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# Children of a Lesser God: Should the Fourteenth Amendment be Altered or Repealed to Deny Automatic Citizenship Rights and Privileges to American Born Children of Illegal Aliens?

## I. INTRODUCTION

Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!<sup>1</sup>

Welcome to California, Now Go Home!<sup>2</sup>

The United States is a nation of immigrants.<sup>3</sup> It has welcomed far more people into its borders than any other country in the world.<sup>4</sup> In fact, the United States has absorbed more immigrants than the rest of the world combined.<sup>5</sup>

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1. EMMA LAZARUS, *THE NEW COLUSSUS* (1883), reprinted in UNITED STATES COMM'N ON CIVIL RIGHTS, *THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION* 1 (1981). Emma Lazarus' famous words engraved at the base of the Statue of Liberty have beckoned millions of immigrants from all over the world to the United States with the promise of safety and opportunity. The words are from Lazarus' sonnet *The New Colossus*. *Id.*

2. This slogan is printed on a popular bumper sticker seen frequently on vehicles in California.

3. SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND NATIONAL INTEREST 172-73 (Supp. 1981). Between 1821 and 1978, more than 48 million immigrants arrived in the United States. *Id.* With the obvious exception of Native Americans, everyone now living in the United States is an immigrant or has descended from immigrants. President Franklin Roosevelt once said, "Remember, remember always that all of us, and you and I especially, are descended from immigrants." Brown, *Shut Out Immigrants? No; The United States Must Be a Beacon of Hope to the Oppressed. But Changes in Our Immigration Policies and Practices are Needed*, ORLANDO SENTINEL, July 6, 1993, at A6.

4. THOMAS A. ALEINIKOFF & DAVID A. MARTIN, *IMMIGRATION: PROCESS AND POLICY* 39 (interim 2d ed. 1991).

5. Dianne Klein, *State Puts New Edge on Immigration Debate; Border: Residents Increasingly See Illegal Influx as a Source of California's Woes. Pressure for Action Grows*, L.A. TIMES, Sept. 6, 1993, at A1. Some estimates claim that the number of immigrants that have entered the United States is actually twice the number of immi-

However impressive this may be, the history of American immigration does not reveal a sovereign nation unconditionally opening its arms to all those yearning for a better life. A dim and murky fear of foreigners has, on occasion, cast its dark, isolationist shadow over the entryway to the United States.<sup>6</sup>

More recently, these flames of fear have been fanned by an increasingly alarming number of illegal aliens<sup>7</sup> entering the United States, the vast majority crossing into the United States from Mexico.<sup>8</sup> Illegal entry into the United States can be accomplished with the aid of readily available false documents, unpatrolled border areas that allow for virtually unchallenged crossings, and effective immigration lawyers who stand ready to help.<sup>9</sup> Even those illegal immigrants who are caught and leave the coun-

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grants in all other countries combined. ELIZABETH HULL, *WITHOUT JUSTICE FOR ALL; THE CONSTITUTIONAL RIGHTS OF ALIENS* 4 (1985). See generally KEVIN MCCARTHY & DAVID RONFLEDT, *UNITED STATES IMMIGRATION POLICY AND GLOBAL INTERDEPENDENCE* (1982) (explaining the effect of world crises on immigration to the United States).

6. *Id.* See generally UNITED STATES COMM'N ON CIVIL RIGHTS, *supra* note 1, at 1.

7. People who are not citizens or nationals of the United States are classified as "aliens." Immigration & Nationality Act § 101, 8 U.S.C. § 1101(a) (1980). There are three general groups of aliens. The first group consists of students, visitors on vacation, and people entering the United States for business purposes, all of whom are issued valid temporary visas. Janet M. Calvo, *Alien Status Restrictions on Eligibility for Federally Funded Assistance Programs*, 16 N.Y.U. REV. L. & SOC. CHANGE 395, 397 (1988). The second group is made up of permanent alien residents who, despite this government-recognized status, are subject to deportation. *Id.* People in this category may apply for citizenship status after residing in the United States for five years. *Id.* Aliens in the third category are commonly referred to as illegal aliens, undocumented workers, or simply illegals. *Id.* These terms are used interchangeably, and while there may be some negative and dehumanizing connotations to them, this author intends no disrespect and uses them solely as descriptive terms.

These three categories are somewhat misleading as many immigrants do not fit within either of the first two categories, yet are still lawfully in the country as prescribed by the IMMIGRATION REFORM AND CONTROL ACT OF 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359. *Id.* This comment focuses on true illegal immigrants—those whose presence in the country resulted from violating United States immigration laws.

8. The Immigration and Naturalization Service (INS) has estimated that there are over 3.2 million undocumented or illegal aliens presently living in the United States. Klein, *supra* note 5, at A1. This estimate does not include the 3.7 million illegal aliens who have accepted amnesty through the Immigration Reform and Control Act of 1986 (IRCA). *Id.* In 1988, the INS captured over 1 million illegal immigrants. ALEINIKOFF & MARTIN, *supra* note 4, at 252. However, no accurate method of calculating the actual number of illegal aliens residing in the United States exists. *Id.* Accordingly, estimates range from 3 million to over 12 million. *Id.* Based on the amount of undocumented aliens caught at the border, it appears that the volume of illegal immigration has slowed slightly in the past year. Ramon G. McLoed, *Fewer Caught Crossing into State Illegally; Data Suggest Drop in Rate of Undocumented Entries From Mexico*, S.F. CHRON., Jan. 6, 1994, at A2.

9. Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 77 (1984).

try, either voluntarily or involuntarily, are free to make other entrance attempts, often hours later.<sup>10</sup>

Federal and state court rulings which broaden the rights of illegal immigrants have further contributed to these problems.<sup>11</sup> In addition, the lack of sufficient funds necessary for the Immigration and Naturalization Service (INS) to adequately patrol the borders and to capture, prosecute, and deport illegal aliens makes the INS's task nearly impossible.<sup>12</sup> The ineffectiveness of INS efforts has resulted in a sizable problem, especially in border states such as California and Texas.<sup>13</sup> In fact, the United States has effectively lost control of its own borders.<sup>14</sup>

While some Americans claim that the problem of illegal aliens has been overstated,<sup>15</sup> the majority of United States citizens are not con-

10. *Id.*

11. *Id.* at 76.

12. *Id.*

13. An INS study revealed that two of the four states with the largest alien population are California (26%) and Texas (8%). *Id.* at 23 n.121 (citing IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP'T OF JUSTICE, 1979 STATISTICAL YEARBOOK 84 (1979)).

14. See, e.g., *Report to the Congress by the Controller General of the United States, Illegal Entry at US-Mexican Border: 7 Multiagency Enforcement Efforts Have Not Been Effective in Stemming the Flow of Drugs and People* (1977). Attorney General William French Smith testifying before a joint congressional subcommittee said, "We have lost control of our borders. We have pursued unrealistic policies. We have failed to enforce our laws effectively." *Administration's Proposals on Immigration and Refugee Policy: Joint Hearing Before the Subcomm. on Immigration, Refugees, and International House Comm. on the Judiciary, 97th Cong., 1st Sess. 6* (1981) (statement of William French Smith, Attorney General). Echoing these sentiments in a dissenting opinion three years later, Justice Starr noted:

[T]his Nation has lost control of its borders. Not only does the Nation seem powerless to curb the tide of illegal immigration in the first instance, but the process of returning whence they came those who are now illegally here has become so protracted and complicated that the cost of an able immigration lawyer is in effect a ticket of admission permitting those unlawfully here to remain indefinitely.

*Shin v. INS*, 750 F.2d 122, 130 (D.C. Cir. 1984) (Starr, J., dissenting).

15. Schuck, *supra* note 9, at 89. In 1910, more than 14% of the United States population were foreign born. *Id.* A 1970 estimate, however, indicates that only 4.5% of the population are foreign born. *Id.* The arrival of even a few million foreign nationals to a country with a population approaching 250 million does not really pose a threat of imminent takeover. *Id.* Further, the percentage of foreign born individuals relative to the U.S. population is less than that of many other industrialized nations. *Id.*

Some observers believe that while massive immigration to industrialized countries causes some short term problems, in the long run, this immigration actually spurs

vinced.<sup>16</sup> The public and its elected officials have responded to this unchecked invasion by illegal aliens with a myriad of proposals aimed at stemming the tide.<sup>17</sup> These proposals include imposing an entry fee at the border,<sup>18</sup> restricting driver's licenses to only verified United States citizens and legal visitors,<sup>19</sup> forcing doctors to report their illegal alien patients,<sup>20</sup> and requiring all citizens to carry a tamper proof identification card.<sup>21</sup>

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world trade and is a positive force on the world economy. See Christopher Farrell, *Shut Out Immigrants and Trade May Suffer*, BUS. WK., July 5, 1993, at 83.

16. Jacklyn Fierman, *Is Immigration Hurting the U.S.?*, FORTUNE, Aug. 9, 1993, at 76. A June 1993 *New York Times* and CBS News poll indicated that 61% of the American public believes that curtailment of the current permissive immigration policy is the best policy. *Id.*

17. Michael Otten, *Recession Causes Backlash Against Immigrants*, REUTERS, June 8, 1993 available in LEXIS, News Library, Wires File. The California legislature proposed 35 bills to curb services provided to illegal immigrants during this past session alone. *Id.* For example, Assemblyman Mickey Conroy proposed a bill requiring the state to study the feasibility of funding the construction and operation of a prison in Mexico to be run by Mexican authorities to house the estimated 12,000 illegal aliens currently jailed in California for felonies. *Id.* Another measure in Conroy's proposal would deny illegal aliens entrance to state colleges and universities. *Id.*

Even president Bill Clinton has become actively involved in the immigration problem by launching a new program to better prevent illegal border crossings. Tyra White, *Immigration Law: Past, Present and Future*, THE LEGAL INTELLIGENCER, Aug. 2, 1993, at 1. The President summarized his concern, "Our borders leak like a sieve . . . we are going to try to do better." *Id.*

18. Senator Diane Feinstein of California proposed a one dollar entry fee at the border to raise money to hire more INS border agents. *One More Brilliant Idea*, THE PHOENIX GAZETTE, Aug. 11, 1993, at A14. Those opposed to the idea are afraid the fee will hurt the economy of border cities such as El Paso, Texas and San Diego, California. These cities fear that significant retail sales to Mexican nationals might suffer. *Id.* Middle class Mexicans prefer to shop in the United States, lured across the border by higher quality, better selection, and lower prices. *Id.* Many women bring their children across the border to help them carry their purchases. *Id.* Under the plan, presumably these women would be required to pay one dollar per child in addition to the one dollar for themselves. *Id.* Some retailers are worried the entry fee or tight border security will discourage these shoppers. See *id.*

19. Senate Bill 976, ch. 820, which was enacted in California on October 4, 1993, mandates that driver's licenses be issued only upon proof of valid U.S. citizenship or other legal reason to be in the United States. CAL. VEH. CODE §§ 12801.5 & 14610.7 (West Supp. 1994). The plan seeks to verify citizenship with the INS through a computer network. *Id.*; see also Otten, *supra* note 17 (discussing proposals to reduce illegal immigration).

