*; see also Dana Bash et al., *House GOP Passes Border Bill—Likely to no Effect*, CNN (Aug. 1, 2014), [http://www.cnn.com/2014/08/01/politics/congress-immigration/index.html?iid=article\\_sidebar](http://www.cnn.com/2014/08/01/politics/congress-immigration/index.html?iid=article_sidebar).

407. *Obama’s Plan*, *supra* note 398.

Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA),<sup>408</sup> was temporary and offered no path to citizenship, but it allowed approximately four to five million people to “come out of the shadows” and delay deportation if they met certain requirements.<sup>409</sup> That move likewise generated immediate backlash, and Republican lawmakers called President Obama’s actions “unconstitutional and illegal” and “a brazen power grab.”<sup>410</sup> The president of the Tea Party Patriots went further, comparing the President’s actions to those of a “banana republic,” and the Speaker of the House suggested that President Obama had “cemented his legacy of lawlessness and squandered what little credibility he had left.”<sup>411</sup> In a speech to the Heritage Foundation, one Senator even resorted to nativist language by saying that President Obama and his cronies “were ignoring the will of ordinary Americans who want good-paying jobs that are not taken by immigrants.”<sup>412</sup> President Obama responded to his critics with an invitation for Congress to finally take the helm and pass a comprehensive reform bill.<sup>413</sup> Instead, Texas sued the Obama administration in federal court, and House Republicans intervened, actually joining in arguments before the Supreme Court.<sup>414</sup> In a one-

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408. Memorandum from Jeh Johnson, Sec’y, Dep’t of Homeland Sec., to Leon Rodriguez, Dir., USCIS, et al. 3–4 (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf).

409. Shear, *supra* note 328. The order applied to those who have been in the country for more than five years, who registered and passed a background check, and would begin to pay taxes. *Id.* (Obama’s Immigration Address video). “Deferrals would include authorization to work and would be granted for three years at a time.” *Obama’s Plan*, *supra* note 398. “The deferrals would not include a path to full legal status or benefits under the Affordable Care Act.” *Id.* The initiative also expanded the reach of DACA eligibility to approximately 300,000 more people by stretching the eligibility date to those people who entered the United States as children before January 2010, enlarging the deferral period to three years, and removing the requirement that applicants be under 31 years old. *Id.*

410. *Obama’s Plan*, *supra* note 398 (quoting Sen. John Cornyn (R-Tex.), who declared that the action “will deeply harm our prospects for immigration reform”). President Obama dismissed these concerns, noting that executive orders had been issued by every president, both Republican and Democratic alike, “for the past half-century.” Shear, *supra* note 328 (quoting President Obama).

411. Shear, *supra* note 328 (quoting Jenny Beth Martin and John A. Boehner (R-Ohio)).

412. Peters, *Obama*, *supra* note 331 (quoting Representative Jeff Sessions, (R-Ala.)). Even though a reported majority of American citizens supported broad support for a path to citizenship for unauthorized immigrants, a Wall Street Journal/NBC News poll showed that 48 percent disapproved of the unilateral actions, and even some Democratic members of Congress felt the president overreached. Shear, *supra* note 328.

413. Shear, *supra* note 328. President Obama challenged, “To those members of Congress who question my authority to make our immigration system work better, or question the wisdom of me acting where Congress has failed, I have one answer: Pass a bill.” *Id.*

414. The State of Texas, joined by 25 other states, sued President Obama and members of his administration in federal court, challenging his authority to issue DAPA, and the court enjoined the program nationwide. *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015). A divided Fifth Circuit Court of Appeals upheld the preliminary injunction. 809 F.3d 134 (5th Cir. 2015). In January, the Supreme Court granted President Obama’s petition for writ of certiorari, *United States v. Texas*, 136

sentence opinion, an “equally divided” Supreme Court affirmed the decision of the lower court,<sup>415</sup> leaving in place an injunction against DAPA but providing no further clarity.<sup>416</sup>

In light of the above, it is perhaps surprising then that data from ICE shows that the Obama administration had been noticeably aggressive in its removal efforts, and that President Obama was responsible for more deportations than any preceding president.<sup>417</sup> Since he entered the Oval Office, he ousted nearly two million illegal immigrants, nine times the rate of two decades ago, earning for himself the title of “Deporter in Chief” in return.<sup>418</sup>

Even so, President Obama contended that it would have been cost prohibitive to oust everyone in the country that potentially could be removed.<sup>419</sup> Over eleven million undocumented people currently reside in the United States and are subject to deportation for immigration violations.<sup>420</sup> Hundreds of thousands more are subject to removal because of criminal convictions.<sup>421</sup> Even with the most funding that Congress has ever allocated for immigration enforcement, costs limit removals to 400,000 per year.<sup>422</sup> Without more resources, President Obama had to choose whether to concentrate on interior or border enforcement measures; he chose to focus on the former and relied on criminal history as a means of determining whom to deport.<sup>423</sup>

In his November 2014 address to the nation, President Obama

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S. Ct. 906 (2016), and oral arguments were heard by the eight justices on April 18, 2016. Ariane de Vogue, *Supreme Court Divided on Obama's Immigration Actions*, CNN (Apr. 18, 2016), <http://www.cnn.com/2016/04/18/politics/supreme-court-immigration-executive-actions-texas/>.

However, Solicitor General Donald Verrilli challenged the states' standing to bring suit, noting that “the Constitution ‘assigns the formation of immigration policy exclusively to the National Government precisely because immigration is an inherently national matter.’” *Id.*; see also *supra* notes 122–23 and accompanying text.

415. *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016) (per curiam).

416. Peter M. Shane, *The U.S. Supreme Court's Big Immigration Case Wasn't About Presidential Power*, ATLANTIC (June 28, 2016), <http://www.theatlantic.com/politics/archive/2016/06/us-v-texas-wasnt-really-about-presidential-power/489047/>.

417. Coronos, *supra* note 397. President Bush saw 358,886 deportations in 2008, his last full year in office. *Id.*

418. *Id.* President Obama called himself the “champion in chief” of immigration law reform. However, according to ICE data, the Department of Homeland Security carried out 438,421 deportations in 2013 and followed that with 414,481 in 2014. *Id.*

419. Shear, *supra* note 328 (Obama's Immigration Address video).

420. Cade, *supra* note 147, at 664; Shear, *supra* note 328 (America's 11 million Video).

421. Cade, *supra* note 147, at 664.

422. *Id.*

423. *Id.* Interior enforcement policies are those “aimed at identifying unauthorized immigrants for removal, including worksite enforcement, employment verification, jail-house screening, and state and local law enforcement activity.” *Illegal Immigration & Interior Enforcement*, MIGRATION POL'Y INST., <http://www.migrationpolicy.org/topics/illegal-immigration-interior-enforcement> (last visited Dec. 2, 2016).

pointedly addressed criminal activity, stating that deportation efforts would be directed “not at families, but at felons,” whom he defined as dangerous criminals who pose a threat to the nation’s security.<sup>424</sup> Indeed, some scholars have advanced that deporting criminals “promotes national security perhaps even more than deporting terrorists.”<sup>425</sup> But President Obama’s description of a felon is narrower than defined by federal immigration law.

Under the current regime, even some state misdemeanors can classify a noncitizen immigrant as an “aggravated felon,” and that makes international adoptees who have committed even nonviolent, minor crimes targets for deportation.<sup>426</sup> That is not likely to improve under a Trump administration. Throughout the campaign, Trump promised to deport eleven million immigrants and dismantle DACA.<sup>427</sup> Since the election, Trump has scaled back on the total, but still promised to deport two to three million criminal immigrants.<sup>428</sup> His advisors even suggested the net might be widened to also include those who have committed lower-level misdemeanors and even those charged but not convicted of a crime.<sup>429</sup> Indeed, they were among those targeted by recent deportation raids across the country as part of ICE’s Operation Cross Check, which “marked the first large-scale enforcement of President Trump’s Jan. 25 order to crack down on the estimated 11 million immigrants living here illegally.”<sup>430</sup> True to his promise, most

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424. Shear, *supra* note 328 (Obama’s Immigration Address video). President Obama addressed the nation:

I believe that they must be held accountable, especially those who may be dangerous. That’s why over the past six years deportations of criminals are up 80 percent. And that’s why we’re going to keep focusing enforcement resources on actual threats to our security. Felons, not families. Criminals, not children. Gang members, not a mom who’s working hard to provide for her kids. We’ll prioritize just as law enforcement does every day.