20. Otten, *supra* note 17.

21. Daniel M. Weintraub, *Wilson Shifts Track on Illegal Immigration; Reform: Governor Endorses Bills Making It Harder for Undocumented Immigrants to Get Services. He Says the State Must Do All It Can to Stem Flow*, L.A. TIMES, Aug. 25, 1993, at A3. Governor Wilson of California has supported a bill requiring proof of U.S. residency before the Department of Motor Vehicles will issue a driver's license or state identification card. *Id.*

A recent proposal, California Proposition 187, denying services to illegal aliens, was one of the most controversial and watched ballot measures of the 1994 November election campaign.<sup>22</sup> The measure, which passed by a wide margin, cuts off all but emergency medical and social services to illegal aliens and denies public education to undocumented children.<sup>23</sup>

One of the more prominent and far reaching proposals, spearheaded by Governor Pete Wilson of California, would deny automatic citizenship to any child born in the United States of illegal immigrant parents.<sup>24</sup> This

22. *Election USA '94, Part 63*, (CNN News Broadcast, Nov. 9, 1994). Proposition 187 was closely watched by both political parties to determine voter mood toward illegal aliens. *Id.*

23. Dan Balz, *A Historic Republican Triumph: GOP Captures Congress; Party Controls Both Houses for the First Time Since '50's*, WASH. POST, Nov. 9, 1994, at A1. The vote polarized California voters along ethnic lines. It was favored heavily by whites, but was overwhelmingly rejected by Latino voters. Daniel M. Weintraub, *Crime, Immigration Issues Helped Wilson, Poll Finds; Election: Proposition 187 Wins Among Whites, But Loses Among All Other Ethnic Groups, Exit Survey Shows*, L.A. TIMES, Nov. 9, 1994, at A1. The proposition also helped handily re-elect Governor Pete Wilson, who heavily supported the anti-illegal alien proposition. *Id.* Incumbent Wilson was elected by a wide margin by shifting the issue from a poor California economy to fear of illegal immigration and crime. A voter exit survey showed that while Californians were eager to vote for Wilson, 63% of the voters disapproved of the way California had been heading. *Id.*

The proposition, which was heavily favored by Wilson and other Republicans, has created unrest in the Latino community. Maria Puente, *Bitter Battle Over Prop. 187 Down to Wire*, USA TODAY, Nov. 9, 1994, at 2A. Juan Jose Gutierrez, who is in charge of the One Stop Immigration and Education Center in California commented, "Never in the history of the state has the Latino community been so disrespected—it's been nothing but pure hate-speech." *Id.*

Passage of Proposition 187 prompted immediate court challenges which resulted in several temporary restraining orders. *AP Radio Network News* (KHFN, Albuquerque, N.M., Nov. 10, 1994). Los Angeles school official pleaded with children to stay calm and in school, vowing that they would not enforce Proposition 187 which could require school officials to demand identification cards from students. *Id.* Passage of Proposition 187 has already created unrest, with at least a half-dozen immediate protests throughout California. *At Least Six Protests Break Out Over Prop. 187* (CNN News Broadcast, Nov. 11, 1994). Demonstrators have indicated that they will continue in active protests until "this bad law is repealed." *Id.* Reports now indicate that Florida is considering its own version of Proposition 187. *AP Radio Network News, supra.*

24. This bill, introduced by Representative Montjoy, recommends amending the Constitution to limit citizenship at birth to those whose mothers are either U.S. citizens or are legally in the country. 1993 CA. A.J.R. 49. Representatives of both parties have joined in support of this measure. *See, e.g.,* Carlos V. Lozano, *Beilenson and Gallegly Laud Wilson Plan; Immigration: Some Critics Attack the Proposal to Deny*

proposal would require an amendment to the United States Constitution because the Fourteenth Amendment guarantees citizenship to all persons born in the United States,<sup>25</sup> regardless of the citizenship of their parents.<sup>26</sup> The increasing problem of illegal immigration and the surprising public support of Wilson's radical proposal to deny citizenship to children born domestically to illegal aliens<sup>27</sup> and the passage of proposition 187 are the impetus for this Comment.

Following the introduction, part II of this Comment provides a brief overview of the history of United States immigration, including a discussion of American policy toward its borders and the effect that the cyclical fear of foreigners has on policy.<sup>28</sup> Part III explores the American tradition of granting automatic citizenship at birth and its relationship with the Fourteenth Amendment to the United States Constitution.<sup>29</sup> Also discussed in Part III are the rights associated with and the value of possessing United States citizenship.<sup>30</sup> Part IV focuses on the manner in which the Declaration of Independence and the American concept of equality would be affected by denying citizenship to persons born in the United States.<sup>31</sup> Part V examines the rights of minors and immigrant children and explores the concept of punishing the child for the sins of his or her parents.<sup>32</sup> Part VI discusses the effects the proposed constitutional change would have upon immigrants and the immigration problem, as well as its legal, social, and philosophical impact on the United States as a whole.<sup>33</sup> Finally, part VII considers alternative solutions to the problem of illegal immigration.<sup>34</sup>

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*U.S. Citizenship as a Political Ploy that Punishes "Innocent Victims,"* L.A. TIMES, Aug. 11, 1993, at B1.

25. The Fourteenth Amendment to the Constitution states, in pertinent part, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . . ." U.S. CONST. amend. XIV, § 1.

26. Because their parents are not "subject to the jurisdiction" of the United States, children born in the United States to foreign diplomats stationed in the United States as well as children born in the United States to prisoners of war are not automatically granted United States citizenship. PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 85 (1985).

27. Klein, *supra* note 5, at A1.

28. See *infra* notes 35-124 and accompanying text.

29. See *infra* notes 151-76 and accompanying text.

30. See *infra* notes 125-50 and accompanying text.

31. See *infra* notes 177-91 and accompanying text.

32. See *infra* notes 192-300 and accompanying text.

33. See *infra* notes 301-91 and accompanying text.

34. See *infra* notes 392-411 and accompanying text. An in depth solution to the problem of both legal and illegal immigration, however, is beyond the scope of this Comment.

II. AND THE STREETS ARE PAVED WITH GOLD:  
A BRIEF OVERVIEW OF U.S. IMMIGRATION

A. *Immigration and Fear*

[B]e careful with your immigration laws. We were careless with ours.<sup>35</sup>

Put up a Berlin Wall!<sup>36</sup>

Fear of immigration is nothing new.<sup>37</sup> Throughout history, there has always been apprehension of the stranger.<sup>38</sup> This suspicion and anxiety can escalate into the terror of believing that the stranger will grow into a horde of strangers sweeping across the land, taking whatever it can, and crushing one's way of life and culture in the process.<sup>39</sup>

Interestingly, in many ancient languages, the word for stranger and the word for enemy is the same.<sup>40</sup> Many early cultures called themselves names such as "we-are-men" implying that outsiders were inferior to them.<sup>41</sup> Even relative newcomers who have assimilated to a society are often suspicious of strangers.<sup>42</sup> Today, non-citizens of the United States

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35. HULL, *supra* note 5, at 7. These words were spoken by Sioux Indian Chief Ben American Horse to then Vice President of the United States, Alben Barkley. *Id.*

36. Klein, *supra* note 5, at A1. This comment was made by Fred Vines, a U.S. citizen who feared immigration was hurting the American worker. *Id.* He stated, "If you set your table for five people in your home and then 15 people show up unexpectedly . . . you've got problems." *Id.*

37. Fierman, *supra* note 16, at 76. Even in the United States, a land of immigrants, almost every poll conducted since the 1930s has indicated that a majority of Americans, most of whom are descendants of immigrants, want to further limit immigration. *Id.*

Throughout American history, nativist groups have risen to power and prominence on anti-immigration platforms. HULL, *supra* note 5, at 3. These groups have included the Know Nothings, the American Protective Association, and the Ku Klux Klan. *Id.* The wave of recent immigration has caused the emergence of well financed groups such as the Federation for American Immigration Reform (FAIR) which support a complete end to illegal immigration and curtailment of legal immigration. *Id.* at 4.

38. See generally UNITED STATES COMM'N ON CIVIL RIGHTS, *supra* note 1.

39. See HULL, *supra* note 5, at 3.

40. ALEINIKOFF & MARTIN, *supra* note 4, at 87 (excerpting from MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983)).

41. KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 21 (1989).

42. David S. Schwartz, *The Amoralty of Consent*, 74 CAL. L. REV. 2143, 2162-63



are called "aliens," a term which not only separates people, but denotes a lesser status.<sup>43</sup> Persons assigned a lower value are more easily subjected to suspicion and even scorn.<sup>44</sup> "Fear of the other," one commentator asserts, "is, at bottom, a fear of our own inadequacies."<sup>45</sup>

The continuing massive incursion of illegal aliens across U.S. borders has inflamed this fear of the other.<sup>46</sup> As economic fortunes have hit a downturn, especially in California,<sup>47</sup> the influx of illegal aliens has created anxiety for two reasons.<sup>48</sup> First, as in most difficult economic times, people fear for the loss of their jobs to illegal aliens who are willing to work for less.<sup>49</sup> While many studies have been performed on how illegal aliens affect the domestic work force, there is considerable disagreement as to how much negative impact an increase in unskilled immigrant labor might have on citizens or the economy, if there is any negative impact at all.<sup>50</sup>

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(1986) (reviewing PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985)).

43. See *supra* note 7.

44. See *supra* note 7.

45. KARST, *supra* note 41, at 24 (citing Charles R. Lawrence III, *A Dream: On Discovering the Significance of Fear*, 10 NOVA L.J. 627 (1986)).

46. See *supra* notes 8, 16, 17, 35, & 36 and accompanying text. Many Hispanics are concerned with the growing fear and hatred directed at illegal aliens because it can easily generate hostility toward all Latinos. Mercedes Olivera, *Immigrant-Bashing Decried: Conference Will Seek Policy to Counteract Feared Trend*, DALLAS MORNING NEWS, Jan. 2, 1994, at A26.

47. The economic slide in California is the worst since the 1930s and is causing many problems, including the swelling of unemployment. Vincent J. Schodolski, *Much Lost Forever in California: The Golden State Has Bid Farewell to Economic Golden Age*, CHI. TRIB., Dec. 27, 1993, at C1.

48. See generally J. HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925* (1955) (explaining the impact of immigration on citizens of the United States). In difficult economic times, "a recurrent nativism has tapped the dark well springs of racial and religious bigotry in America." Schuck, *supra* note 9, at 2.

49. See generally SELECT COMM'N ON REFUGEE & IMMIGRATION POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: IMPACT ON THE LABOR MARKET: FINAL REPORT, 97th Cong., 1st Sess. 132 (1981) [hereinafter SCRIP], reprinted in ALEINIKOFF & MARTIN, *supra* note 4, at 262-72.

50. Cornell University labor economist Vernon Briggs asks, "Why allow even one unskilled worker into this country when we have so many of our own?" Fierman, *supra* note 16, at 76. A study conducted by Rice professor emeritus of economics Donald L. Huddle found that for every 100 unskilled jobs taken by immigrants, both legal and illegal, 25 or more unskilled native-born Americans were displaced. Donald L. Huddle, *Immigrants: A Cost or a Benefit; A Growing Burden*, N.Y. TIMES, Sept. 3, 1993, at A23.

Other studies have shown that the jobs taken by unskilled immigrants, including illegals, are supplemental and do not displace U.S. citizens. ALEINIKOFF & MARTIN, *supra* note 4, at 264 (incorporating SCRIP, *supra* note 49). Economist Bernhard Ostrolenk observed in 1935 that the number of jobs is not finite, nor is it "fixed by

The second concern is the increasing cost to the public as a result social services being provided for the expanding number of illegal aliens in the United States.<sup>51</sup> While there is certainly great expense to the states in rendering free health care to illegal alien mothers having babies in state hospitals and for providing aliens emergency health care services,<sup>52</sup> exact costs incurred by the states are difficult to calculate.<sup>53</sup> There is also the expense of incarcerating illegal aliens who break the law.<sup>54</sup> However, as with the studies showing the impact of the illegal alien on the work force, studies vary widely as to how much of a financial burden is created by illegal aliens.<sup>55</sup> Some studies have pointed out that the ben-

some occult power, but increases with industrial activity." Reena Shah, *Should U.S. Shut Out Immigrants?*, ST. PETERSBURG TIMES, Feb. 25, 1992, at 1A.

According to Wade Henderson, a director of the Washington, D.C. office of the NAACP, employment problems among the unskilled African-American poor in the inner city are not due to the wave of illegal immigrants taking jobs, but to the general failure of U.S. social and economic policies. *Id.*; see also Michael J. Piore, *Impact of Immigration on the Labor Force*, 98 MONTHLY LAB. REV. 41 (1975) (contending that illegal aliens take employment positions that U.S. citizens do not want).

51. See generally ALEINIKOFF & MARTIN, *supra* note 4, at 251-96 (presenting an overview of the effect of undocumented workers on the U.S. economic, social, and political structures).

52. *Id.* at 268. Richard Berman, Director of the New York State Office of Health Systems Management, stated in 1980, that a large portion of the health care budget was being used to support the medical needs of illegal aliens. *Id.* Due to the increased media attention given to skyrocketing health care costs, many Americans have perceived that the United States health care problem is caused by illegal aliens who overuse the system for free. There is disputed evidence as to whether this is true. Some studies show great costs to the public, while other sources indicate that illegal aliens avoid using public services and facilities for fear of detection and deportation. *Id.* at 268-70; see Sana Loue, *Access to Health Care and the Undocumented Alien*, 13 J. LEGAL MED. 271 (1992).

53. Determining the cost to the federal and state governments for unpaid services rendered to illegal aliens is an inexact science at best. Some illegal aliens pay state taxes when they earn paychecks and some also pay for some of their services. ALEINIKOFF & MARTIN, *supra* note 4, at 270-71. While a burden is certainly placed on the states, especially those states close to the United States-Mexican border, the severity of the problem is in question. *Id.* Regardless, there has been an increasing demand from the states to have the federal government, which is charged with keeping the borders secure, pay for costs incurred by the states due to illegal aliens. *Id.* at 269.

54. The cost for incarcerating illegals in California has been estimated to be at least \$740 million each year. John Bennett, *Many Anti-crime Laws Have Never Received Funding*, WASH. TIMES, Nov. 17, 1993, at A3. Some of this may be offset by the IRCA which set aside funds to assist the states with some of the costs of housing undocumented alien inmates. *Id.*

55. Governor Wilson estimated that illegal aliens cost the state of California over

efits of having more workers spend money in the economy actually has an overall positive impact.<sup>56</sup>

Whatever the size of the current drain on the United States economy, there are those who look anxiously to the unstable world situation and fear that endless millions will flee their deteriorating homelands seeking refuge in the United States.<sup>57</sup> They fear that this potential invasion will further deplete the already shrinking resources of the United States.<sup>58</sup>

Further, the bombing of the World Trade Center in New York, allegedly carried out by foreigners in the United States illegally,<sup>59</sup> has intensified fear of the foreigner to the point of anger and terror.<sup>60</sup> Isolationists are once again heralding their cry for a reduction or even a complete halt to all immigration.<sup>61</sup> Legislators have responded by proposing various re-

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\$3 billion annually. Weintraub, *supra* note 21, at A3. One study done by University of California at San Diego economics professor George Borjas estimates that the nation's 20 million aliens receive about \$1.1 billion more in welfare and services than they pay in taxes. Fierman, *supra* note 16, at 76. However, they also spend money on food, clothing, and consumer goods which contributes about \$5 billion to the economy. *Id.*

In another study, the Urban Institute claims that while illegal aliens cost more than they contribute initially, they later make substantial contributions to the government. *Id.* This directly conflicts with a study by Los Angeles County that concluded that illegals use more state resources than they contribute. *Id.* Another study, conducted by Donald L. Huddle, estimates that in the next ten years, 1994-2004, 11.1 million immigrants will cost \$951.7 billion and pay only \$283.2 billion in taxes. Huddle, *supra* note 50, at A23; see also D. NORTH & M. HOUSTOUN, *THE CHARACTERISTICS AND ROLE OF ILLEGAL ALIENS IN THE U.S. LABOR MARKET: AN EXPLORATORY STUDY* (1976) (presenting a study of illegal aliens' effect on the U.S. labor market).

56. NORTH & HOUSTOUN, *supra* note 55.

57. See generally Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955 (1988) (maintaining that resources should be shared with only those that have a right to be in the U.S.).

58. See generally Bosniak, *supra* note 57.

59. Fierman, *supra* note 16, at 76.

60. Robert L. Jackson and John Jay Goldman, *Four Found Guilty in Plot to Bomb N.Y. Trade Center*, L.A. TIMES, March 5, 1994, at A1. The four suspects, Mohammed Salameh, Ahmad Mohammed Ajaj, Mahmud Abouhalima, and Nidal Ayyad were found guilty on all counts of conspiracy and assault charges stemming from the bombing of the World Trade Center on February 26, 1993. *Id.* The prosecutors called the bombing "the worst terrorist attack in U.S. history." *Id.*

This attack destroyed the myth that the United States was free from the type of terrorist attacks that have occurred around the world. *Id.* Commenting on the hysteria created by the incident, defense attorney Robert E. Precht complained that the United States government deliberately leaked information before the trial in an attempt to "demonize" his client. *Id.*

61. See Shah, *supra* note 50, at 1A. Daniel Stein, executive director of the Federation of American Immigration Reform (FAIR) supports a complete moratorium on immigration and believes, "Our politicians are for letting people in because they're

strictions and sanctions against immigrants, sometimes even changing political positions in order to satisfy the angry public.<sup>62</sup> This is nothing new, though, as politicians have often exploited the public's anxiety of the outsider, rising to popularity on the wings of worry and apprehension.<sup>63</sup> While visions of Joe McCarthy, Adolph Hitler, and more recently the astounding success of Vladimir Zhiranovsky<sup>64</sup> in Russia may seem a bit extreme, fear and separation have their beginnings in the same ugly and powerful message: stranger is enemy.<sup>65</sup> To deny the possibility of such extreme positions causing problems in the United States is to turn a blind eye toward the unfortunate record of racial violence,<sup>66</sup> a deaf ear

sorry for the people of Cuba, . . . China . . . [and] Mexico because their life is so hard. When are they going to take care of the American people?" *Id.*

Pat Buchanan has promised to construct "Buchanan fences"—deep trenches across the Mexican border to help prevent illegal immigration. *Id.* He has stated, "I think God made all people good. But if we had to take a million immigrants in, say, Zulus next year, or Englishmen, and put them up in Virginia, what group would be easier to assimilate and would cause less problems for the people of Virginia?" *Id.*

62. Klein, *supra* note 5, at A1. For example, several bills on both the state and national level propose to make English the "official" language of the United States. *Id.* Although welcomed by some, others reject this action as unnecessary and view it as a thinly veiled attempt by the dominant culture to symbolize its superiority over a group of newcomers. KARST, *supra* note 41, at 98.

63. See *supra* note 37.

64. Victoria Pope, *A New Face of the Old Russia*, U.S. NEWS & WORLD REPORT, Dec. 27, 1993, at 32-34. Zhiranovsky, the leader of the Liberal Democratic Party, received a surprisingly large percentage of the vote in the recent Russian elections. *Id.* See generally Vladimir Matlin, *Falcons and Ducklings in Russia*, WASH. TIMES, Feb. 2, 1994, at A19.

Throughout Europe, especially in Germany, France, Sweden and Great Britain, leaders are worried over the rise of right-wing anti-foreigner sentiment sparked by increased immigration. John Darnton, *Western Europe is Ending its Welcome to Immigrants*, N.Y. TIMES, Aug. 10, 1993, at A1. Due to increasing nativist pressures, these countries have been changing their immigration policies to retard the influx of immigrants who are either seeking a better economic opportunity or political asylum. Wilbur G. Landrey, *Don't Shut Out Immigrants; Make Their Life at Home Bearable*, ST. PETERSBURG TIMES, May 28, 1993, at 2A.

65. See KARST, *supra* note 41, at 90-91. Making scapegoats of one race or group is a common occurrence. *Id.* It often leads to violence, such as the murder in Detroit of Vincent Chin, who mistaken as Japanese, was killed by angry United States citizens afraid of losing auto industry jobs to Japan. *Id.* Equally disturbing is the escalation of violence toward Hispanics at the border between the U.S. and Mexico. See generally Michael J. Nunez, *Violence at Our Border: Rights and Status of Immigrant Victims of Hate Crimes Along the Border Between the United States and Mexico*, 43 HASTINGS L. J. 1573 (1992) (commenting on the increasing violence toward Hispanics at the United States-Mexican border).

66. See generally KARST, *supra* note 41 (explaining the causal connection between

toward the cries against the illegal alien,<sup>67</sup> and a failed memory toward the history of immigration to the United States.<sup>68</sup>

## B. A Brief History of Immigration

Give us your tired . . .<sup>69</sup>

I hear you knocking, but you can't come in<sup>70</sup>

### 1. The Sovereign Right to Control the Border

The right to control borders is a basic right of every sovereign nation.<sup>71</sup> Accordingly, unapproved entry into the United States is prohibited by law.<sup>72</sup> The Attorney General has the power to restrict immigration,<sup>73</sup> and any person illegally in the country can be deported.<sup>74</sup> Deportation is a civil penalty, not a criminal action,<sup>75</sup> and is subject to limited judicial review.<sup>76</sup> In general, due process and the increase of individual rights have not effected immigration law, as they have the main body of United States law.<sup>77</sup>

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race and the sense of belonging, to social unrest).

67. *Id.*

68. See *supra* note 3 and accompanying text. See generally HULL, *supra* note 5, ch. 1 (providing an overview of immigration policies in the United States).

69. Written by Emma Lazarus, these words are engraved on the Statue of Liberty. See *supra* note 1.

70. FATS DOMINO, *I Hear You Knocking*, on THE BEST OF FATS DOMINO (United Artists Records 1973).

71. Schuck, *supra* note 9, at 6.

It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.