*Id.*

425. See, e.g., ROMERO, *supra* note 94, at 52.

426. See *supra* Sections III.A, IV.C.

427. Brian Bennett, *When Trump Says He Wants to Deport Criminals, He Means Something Starkly Different than Obama*, L.A. TIMES (Nov. 14, 2016), <http://www.latimes.com/politics/>. Ironically, some suggested he might use an Executive Order to carry out his agenda, the very instrument that Republicans criticized Obama for using to institute DACA. Mica Rosenberg & Julia Edwards Ainsley, *Trump Has Broad Power to Implement Immigration Policies: Legal Experts*, REUTERS (Dec. 5, 2016), <http://www.reuters.com/article/us-usa-trump-immigration-idUSKBN13U199>.

428. Lesley Stahl, *President-elect Trump Speaks to a Divided Country on 60 Minutes*, CBS NEWS (Nov. 13, 2016), <http://www.cbsnews.com/news/60-minutes-donald-trump-family-melania-ivanka-lesley-stahl/>.

429. Bennett, *supra* note 427.

430. Lisa Rein et al., *Federal Agents Conduct Immigration Enforcement Raids in at Least Six States*, WASH. POST (Feb. 11, 2017), [https://www.washingtonpost.com/national/federal-agents-conduct-sweeping-immigration-enforcement-raids-in-at-least-6-states/2017/02/10/4b9f443a-efc8-11e6-b4ff-ac2cf509efe5\\_story.html?utm\\_term=.bbc0212b2b13](https://www.washingtonpost.com/national/federal-agents-conduct-sweeping-immigration-enforcement-raids-in-at-least-6-states/2017/02/10/4b9f443a-efc8-11e6-b4ff-ac2cf509efe5_story.html?utm_term=.bbc0212b2b13). “Immigration officials acknowledged that as a result of Trump’s executive order, authorities had cast a wider net than they would have last year.” *Id.*

of those picked up are expected to be deported.<sup>431</sup>

## VI. CONCLUSION

Family law and immigration law are “two completely different systems, run by two different governments.”<sup>432</sup> Family law, historically, has been a matter of state government, with each state developing its own laws governing the creation and dissolution of family bonds while protecting the best interests of its children.<sup>433</sup> Conversely, immigration law is primarily a federal concern, as it acts as “a gatekeeper for the nation’s border.”<sup>434</sup> Deportation involves the complicated intersection of the two, as the decisions involving those forced to leave the country oftentimes impact separated family members who remain behind.<sup>435</sup>

In light of current anti-immigration rhetoric,<sup>436</sup> it is perhaps surprising to discover that family unification has served as a central tenet in the formation of immigration law.<sup>437</sup> Reflecting congressional intent for family unity, the INA created “preference categories” for reunifying family members of U.S. citizens and immigrants.<sup>438</sup> The United States Immigration and Nationality Act and Amendments of 1965<sup>439</sup> continued its commitment to the reunification of family members by issuing visas to family members of U.S. citizens and permanent residents.<sup>440</sup> Indeed, the United States Supreme Court concluded, after examining the INA’s legislative history, that Congress was concerned with “the problem of keeping families of United States citizens and immigrants united.”<sup>441</sup>

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431. Miriam Jordan et al., *Trump Administration Begins Deportation Raids Across the U.S.*, WALL ST. J. (Feb. 10, 2017), <https://www.wsj.com/articles/trump-administration-begins-deportation-raids-across-the-u-s-1486771279>.

432. Molina & Kohm, *supra* note 97, at 82.

433. *See id.* at 79.

434. *Id.* at 82 (noting the federal government is to be “a gatekeeper for the nation’s border, determining who may enter, how long they may stay, and when they must leave”).

435. *Id.*

436. “Even the popular phrase ‘immigration reform’ has taken on two contradictory meanings. Careful students of the subject must ask: Is the reform intended to protect immigrants, or is it designed to keep them out?” BAUSUM, *supra* note 2, at 94; *see also supra* Section IV.A.

437. *See* Molina & Kohm, *supra* note 97, at 87.

438. INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (2012). Currently, immediate relatives and other family members may obtain permanent residence. Hawthorne, *supra* note 30, at 814 (citing §§ 201-03).

439. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911, and Pub. L. No. 99-603, § 201, 100 Stat. 3359, 3394 (1986) (adding 8 U.S.C. § 1255a (2012)).