*Id.* (quoting *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892)).

72. 8 U.S.C. § 1325 (1976).

73. 8 U.S.C. § 1255a (1993).

74. 8 U.S.C. §§ 1251 & 1252 (1976). Congress has the power to deport anyone it considers to be a harmful alien. *Bugajewitz v. Adams*, 228 U.S. 585, 591-92 (1913).

75. *Id.*; see also *United States v. Ward*, 448 U.S. 242, 248-49 (1980) (stating that a penalty is criminal only when dictated criminal by Congress); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (stating that, as determined by Congress, deportation is not a criminal penalty).

76. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101-02 n.21 (1976); see also *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) (denying entry into the U.S. by communist with visa).

77. Schuck, *supra* note 9, at 1.

## 2. The United States Border Policy: An Open and Shut Case

In the past, the United States has had one of the most open border policies of any nation.<sup>78</sup> In early United States history, immigrants were needed to populate the land and work in the factories.<sup>79</sup> The nation prided itself on its openness as well as the autonomous nature of immigrants and their ability to take their position in a productive society.<sup>80</sup> America was a safe haven beckoning the downtrodden, the unhappy, and those simply seeking an opportunity to tame the "new" continent.<sup>81</sup>

However, while the United States has laid claim to an open arms policy, certain individuals have systematically been denied access to the "golden door" of the American Dream.<sup>82</sup> From the very beginning of the American nation, residents have been suspicious of those who are different.<sup>83</sup> Fueled by this fear of the foreigner, many nativist bills have been introduced into Congress through the years.<sup>84</sup> Some of these bills, which fortunately did not succeed in becoming law, include deportation of those failing to learn English within a certain time period, abolishment of foreign language press, and even mass internment.<sup>85</sup>

The fear of foreigners intensified noticeably as the nationalities of

78. See *supra* notes 4 & 5 and accompanying text.

79. Schuck, *supra* note 9, at 2.

80. *Id.*

81. *Id.* See generally ALEINIKOFF & MARTIN, *supra* note 4, at 40-41 (indicating that the continent was not new to thousands of Native Americans).

82. See Schuck, *supra* note 9, at 13. Immigration policy has excluded "undesirables," such as prostitutes, Asians, and illiterates, as well as persons from areas where the imposed quotas were already filled. *Id.* See generally UNITED STATES COMM'N ON CIVIL RIGHTS, *supra* note 1. For another view of the relationship between the legal aspects of immigration and how the practical application of the laws are carried out, see Joseph Minsky, *Introductory Overview of Immigration Law and Practice*, C394 ALI-ABA 1 (1989).

83. Benjamin Franklin cautioned that allowing the Germans to settle in Pennsylvania was dangerous because:

[t]hose who came hither are generally the most stupid of their own nation, and as ignorance is often attended with great credulity, when knavery would mislead it, and with suspicion and when honesty would set it right; and, few of the English understand the German language, and so cannot address them either from the press or pulpit, it is almost impossible to remove any prejudices they may entertain . . . . Not being used to liberty, they know not how to make a modest use of it.

JOYCE VIALET, A BRIEF HISTORY OF U.S. IMMIGRATION POLICY 6 (1980).

84. KARST, *supra* note 41, at 85.

85. *Id.*

immigrants shifted from Northern and Western Europeans to Eastern Europeans and Asians and from the prevalent Protestant English immigrant to Irish Catholics, Germans, Poles, and Russians.<sup>86</sup> In *Chae Chan Ping v. United States*<sup>87</sup> (the Chinese Exclusion Case) the Supreme Court held that the Chinese could be excluded as a race.<sup>88</sup> Regrettably, race-driven exclusionist fever persisted, resulting in the passage of laws such as the prohibition of Japanese immigration,<sup>89</sup> the creation of immigration quotas clearly favoring Northern and Western Europeans,<sup>90</sup> and the cruel exclusion of approximately 20,000 children desperately fleeing persecution and death at the hands of the Nazis.<sup>91</sup> All of this legislation was in obvious contradiction to George Washington's belief that the United States should always be "an asylum to the needy and oppressed of the earth."<sup>92</sup>

The rights of immigrants in the United States have been periodically expanded.<sup>93</sup> Three years before the disgrace of the *Chinese Exclusion*

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86. ALEINIKOFF & MARTIN, *supra* note 4, at 40-60. The very first Select Committee of the House of Representatives to study immigration warned:

[T]he number of emigrants from foreign countries into the United States is increasing with such rapidity as to jeopardize the peace and tranquility of our citizens . . . . Many of them are . . . *paupers, vagrants, and malefactors* . . . sent hither at the expense of their foreign governments, to relieve them from the burden of their maintenance.

*Id.* at 44.

87. 130 U.S. 581 (1889). The Chinese had been welcomed between 1860 and 1880 for cheap labor to build the trans-continental railroad. ALEINIKOFF & MARTIN, *supra* note 4, at 46. When the railroad was completed, fears of a continued invasion of non-assimilating Chinese created a climate for the racist Chinese Exclusionary Law of 1882. *Id.* The Chinese were accused of being criminals even though there was no statistical evidence in support of the allegations. *Id.*

88. 130 U.S. at 606, 610-11.

89. The National Origins Act of 1924 tried to keep the ethnic and racial balance of the United States at a standstill. One of the provisions was to completely exclude anyone of Japanese origin. ALEINIKOFF & MARTIN, *supra* note 4, at 52.

90. *Id.* at 52-53. One of the recurring fear-driven patterns of nativists has been to accuse a particular group of immigrants of being criminals. *See supra* note 87. In 1876, an article in *Scribner's Magazine* stated that women should not leave their little girls with a Chinaman because the Chinese were untrustworthy. ALEINIKOFF & MARTIN, *supra* note 4, at 46. At the turn of the century, the police commissioner of New York wrote, in the *North American Review*, that exotic races were responsible for 85% of the city's crime and that half of the perpetrators were Jews. *Id.* Also, in *Colliers*, Italians were called the "most vicious and dangerous" of criminals. *Id.* at 47.

91. *Id.* at 54. These German children were excluded simply because their large number exceeded that permitted under immigration quotas.

92. *Id.* at 53.

93. ALEINIKOFF & MARTIN, *supra* note 4, at ch. 1; *see also* NATHAN GLAZER, *CLAMOR AT THE GATES*, 1-13 (1985).

Case in 1889,<sup>94</sup> the Supreme Court held that it was unlawful to discriminate against Chinese laundries.<sup>95</sup> In the 1896 case of *Wong Wing v. United States*, another case affecting the rights of immigrants, the Supreme Court held that the government could not force a deportee to engage in hard labor prior to deportation.<sup>96</sup> Further expanding the rights of immigrants, the courts have fairly uniformly declared that illegal immigrants are guaranteed due process once they are inside the United States.<sup>97</sup> The Court has also held that a state cannot idly discriminate against a specific group, including illegal aliens, unless the state can prove that it has some significant state interest.<sup>98</sup>

In a shift away from this expansionist trend, several states and the federal government have restricted the rights of illegal aliens.<sup>99</sup> For ex-

94. 130 U.S. 581 (1889).

95. *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

96. 163 U.S. 228, 238 (1896).

97. See *Kwong Hai Chew v. Colding*, 344 U.S. 590, 599 (1953); *Yung Yang Sun v. McGrath*, 339 U.S. 33, 49-50 (1950); *Yamataya v. Fisher*, 189 U.S. 86, 89 (1903). Even if a person has illegally entered the country, they are afforded the Fifth and Fourteenth Amendment rights to life, liberty, and property, of which they cannot be deprived without due process. *Mathews v. Diaz*, 426 U.S. 67 (1976). It should, however, be noted that if an undocumented person is caught at the border while trying to enter, there is no requirement for guaranteed due process or for review of the Attorney General's actions. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (stating that an alien's involuntary presence within the United States does not constitute a substantial connection to justify granting due process rights); see also *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543-44 (1950).

Many illegal aliens find it highly unwise and impractical to step forward to exercise their constitutional rights because they may still face deportation. See generally Harvard Law Review Association, *Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286 (1983) (detailing the rights granted to aliens in the United States).

98. In general, the courts have used the intermediate scrutiny test in instances where states have discriminated against a group based on sex or illegitimacy. See *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 & n.9 (1982); *Craig v. Boren*, 429 U.S. 190, 197 (1976). The Court expanded this level of scrutiny to illegal aliens in *Plyler v. Doe*, after Texas attempted to withhold educational funds from illegal alien children. 457 U.S. 202, 223-24 (1982). See also *Graham v. Richardson*, 403 U.S. 365 (1971) (holding that denying welfare benefits to resident aliens violated the Equal Protection Clause).

Recently, a bill popularly called the Frank Amendment bars discrimination in the work place based on national origin or citizenship status. Immigration and Nationality Act of 1986, Pub. L. No. 99-603, 100 Stat. 3374-76 (codified as amended at 8 U.S.C. § 1324b (1988)) (overturning *Espinoza v. Farah*, 414 U.S. 86 (1973)). The Frank Amendment established the Special Counsel for Immigration-Related Unfair Employment Practices division of the Justice Department. *Id.*

99. See, e.g., ALEINIKOFF & MARTIN, *supra* note 4, at 260-65.



ample, by federal mandate, states must currently implement methods of verifying citizenship for various federal programs including the lending of public assistance which can be denied to non-citizens.<sup>100</sup> In 1986, Congress passed the Immigration Reform and Control Act, commonly called IRCA,<sup>101</sup> which was specifically designed to stop the flow of illegal immigrants into the United States.<sup>102</sup>

Policy toward Mexican immigration is as inconsistent as general United States immigration policies.<sup>103</sup> When extra manpower was needed for special wartime or agricultural needs, the United States government introduced policies that encouraged Mexicans to cross the border to work in American factories and fields.<sup>104</sup> The Bracero program, which began in World War II and operated in some fashion until 1964, also actively supported the arrival of Mexican workers.<sup>105</sup>

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100. See generally Bill Piatt, *Born As Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35 (1988). While the non-citizen child is not eligible for public assistance, a citizen offspring of illegal alien parents is entitled to assistance regardless of its parents' citizenship status. *Id. Compare* *Mow Sun Wong v. Campbell*, 626 F.2d 739 (9th Cir. 1980) (stating that denial of a federal civil service position based on non-citizen status does not violate the Constitution) with *Mathews v. Diaz*, 426 U.S. 67 (1976) (upholding a federal provision that denied Medicare benefits to an illegal alien).

101. Immigration Reform and Control Act, Pub. L. 99-603, 100 Stat. 3359 (1986). In spite of this far reaching reform act, thousands of illegal aliens, mostly from Mexico, still stream across the border each day. ALEINIKOFF & MARTIN, *supra* note 4, at 296. See generally Gerald P. Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615 (1981) (explaining U.S. immigration policy and suggesting changes, some of which were later incorporated into IRCA).

102. In trying to curb illegal immigration into the United States, IRCA focuses on several fronts. ALEINIKOFF & MARTIN, *supra* note 4, at 281-84. IRCA imposed tough sanctions on employers who hired undocumented workers, granted amnesty to certain illegal aliens who had resided uninterrupted in the United States for at least five years, and increased the patrolling and enforcement of the U.S. border with Mexico. *Id.* According to the House report regarding IRCA, "While there is no doubt that many who enter illegally . . . seek a better life . . . immigration must proceed in a legal, orderly, and regulated fashion." H.R. Rep. No. 682(I), 99th Cong., 2d Sess. 46 (1986).

103. ALEINIKOFF & MARTIN, *supra* note 4, at 253-58; see also HULL, *supra* note 5, at 79-85.

104. See generally Congressional Research Service, *Illegal Aliens: Analysis and Background*, House Committee on the Judiciary, 95th Cong., 1st Sess. (1977).

105. ALEINIKOFF & MARTIN, *supra* note 4, at 254-56. During the 22 year period that the Bracero program, (Public Law 78) was in operation, more than 4.8 million workers were hired. *Id.* During the same period, more than 5 million undocumented and non-contracted Mexicans, sometimes derogatorily called "wetbacks," were apprehended in campaigns such as Operation Wetback in 1954-55. *Id.*

Some contend that the Bracero program was the real beginning of the illegal immigration problem today because more Mexicans wanted to work in the U.S. than

Both the workers who were contracted in the legally sanctioned Bracero program and those who continue to illegally migrate today have created benefits for both countries.<sup>106</sup> For example, Mexican immigrants have been a source of cheap labor in manufacturing and agriculture.<sup>107</sup> In addition, once in the United States, the illegal alien quickly forms friendships, joins family and friends already living in the United States, and after finding employment, pays taxes and becomes a part of American society.<sup>108</sup> Mexico's economy likewise benefits as those who enter the United States for employment generally send money home to their families in Mexico creating what has become a way of life virtually impossible to change.<sup>109</sup>

While the immigration policy of the United States has been a generous one when compared to other nation's policies,<sup>110</sup> it has been inconsistent and at its worst, embarrassingly racist.<sup>111</sup> The current furor against immigration, legal and illegal, is a by-product and continuation of America's contradictory border policy.<sup>112</sup> The major influx of newcomers entering the United States representing strange cultures and speaking

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were permitted by the program. *Id.* In addition, from 1952 to the IRCA reforms of 1986, the Immigration and Nationality Act of 1952 immunized employers of illegal aliens from prosecution by not categorizing such employment as "unlawful harboring." IMMIGRATION AND NATIONALITY ACT OF 1952, § 274, Pub. L. No. 82-414, 66 Stat. 163. See generally JULIAN SAMORA, *LOS MOJADOS, THE WETBACK STORY* (1971).

106. According to Professor Niles Hansen:

The United States gains relatively cheap labor willing to perform tasks that citizen workers are reluctant to undertake. [I]n the near future fewer Americans will be available to take low-wage, entry-level jobs, so the issue of the displacement of American workers by undocumented Mexicans is likely to decline in importance. Mexico exports some of its unemployment and gains foreign exchange that workers send or bring home as well as some technical skill when workers return home. The migrants gain higher incomes and, frequently, better working conditions than in Mexico.

NILES HANSEN, *THE BORDER ECONOMY: REGIONAL DEVELOPMENT IN THE SOUTHWEST*, 158-59 (1981). While the number of illegal Mexican immigrants may have increased since Professor Hanson made his observations, the basic benefits to the border economy have remained the same.

107. See *id.*

108. Schuck, *supra* note 9, at 43.

109. See generally WAYNE A. CORNELIUS, *MEXICAN MIGRATION TO THE UNITED STATES: THE LIMITS OF GOVERNMENTAL INTERVENTION*, Working Papers in U.S.-Mexican Studies (1981); see also ALENIKOFF & MARTIN, *supra* note 4, at 265-67.

110. See *supra* notes 4-5 and accompanying text.

111. See *supra* notes 41-45 and accompanying text.

112. See *supra* notes 41-45 and accompanying text.

unfamiliar languages has many residents questioning what defines America and who really is and isn't an American.<sup>113</sup>

However, viewed from another perspective, changes in the composition of the United States have been a consistent feature of America. Since its inception, America has been redefining itself daily. The first change occurred when those who are now known as Native-Americans arrived on the continent some time after the last Ice Age.<sup>114</sup> Many centuries later, a new wave of immigration began when the Europeans arrived.<sup>115</sup> That led to the formation of the original colonies populated primarily by white Protestants with English ancestry.<sup>116</sup>

Sometime later, the face of the nation changed again with immigration by the Irish, Germans, and Eastern Europeans.<sup>117</sup> In addition, Africans had begun to arrive unwillingly as slaves, while Chinese and other Asians had begun to arrive in the west.<sup>118</sup> Hispanics, who already populated parts of the southwest, also increased in numbers.<sup>119</sup>

In addition to continuously redefining itself through immigration, America also redefined itself via the changing roles and the acceptance and incorporation of groups already living within its borders.<sup>120</sup> These groups have included Native-Americans, African-Americans, and women.<sup>121</sup> While assimilation to some is defined as Americanizing of different cultures,<sup>122</sup> the contributions of foreign newcomers, especially in art,

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113. See generally Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Culture Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863 (1993).

114. ALEINIKOFF & MARTIN, *supra* note 4, at 40 (quoting SELECT COMM'N ON IMMIGRATION AND REFORM POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST STAFF REPORT 92, 93, 161-216 (1981)). The original settlers of the continent did not call themselves "Native Americans." *Id.* Scientists believe they migrated from the Asian continent and are the ancestors of the present day Native Americans. *Id.*

115. *Id.* While the Europeans were welcomed by some tribes and were resisted by others, the new immigrants continued to arrive until they outnumbered the natives. *Id.*

116. *Id.* Not all of the first settlers were English. The Dutch arrived in New Amsterdam, later renamed New York. ALEINIKOFF & MARTIN, *supra* note 4, at 41. The Swedes began relocating in Delaware, New Jersey and Pennsylvania. *Id.* The French began settling in Canada and the Louisiana Territory. *Id.* In addition, people of Spanish descent settled in the Southwest, which was once part of Spain and later Mexico. *Id.* At the time of the founding of the nation, English had clearly established itself as the new nation's language and dominant culture. *Id.*

117. HULL, *supra* note 5, at 13. New arrivals from Poland, Greece, and Italy began to outnumber immigrants from France and England by the turn of the century. *Id.*

118. See generally HULL, *supra* note 5.

119. See *supra* notes 101-06 and accompanying text.

120. See generally KARST, *supra* note 41.

121. See generally *id.*

122. *Id.* at 29. Assimilation happens gradually as the newcomers accept the lan-

music, language, and literature, in actuality, widen and expand national culture.<sup>123</sup> Defining what is American is perhaps as difficult as trying to define the precise shape of the ocean's shoreline. President Wilson once said to a group of newly naturalized citizens, "You have just taken an oath of allegiance to the United States. Of allegiance to whom? Of allegiance to no one unless it be to God . . . You have taken an oath of allegiance to a great ideal, to a great body of principles, to a great hope of the human race."<sup>124</sup>

### III. AUTOMATIC BIRTHRIGHT OF CITIZENSHIP AND THE FOURTEENTH AMENDMENT

I was born in the USA.<sup>125</sup>

I was born in East LA.<sup>126</sup>

#### A. *Citizenship: Is it Worth Anything?*

##### 1. The Importance of United States Citizenship

The first citizenship act was passed in 1790, long before any laws governing immigration existed.<sup>127</sup> Since that time, the importance of United

guage, dress, and cultural standards of the dominant American culture. *Id.* at 95-96. The big change usually comes from the offspring of the first group of immigrants. *Id.* at 95. Eventually, after several generations, many of the old values and much of the culture fades into the past. *Id.* at 96. However, assimilation cannot occur unless the dominant culture is tolerant enough to accept the immigrant culture. *Id.* See generally Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303 (1986).

123. KARST, *supra* note 41, at 29. Gradual assimilation of the immigrant has generally been the natural order of the American culture. However, for certain groups the assimilation has been slower. For Hispanics, the large population of Spanish speaking areas, the proliferation of Spanish media, and frequent travel between the United States and Mexico, Puerto Rico, and Central America, have slowed the language assimilation process. *Id.* at 98-99. However, knowing the main language of the country is still the key to the greatest opportunities, and the benefits of learning English will probably encourage the assimilation process. *Id.* at 98.

124. *Id.* at 30.

125. BRUCE SPRINGSTEEN, *Born in the USA*, on BORN IN THE USA (Columbia Records 1983).

126. CHEECH MARIN, *Born in East L.A.* (Warner Bros. Records 1984) (parody of the Bruce Springsteen song).

127. ALEINIKOFF & MARTIN, *supra* note 4, at 956.

States Citizenship has been a topic of debate, with some scholars suggesting that the concept of citizenship was not foremost on the minds of the founding fathers.<sup>128</sup> However, there are also those who believe citizenship is a basic human right<sup>129</sup> or a necessary provision of fundamental membership in some community, the loss of which leaves a person without basic rights and protection.<sup>130</sup> It is important to consider that such a severance results in the loss of not only one's home, but also of one's entire societal connection.<sup>131</sup> Furthermore, loss of citizenship can be the first step in depriving citizens of other rights.<sup>132</sup>

However, citizenship alone was not enough to protect Japanese-American citizens in World War II from losing their rights and their homes as they were banished to interment camps.<sup>133</sup> Nor did citizenship in itself

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128. ALEXANDER BIKEL, *THE MORALITY OF CONSENT* 53-54 (1975). The original Constitution rarely used the term 'citizen'. *Id.* at 35-36. However, Justice Rehnquist contends that citizenship was important to the framers of the Constitution because citizenship was mentioned "in no less than 11 instances in a political document noted for its brevity." *Sugarman v. Dougall*, 413 U.S. 634, 651-52 (1973) (Rehnquist, J., dissenting). See generally JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608 TO 1870* (1978) (reasoning that the founding fathers were very concerned with citizenship when they fought the Loyalists).

Daniel Webster said, "every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society." KARST, *supra* note 41, at 34-35. One Congressional report touted the importance of United States Citizenship by underscoring its "dignity and [its] priceless value." H.R. Rep. No. 1086, 87th Cong., 1st Sess. 41 (1961), reprinted in 1961 U.S.C.C.A.N. 2950, 2985. See also REPORT OF THE PRESIDENT'S COMM'N ON IMMIGRATION AND NATURALIZATION 235 (1953).

129. Emphasizing the importance of citizenship, Chief Justice Earl Warren stated in his dissent in *Perez v. Brownell*, that "[c]itizenship is man's basic right . . . to have rights." *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting), overruled by *Afrayim v. Rusk*, 387 U.S. 253, 268 (1967) (adapting the holding urged by Chief Justice Warren's dissent in *Perez*, 356 U.S. at 62); In *Ng Fung Ho v. White*, Justice Brandeis stated that the loss of citizenship by deportation could result in a loss of "all that makes life worth living." 259 U.S. 276, 284 (1922).