440. Molina & Kohm, *supra* note 97, at 82. “Skilled educated foreigners who would enrich the national community” were also admitted. *Id.*

441. Hawthorne, *supra* note 30, at 814–15 (citing *Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977) (quoting H.R. REP. NO. 85-1199, at 7 (1957), *reprinted in* 1957 U.S.C.C.A.N. 2016, 2020)); Molina & Kohm, *supra* note 97, at 87.

Lower courts also recognized the INA's "humane purpose . . . to reunite families," and its concern of family unity as "the foremost policy underlying the granting of preference visas under [U.S.] immigration laws."<sup>442</sup>

Deportation of America's adoptees undercuts this objective, as families are divided, rather than united. The significant broadening of the grounds for removal and the simultaneous curtailing of judicial review has resulted in a "radical transformation of immigration law" that bows to party politics rather than family unification.<sup>443</sup> Thus, given the tense political partisanship that now surrounds nearly every aspect of border policy, it seems unlikely that Congress will be amenable to any legislation that expands any part of immigration law—even to grant citizenship to adult adoptees who originally came to this country legally. To illustrate, even House Judiciary Committee Chair Representative Goodlatte, a vocal detractor of President Obama's immigration expansion policies,<sup>444</sup> was also part of the original Child Citizenship Act carve out of those 18 and older. Supporters seem to sense this and have tried to steer the issue away from immigration and reframe it as a "human rights issue."<sup>445</sup> Gazillion Strong's Kevin Vollmers, an adoptee activist, recently remarked, "There are folks who are tying this in with anti-immigration sentiment . . . Regardless of what people think about anti-immigration or immigration, this question is fundamentally about adoptions."<sup>446</sup> Other countries, too, have challenged the United States, as the world leader in the number of children adopted from abroad, to "also lead the world in the humanitarian treatment of them."<sup>447</sup>

It is time, as Senator Klobuchar recently remarked, that "international adoptees who came legally into this country are recognized as the Americans who they truly are."<sup>448</sup> The fact is that time will eventually solve the problem. Adoptees who were under 18 on February 27, 2001 do not face this issue, as they were granted full U.S. citizenship on that date. But the 18,000 or so adoptees who were not afforded citizenship then should not be held in limbo for the rest of their lives.

Indeed, this should be a humanitarian issue, not a political one. Foreign-born adoptees are not refugees seeking asylum. Nor are they the same as Dreamers, who were brought here illegally. Rather, they

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442. Hawthorne, *supra* note 30, at 815 (citing *Kaliski v. Dist. Dir. of I.N.S.*, 620 F.2d 214, 217 (9th Cir. 1980); *Delgado v. INS*, 473 F. Supp. 1343, 1348 (S.D.N.Y. 1979) (quoting *Lau v. Kiley*, 563 F.2d 543, 547 (2d Cir. 1977))).

443. Cade, *supra* note 147, at 723.

444. See Hayes, *supra* note 405 and accompanying text.

445. Xaykaothao, *supra* note 319.

446. *Id.*

447. Sung-soo, *supra* note 140; see also Levine, *supra* note 151.

448. Xaykaothao, *supra* note 319.



occupy a unique space altogether because they came to this country legally. The governments of both the sending country and the United States signed off on the adoptions, and the children became part of American families, just the same as if they had been born biologically into those families. Through no fault of their own, they did not obtain citizenship only because adoption agencies and parents did not follow through on naturalization requirements. Still, adoptees are being treated as all other noncitizen immigrants and getting lost amid the nativist noise surrounding immigration concerns.

Nearly 100 years ago, Judge Learned Hand opined that it would be “deplorable” to deport a young man born abroad but brought to this country as an infant.<sup>449</sup> He stated, “[H]e is as much our product as though his mother had borne him on American soil . . . . However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples . . . [S]uch a cruel and barbarous result would be a national reproach.”<sup>450</sup> And so it is.

Accordingly, as proposed by the Adoptee Citizenship Acts of 2015 and 2016, Congress should finally grant retroactive citizenship to all U.S. foreign-born adoptees—regardless of their age.

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449. United States *ex rel.* Klonis v. Davis, 13 F.2d 630, 630–31 (2d Cir. 1926).

450. *Id.* at 631.