The courts have held that citizenship is a precious right that cannot be involuntarily removed, even for voting in a foreign election, desertion from the military in times of war, or taking up permanent residence in the country from which the naturalized citizen immigrated. *Afrayim v. Rusk*, 387 U.S. 253, 256-58 (1967); see *Trop v. Dulles*, 356 U.S. 86, 99-101 (1958) (Warren, C.J., plurality opinion) (stating that denaturalization as a punishment is barred by the Eighth Amendment's prohibition of cruel and unusual punishment).

130. See generally HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1951).

131. *Id.*

132. *Id.* at 293. For example, Nazi Germany deprived the Jews of citizenship before sending them to concentration camps. *Id.*

133. *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944). The Court upheld the conviction of a Japanese-American citizen who remained near a designated military area during World War II. *Id.* The citizen was convicted of disobeying a commanding general's order that no one of Japanese descent could be in the vicinity of any such

grant women<sup>134</sup> and, as a practical matter, African-Americans, the right to vote.<sup>135</sup> These groups needed Constitutional Amendments and various legislation<sup>136</sup> to gain the voting rights supposedly granted by citizenship.<sup>137</sup>

## 2. The Rights of United States Citizenship

While most rights and privileges are enjoyed by both citizens and non-citizens within the boundaries of the United States,<sup>138</sup> certain privileges are available only to citizens.<sup>139</sup> Perhaps the paramount citizenship right is the right to vote.<sup>140</sup> Citizenship is also a prerequisite for jurisdictional access and protection of the federal courts in certain situations.<sup>141</sup> Additionally, the office of President of the United States is available only to a

area. *Id.* at 218, 224. *See also* JOHN TATEISHI, *AND JUSTICE FOR ALL: AN ORAL HISTORY OF THE JAPANESE-AMERICAN DETENTION CAMPS* (1984).

134. Although women were already considered citizens of the United States, it required the Nineteenth Amendment to the Constitution, in 1920, to guarantee women the right to vote. U.S. CONST. amend. XIX. *See* *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1895) (holding that while women are citizens, that status does not necessarily carry with it the right to vote).

135. Even with the citizenship granted by the Fourteenth Amendment, a series of laws and practices still denied African-Americans the ability to vote in many areas of the nation. *See* U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States . . . are citizens of the United States."); *see also infra* note 155.

136. *See* U.S. CONST. amend. XIX (granting women the right to vote); U.S. CONST. amend. XV (granting African-Americans the right to vote). While the Fifteenth Amendment granted African-Americans the right to vote, the practical right to cast a ballot remained unavailable to many African-Americans until enforcement of the Voting Rights Act of 1965. Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 197366-1 (1988)). *See* Evelyn Elayne Shockley, Note, *Voting Rights Act Section 2: Racially Polarized Voting and the Minority Community's Representative of Choice*, 89 MICH. L. REV. 1038 (1991).

137. U.S. CONST. amends. XIV & XV.

138. *See* *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (stating that even aliens in the United States illegally are entitled to Fifth and Fourteenth Amendment protection). The actual wording of the Fourteenth Amendment guarantees due process and equal protection to "any person" and not just citizens. U.S. CONST. amend. XIV, § 1. As long as the situation is not immigration related, an illegal alien is also protected by the Bill of Rights. *Choudry v. Jenkins*, 559 F.2d 1085, 1087 n.1 (7th Cir.) *cert. denied*, 434 U.S. 997 (1977).

139. *See generally* ALEINIKOFF & MARTIN, *supra* note 4, at 956-73. (explaining the importance of U.S. citizenship).

140. *See* U.S. CONST. amend. XIV, § 2.

141. U.S. CONST. art. III, § 2, cl. 1.

"natural born Citizen."<sup>142</sup> Further, citizenship protects against unwarranted deportation and theoretically provides protection by the United States government when traveling abroad.<sup>143</sup>

Citizenship can also be a requirement for certain employment.<sup>144</sup> In *Foley v. Connelie*,<sup>145</sup> the Supreme Court upheld a New York statute requiring United States citizenship for the occupation of police officer.<sup>146</sup> The Court reasoned that a policeman must use authority to carry out broad public policy and that an officer of the law who is a citizen can best understand American traditions and values.<sup>147</sup> In *Sugarman v. Dougall*,<sup>148</sup> the Supreme Court concluded that citizenship may be a relevant qualification for filling those "important nonelective executive, legislation and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy [and] perform functions that go to the heart of representative government . . . 'where citizenship bears some rational relationship to the special demands of the particular position.'"<sup>149</sup> It is also significant to note that IRCA now provides stringent penalties for employers who hire illegal aliens.<sup>150</sup>

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142. U.S. CONST. art. II, § 1, cl. 4.

143. In analyzing the dramatic effect of the loss of citizenship, Hannah Arendt wrote:

The . . . loss which the rightless suffered was the loss of government protection, and this did not imply just the loss of legal status in their own, but in all countries. Treaties of reciprocity and international agreements have woven a web around the earth that makes it possible for the citizen of every country to take his legal status with him . . . thus during the last war stateless people were invariably in a worse position than enemy aliens who were still indirectly protected by their governments through international agreements."

ARENDETT, *supra* note 130, at 294.

144. Permanent resident aliens can be barred from certain public positions. Exec. Order No. 11, 935, 5 C.F.R. 13 (1983) *reprinted in* 5 U.S.C. §§ 3301, 3302 (1988)); *see* *Mow Sun Wong v. Campbell*, 626 F.2d 739, 743 (9th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); *see also* *De Canas v. Bica*, 424 U.S. 351, 365 (1976) (holding that the INA does not preclude states from regulating "the employment of illegal aliens").

145. 435 U.S. 291 (1978).

146. *Id.* at 300.

147. *Id.* at 298-300.

148. 413 U.S. 634 (1973).

149. *Id.* at 647 (quoting Judge Lumbard's concurring opinion in the lower court decision *Dougall V. Sugarman*, 339 F. Supp. 906, 911 (S.D.N.Y. 1971)).

150. Section 274 of the INA provides a prohibition against the hiring of unauthorized aliens and a condition that all employers authenticate the citizenship or legal status of all new employees. Immigration and Nationality Act, Publ. L. No. 99-603, § 101, §§ 274A(a)(1)(A), (b), (e)(4), (e)(7)-(8), 100 Stat. 3359, 3360-67 (1986) (codified as amended by 8 U.S.C. § 1324(a) (Supp. 1993)). Civil fines may be levied against employers who hire illegal aliens. *Id.* First time offenders can be fined between \$250 and \$2000 per illegal alien. *Id.* The fine increases from \$2000 to \$5000 for second offenses, and to \$3000 to \$10,000 for subsequent offenses. *Id.* Furthermore, the gov-

### 3. Methods of Obtaining United States Citizenship

Citizenship can be obtained either by being born within the United States (*jus soli*),<sup>151</sup> being born the child of United States citizens (*jus sanguinis*),<sup>152</sup> or proceeding through the process that awards citizenship (naturalization).<sup>153</sup> *Jus soli*, the citizenship birthright, has been part of the American culture since colonial times.<sup>154</sup> Throughout history, however, there have been exceptions to this birthright, most notably for non-whites before the enactment of the Civil Rights Act of 1866.<sup>155</sup> Also excluded from the citizenship birthright are children whose parents are not "subject to the jurisdiction"<sup>156</sup> of the United States. These include children domestically born of foreign diplomats, children born of alien enemies in hostile occupation, children born on foreign ships in United States waters, and for a limited time, certain Native Americans who pledged their allegiance to their tribes.<sup>157</sup>

Most countries, by contrast, do not grant automatic citizenship at birth.<sup>158</sup> However, certain international treaties do favor giving children

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ernment has the authority to issue cease and desist orders. *Id.* Offenders can appeal the fines by petitioning for review with the court within 45 days after the order against them becomes final. *Id.*

151. Schuck, *supra* note 9, at 9.

152. *See* 8 U.S.C. § 1401(c) (1994).

153. Schuck, *supra* note 9, at 9. Naturalization has been part of the American legal process since colonial times. *Id.* The process and requirements, however, have changed over the years. *Id.* Nationalization can no longer be based on sex or race. *See* ALENIKOFF & MARTIN, *supra* note 4, at 978-81. Currently, the primary naturalization laws can be found in the Nationality Act of 1952. *Id.*

154. Schuck, *supra* note 9, at 8.

155. The Civil Rights Act of 1866 was passed by Congress to rectify racial injustices that persisted after the Civil War and the abolition of slavery. KARST, *supra* note 41, at 49-51. Many laws were enacted, mostly in Southern states, to perpetuate the status quo. *Id.* at 50. These laws, aimed at the former slaves, denied them the right to own property, to participate in inheritance schemes, and to obtain legal remedies. *Id.* In addition to curing these inequities, the 1866 Act stipulated that all persons of all races, including those of African descent, were citizens of the United States. *Id.*

156. U.S. CONST. amend. XIV, § 1.

157. Schuck, *supra* note 9, at 9 n.28. In *Elk v. Wilkins*, 112 U.S. 94 (1884), the Court proclaimed that a Native American who was a citizen of a tribe was "not subject to the jurisdiction thereof." *Id.* at 109 (quoting *United States v. Osborne*, 6 Sawyer 406, 409). The Court reasoned that any children born to these non-jurisdiction Native Americans were, therefore, not granted citizenship at birth. *Id.* at 109. However, this decision has been legislatively overruled and all Native-American children are automatically citizens. ALENIKOFF & MARTIN, *supra* note 4, at 974.

158. In England, a newborn is granted citizenship at birth only if at least one par-



automatic citizenship birth rights.<sup>160</sup> Not only has automatic citizenship at birth been an important part of tradition and culture of the United States,<sup>160</sup> but in reality, it has become a property right held by the newborn against the federal government.<sup>161</sup>

Although non-citizens enjoy many rights granted to citizens, the importance of United States citizenship should not be regarded lightly. Having the citizenship right not only permits full participation in the democracy and provides the protection of the government, but it also guarantees the basic right to earn a living.<sup>162</sup> Furthermore, citizenship lends a sense of belonging, identity, and home.<sup>163</sup>

### B. *The Fourteenth Amendment and Citizenship*

The Fourteenth Amendment, ratified in 1868, provides that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State in which they reside.”<sup>164</sup> The main purpose for enacting the Fourteenth Amendment was to overrule one of the greatest inequities of American justice, the *Dred Scott* case.<sup>165</sup> In his infamous majority opinion, Chief Justice

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ent is a citizen or permanently settled in Britain, but can acquire citizenship if one of his parents acquires citizenship while he is still a minor. British Nationality Act, 1981, ch. 61 §§ 1 & 3 (Eng.).

In France, a new law will take effect that will deny citizenship to children of foreigners born on French soil. Andrew Gumbel, *French Rights Group Angry at Leaked Immigration Document*, REUTER LIBRARY REPORT, May 6, 1993. Rather, they will be required to request such citizenship. *Id.* This new law has been attacked by Fode Sylla, president of SOS Racisme, a political lobby group. *Id.* Sylla maintains that losing the citizenship birth right is a serious erosion of French values of freedom and notes that the only other time birth rights were attacked was by the collaborationist Vichy regime in World War II. *Id.*

159. International Covenant on Civil and Political Rights, Dec. 19, 1966, 949 U.N.T.S. 171.

160. *See supra* note 154 and accompanying text.

161. *See Schwartz, supra* note 42, at 2151.

162. *See supra* notes 144-50 and accompanying text.

163. *See supra* notes 129-30 and accompanying text.

164. U.S. CONST. amend. XIV, § 1.

165. *Scott v. Sandford*, 60 U.S. 393 (1857). *Dred Scott* was a slave who lived in Missouri, a state that allowed slavery. *Id.* at 397. His master then took him to the Northwest Territory where slavery was outlawed. *Id.* When *Scott* returned to Missouri, he tried to establish his freedom in the courts by claiming that living in a free territory made him free in Missouri. *Id.* at 398. The case ultimately reached the Supreme Court, where Chief Justice Taney declared that all blacks, including *Scott*, were not considered people as defined in the Constitution. *Id.* at 407. Taney reasoned that, at the formation of the United States, various states had discriminatory laws categorizing blacks as an inferior race, and not part of the constituency. *Id.* He stated that blacks were, therefore, not entitled to any “rights which the white man was

Taney proclaimed that blacks were incapable of citizenship because they were a "subordinate and inferior class of beings," and were not members of "the people" as defined by the preamble of the Constitution.<sup>166</sup>

In addition to this principal purpose, the Fourteenth Amendment also secured the validity of the Civil Rights Act of 1866,<sup>167</sup> guaranteeing United States citizenship to members of all races,<sup>168</sup> and thus assuring that no state of citizenship limbo exists.<sup>169</sup> However, the Amendment's broad language did not enumerate the rights of the citizenship that it guaranteed.<sup>170</sup> Some observers believe this may have been done as a political concession, or perhaps to allow for courts in future generations to decide what those rights would include.<sup>171</sup>

Since the passage of the Fourteenth Amendment, courts have interpreted its meaning broadly, holding that all those born in the United States, other than children of diplomats or children of prisoners of war, are citizens.<sup>172</sup> These who are not considered citizens at birth are ex-

bound to respect." *Id.* Since Scott was not a citizen, he had no standing in the court and could not obtain his freedom. *Id.* at 454. See generally KARST, *supra* note 41 (explaining the significance of the *Dred Scott* case).

166. *Scott*, 60 U.S. at 404-05.

167. The first section of the 1866 Civil Rights Act stated:

[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color . . . shall have the same right, in every state and territory of the United States.

Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

168. KARST, *supra* note 41, at 52. Legislative history reflects Representative Bingham's contention that the protection of citizenship does not merely pertain to the newly freed slaves, but also includes "the alien and the stranger." CONG. GLOBE, 39th Cong., 1st Sess. 211 (1866).

169. ALEINIKOFF & MARTIN, *supra* note 4, at 962 (incorporating Alexander M. Bickel, *Citizen or Person?: What is Not Granted Cannot be Taken Away*, The Morality of Consent, ch. 2 (1975)).

170. U.S. CONST. amend XIV, § 1. The amendment states in pertinent part that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . ." *Id.* (emphasis added). However, nowhere in this amendment are any of these rights, privileges, or immunities explained or defined.

171. KARST, *supra* note 41, at 55-56.

172. See *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). Native-Americans born in the United States were first excluded and later included as citizens upon birth. See *Elk v. Wilkins*, 112 U.S. 94 (1884) (denying citizenship to Native-Americans); 8 U.S.C.A. § 1401(b) (1994) (stating "a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: Provided, [t]hat the granting

cepted from citizenship because their parents are not considered to be "within the jurisdiction" of the United States as specified by the Fourteenth Amendment.<sup>173</sup> Apart from these few exclusions, though, citizenship rights apply to every person of every race.<sup>174</sup>

Overall, the Fourteenth Amendment has solidified the ideals of the Constitution as well as those of the Declaration of Independence.<sup>175</sup> The Amendment continues to protect people of all races against unfortunate actions such as the one in 1857 that resulted in the highest court in the land declaring all members of a race non-citizens because they were less than human.<sup>176</sup>

#### IV. THE DECLARATION OF INDEPENDENCE AND THE CONCEPT OF EQUALITY AS IT APPLIES TO IMMIGRANTS

I have a dream . . .<sup>177</sup>

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of citizenship in this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property . . .").

There are those who believe that the term "within the jurisdiction" should be construed narrowly, thus allowing for a reading of the Fourteenth Amendment that excludes illegal aliens from the jurisdiction of the United States. See SCHUCK & SMITH, *supra* note 26. This theory is problematic for two reasons. First, it runs contrary to the continuing line of cases that rely on the broad interpretation of who is "within the jurisdiction." See *supra* notes 157 and 168. In addition, unlike diplomats who cannot be prosecuted because of immunity, illegal aliens are subject to arrest, conviction, and imprisonment. *Id.* Second, this theory is in opposition to the spirit of the Fourteenth Amendment which was implemented to erase a status discrepancy between persons. *Id.* A narrow reading would allow a return to the days of *Dred Scott*. *Id.*; see Schwartz, *supra* note 42, at 2169-70.

173. SCHUCK & SMITH, *supra* note 26, at 85.

174. See *Plyler v. Doe*, 457 U.S. 202 (1982); *Wong Wing v. United States*, 163 U.S. 228, 242-43 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

175. If all men are created equal, it should follow that they should share equal rights and protections.

176. *Scott v. Sandford*, 60 U.S. 393, 404-05 (1856). By pronouncing *Dred Scott* less than human, the Court justified its determination that Scott was a non-citizen. *Id.*; see also *supra* notes 163-64 and accompanying text. See generally KARST *supra* note 41, at 43-61.

177. "I have a dream" are the key words to one of the most memorable civil rights speeches ever made. Reverend Dr. Martin Luther King spoke these words:

I say to you today, my friends, so even though we face the difficulties of today and tomorrow, I still have a dream. It is a dream deeply rooted in the American meaning of its creed, "we hold these truths to be self evident, that all men are created equal." I have a dream that one day on the red hills of Georgia, sons of former slaves and the sons of former slave owners will be able to sit down together at the same table of brotherhood . . . I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin, but by the content of their

The concept of equality between all people is a basic premise of the United States.<sup>178</sup> The Declaration of Independence, the document dissolving ties with England and creating the United States Government, evidences this premise: "We hold these Truths to be self-evident, that all Men are created equal."<sup>179</sup>

However, there are several ways to view the meaning of the word "created" within the phrase "created equal." There is the theological meaning, a discussion of which is well beyond the scope of this comment. Focusing on practical implications, it takes little imagination to understand the relationship between creation and birth. Notwithstanding the powerful words in the Declaration of Independence, some of the darkest hours in the history of the United States have been spent in a struggle to reconcile the lofty words, "all Men are created equal"<sup>180</sup> with the actions of Americans who have unfairly judged, injured, and in some instances killed those whose only "mistake" was being created as part of a different race or religion.<sup>181</sup>

Without the protection of the Fourteenth Amendment, a native-born child of an unpopular nationality could be declared a non-citizen and deprived of her rights at the whim of a state government.<sup>182</sup> This would, in effect, sanction hatred and discrimination among citizens.<sup>183</sup> In addition, the end of the citizenship birthright would create a non-citizen class easily stigmatized, separated, and immediately disadvantaged.<sup>184</sup> Being part of such a class would be tantamount to being created "unequal" in the eyes of the law.<sup>185</sup> Such inequality fosters angst and separation that

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character . . . .

Martin Luther King, Jr., An address before 250,000 during the March on Washington, August 28, 1963. The speech was carried live by the three major television networks and was viewed by millions. Henry Hampton et al., *Voices of Freedom: An Oral History of the Civil Rights Movement From the 1950s through the 1980s*, 167 (1990).

178. See *infra* notes 179-91 and accompanying text.

179. THE DECLARATION OF INDEPENDENCE, para. 1 (U.S. 1776).

180. Women have always had to struggle with achieving rights as the strict interpretation of the word "men" excludes them. See generally KARST, *supra* note 41; Margaret Y.K. Woo, *Biology and Equality: Challenge for Feminism in the Socialist and the Liberal State*, EMORY L. J. 143 (1993).

181. See generally KARST, *supra* note 41 (showing the relationship between equality and belonging to a community).

182. See *supra* notes 164-76 and accompanying text.

183. See *supra* notes 164-76 and accompanying text.

184. See *supra* notes 127-52 and accompanying text.

185. KARST, *supra* note 41, at 25-26. Although not all inequalities stigmatize, the essence of all stigmas lie in the fact that the individuals who are affected are not

attacks the very soul of a person and ultimately, of a nation.<sup>186</sup> African-American educator and sociologist W.E.B. DuBois poignantly wrote in 1940:

It is as though one, looking out from a dark cave . . . sees the world passing and speaks to it . . . and how their loosening from prison would be a matter not simply of courtesy, sympathy and they to them, but aid to all the world . . . . It gradually penetrates the minds of the prisoners that the people passing do not hear; that some thick sheet of invisible but horribly tangible plate glass is between them and the world . . . [T]he people within . . . may scream and hurl themselves against the barriers, hardly realizing in their bewilderment that they are screaming in a vacuum unheard and that their antic may actually seem funny to those outside looking in. They may even, here and there, break through in blood and disfigurement, and find themselves faced by a horrified, implacable, and quite overwhelming mob of people frightened for their own existence.<sup>187</sup>

The concept of equality has often been tested by the immigration process.<sup>188</sup> The “golden door” has sometimes opened easily to individuals who sought change and new opportunities.<sup>189</sup> However, for certain people of unfamiliar race, religion, or in some instances, merely from an unpopular region of the world, the American dream has been slammed shut by fear of the “other.”<sup>190</sup> Abraham Lincoln once expressed fear that if the nativists ever gained control of United States policy, they would rewrite the Declaration of Independence to read: “All men are created equal, except Negroes, and foreigners, and Catholics.”<sup>191</sup>

## V. A HISTORY OF CHILDREN’S RIGHTS AND THE CORRUPTION OF BLOOD

I ain’t the one, I ain’t the one, I ain’t no fortunate son<sup>192</sup>

### A. *America Treats its Young—The Rights of the Minor in the United States*

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treated as equals. *Id.* “Inequities that stigmatize belie the principle that people are of equal ultimate worth.” *Id.*

186. *Id.* at 215. The seeds of inequality are directly connected to self worth. *Id.* When you are automatically treated as “less than,” you naturally feel “less than.” *Id.* The social fabric of a nation can be upset when those who traditionally had less status reject the “norm” and strive to increase their self-esteem. *Id.* This can lead to turmoil and violence. *Id.* However, even if this intensity of emotion is not actually expressed, it is still present, much like a pile of dried twigs awaiting a match. *Id.*

187. KARST, *supra* note 41, at 26 (quoting W.E.B. DuBois).

188. See ALEINIKOFF & MARTIN, *supra* note 4, at 39-60.

189. See *supra* notes 4-5 and accompanying text.

190. See *supra* notes 6, 35-38 and accompanying text.

191. See ALEINIKOFF & MARTIN *supra* note 4, at 55.

192. JOHN FOGARTY/CREDESCENCE CLEARWATER REVIVAL, *Fortunate Son* (Fantasy Records 1970).

Children's rights have recently arrived at the forefront of American debate.<sup>193</sup> A wave of massive media attention surrounding cases involving children is largely responsible for this current reexamination of the rights and privileges of children.<sup>194</sup> High profile cases have included scenarios in which children have demanded the right to be divorced from their parents,<sup>195</sup> and others, in which children were the victim, being batted around in court between natural, adopted,<sup>196</sup> and surrogate parents.<sup>197</sup> One highly publicized case focused on the rights of children be-

193. Karen Fernau, *Kids Suing Parents Not New, Experts Say*, PHOENIX GAZETTE, Oct. 2, 1993, at A1 (explaining that children "divorcing" their parents has become a "media event"); Susan Hegger, *The Trials of Childhood: High Profile Test Cases Define Rights of Minors*, ST. LOUIS POST DISPATCH, Aug. 15, 1993, at 1B.

194. See Fernau, *supra* note 193, at A1; Hegger, *supra* note 193, at 1B.

195. One of the most famous cases is *Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993). Eleven year old Gregory Kingsley petitioned the court to be "divorced" from his biological mother due to her neglect and asked the court to allow his foster parents to legally adopt him. *Id.* The court granted the "divorce," but disallowed the adoption because the adoption petition was improperly filed before the parental rights were severed. *Id.* at 789-90.

196. *In re Baby Girl Clausen*, 502 N.W.2d 649 (Mich. 1993) (per curiam). In this case, called "the Baby Jessica case", a horrified nation watched the court return a two and an half year old girl to her natural mother, even though the little girl had spent her entire life with her adopted parents. *Id.* at 652, 658. Additionally, the natural mother had given the girl up for adoption, and had lied about the father on the birth certificate. *Id.* at 652.

197. *In re Baby M.*, 537 A.2d 1227 (N.J. 1988). In this case, which was highly covered by the media, William Stern and his wife, who was afraid to have her own baby, contracted with Mary Beth Whitehead, who agreed to act as the surrogate mother of the Sterns' child. *Id.* at 1235. After the child was born, Whitehead, who had become quite attached to the new baby, recanted on her contract with the Sterns and fled with the child. *Id.* at 1236-38. The Sterns sued for specific performance on the surrogacy contract. *Id.* at 1237. The court decided that surrogacy contracts are void as against public policy and in violation of state laws forbidding the sale of babies for adoption. *Id.* at 1240. However, the court looked to the best interest of the child and awarded custody to the natural father while allowing visitation rights to Whitehead. *Id.* at 1259, 1263.

In another surrogacy case, *Johnson v. Calvert*, 4 Cal. 4th 84 (1993), *cert. denied*, 114 S. Ct. 206 (1993), the Supreme Court of California confronted the issue of gestational surrogacy. *Id.* Gestational surrogacy is a process whereby an egg from the mother is placed in the uterus of the surrogate mother after it has been fertilized by the father. *Id.* at 87. In this case, there was also a contract for the surrogate mother to carry the baby for a fee. *Id.* The gestational mother then refused to give up the baby and sued to be declared the mother. *Id.* at 88. Since the Uniform Parentage Act classifies both the donor and the surrogate as the "mother," the court looked to the intent of the parties and found that the biological parents, not the surrogate mother, were the catalyst for the birth and should be awarded custody. *Id.* at 93-100. In a

ing left in the home without adult supervision.<sup>198</sup> All of these cases coupled with the rise of reported child abuse,<sup>199</sup> as well as proposals for minors to be tried as adults for felonies,<sup>200</sup> have contributed to this elevation of children's rights issues to national prominence.

In the United States, a child is a person and is accordingly granted constitutional rights.<sup>201</sup> However, children are not granted all the constitutional rights of adults.<sup>202</sup> This difference in status exists because public policy has influenced courts to find both that children lack the maturity required to make critical decisions, and that their vulnerability requires supervision.<sup>203</sup>

At common law, children were considered the property of their parents and also inseparable from them.<sup>204</sup> Recently, though, children have

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well-reasoned dissent, Justice Kennard found that without a guiding state statute, custody should be determined by the best interest of the child standard. *Id.* at 120 (Kennard, J., dissenting).

198. International attention was focused on David and Sharon Shoo, who took a vacation to Mexico, leaving their two daughters, age nine and four, home alone. Heather Tyrrell, *Plight of 'Home Alone' Children*, PRESS ASS'N NEWSFILE, Dec. 25, 1993. After criminal charges were brought in Illinois, the couple pleaded guilty and gave up custody of their children. *Id.* This case inspired passage of the "Home Alone" bill by the Illinois legislature which increased the punishment levied against parents who leave their children unattended. Lindsey Tanner, *A Year After Vacationing Couple Left Kids Alone, People Still Ask 'Why'?*, CHI. TRIB., Dec. 20, 1993, at 2.

199. In 1983 there were almost 1.5 million cases of child abuse reported in the United States. Laura Lane, Note, *The Effects of the Abolition of the Corroboration Requirement in Child Sexual Assault Cases*, 36 CATH. U. L. REV. 793, 793 (1987). One study indicated that the number of reported child abuse cases in 1986 topped the 1.6 million mark. Michael Jupp, *Rights of Children, the United Nations Convention on the Rights of the Child: An Opportunity for Advocates*, 34 HOW. L.J. 15, 18 (1991); see also CHARLES P. EWING, *WHEN CHILDREN KILL*, 130 (1990) (asserting that child abuse is reaching epic proportions).

200. Colorado has enacted tough laws to handle teenagers between fourteen and eighteen as adults if they commit serious "adult crimes." Roy Romer, *How Colorado Shot Down the NRA*, SAN DIEGO UNION TRIB., Oct. 22, 1993, at B7 (Romer was the Governor of Colorado at the time his article was published). Other states are following suit. See generally Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083 (1991).

201. *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (stating that "a child, merely on account of his minority, is not beyond the protection of the Constitution"), *reh'g denied*, 444 U.S. 887 (1979); see also *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) (stating that "[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights").

202. *Schall v. Martin*, 476 U.S. 253, 263 (1984) (stating that "the Constitution does not mandate the elimination of all differences in the treatment of juveniles"); *Bellotti*, 443 U.S. at 634 (stating that "the Constitutional rights of children cannot be equated with those of adults").

203. *Bellotti*, 433 U.S. at 634-35.

204. John Locke, in the Seventeenth Century, believed that since children do not

been afforded more rights.<sup>206</sup> Some of these rights, including the right to an abortion<sup>206</sup> and the right to "divorce parents," are limited in nature.<sup>207</sup> Additionally, courts have generally declined both to expand the right of a minor to get married without parental consent<sup>208</sup> and to ele-

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have the ability to understand the law, parents need to, "nourish and educate their children to help them maintain a mature and rational capacity, 'till . . . [their] understanding be fit to take the government of . . . [their] will . . . . And thus we see how natural freedom and subjection to parents may consist together and are both founded on the same principle." Sarah H. Clark, *Substantive Due Process in a State of Flux: Should Courts Develop New Fundamental Rights for Alien Children?*, 72 B.U. L. REV. 579, 585 n.44 (1992) (citing JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, in TWO TREATISES OF GOVERNMENT, §§ 59, 61, at 325-26 (2d ed. 1967)).

205. See generally Clark, *supra* note 204 (tracing the increasing legal rights of children).

206. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 52 (1976). In *Danforth*, the Court addressed the issue of a child's right to an abortion without first obtaining parental consent. *Id.* The court reasoned that the effects of giving birth to and raising an unwanted child outweighed the state's interest in preserving traditional family and parental authority. See also *Poe v. Gerstein*, 517 F.2d 787 (5th Cir. 1975) (stating that a minor has the fundamental right to an abortion), *aff'd*, 428 U.S. 901 (1976). See generally *infra* note 235.

In a recent decision, the Court allowed a minor's right to an abortion to be restricted by state statute. *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992). The Court upheld a Pennsylvania statute that required parental permission before a minor could get an abortion. *Id.* at 2832. This holding applies, however, only if there is a judicial bypass for the minor in the event that parental permission is too burdensome. *Id.*

207. Some states have enacted statutes that govern the issue of children "divorcing" parents. In Arizona, a child may sever parental ties with his natural parents if the parents abandoned or abused the child, became incapable of caring for the child due to mental disease or drug abuse, were proven unfit due to a conviction, relinquished the rights to the child through adoption, or if the child has been in a foster care home for more than a year and the natural parent shows no interest. See generally Fernau, *supra* note 193.

208. In *Moe v. Dinkins*, 533 F. Supp. 623 (S.D.N.Y. 1981) *cert. denied* 459 U.S. 827 (1982), the court upheld a New York statute that required a minor to gain parental consent to get married. *Id.* at 630. This case involved a 17 year old father and a 14 year old mother who wanted their marriage to "legitimize" their child. *Id.*



vate the right to education to a "fundamental right" status.<sup>209</sup> Courts have also upheld a parent's right to commit a child to a mental institution over the child's objection.<sup>210</sup>

The waters of children's basic rights were first tested in the early part of the twentieth century during the redefinition of the juvenile court system.<sup>211</sup> At that time, the courts' focus shifted away from the innocence or guilt of the child toward a dual acknowledgement of the best interests of the child as well as the state's ability to rehabilitate the minor.<sup>212</sup> In the pivotal juvenile rights case of *Schall v. Martin*,<sup>213</sup> the Court held that juveniles do not possess due process rights when detained before trial.<sup>214</sup> The Court explained such differences between the rights of adults and children as being allowable because children, "unlike adults, are always in some form of custody."<sup>215</sup>

### B. *Rights of the Other Child—The Immigrant Minor's Rights*

Despite the generous granting of rights to citizen children, it is a different story when it comes to the rights of children of immigrants.<sup>216</sup> While the rights of immigrant children, especially illegal immigrant children, have been continually redefined and reshaped, these rights have also suffered significantly more erosion than the rights of citizen children.<sup>217</sup> For example, a citizen child of citizen parents is, of course, a United States citizen and cannot be deported.<sup>218</sup> However, the Supreme Court stated in *Acosta v. Gaffney*,<sup>219</sup> that a citizen child of non-citizen parents cannot claim de facto deportation if the undocumented parents are de-

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209. In *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), the Court declined to strike down a Texas statute regarding the distribution of aid to education as unfair to Mexican-American children because the right to an education was not a fundamental right and thus did not require strict scrutiny. *Id.* at 35. However, the Court has acknowledged the "supreme importance" of education and the acquisition of knowledge. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

210. *Parham v. J.R.*, 442 U.S. 584 (1979). The Court felt that the child's interest in avoiding confinement in a mental hospital was generally less important than the parents' ability and right to decide what was best for the child. *Id.* at 585. In addition, the Court felt that there were further safeguards in place as a trained doctor must also agree that the child needs to be committed. *Id.* at 607.

211. *Clark*, *supra* note 204, at 582.

212. *Id.*

213. 467 U.S. 253 (1984).

214. *Id.*

215. *Id.* at 265 (citing *Lehman v. Lycoming County Children's Servs.*, 458 U.S. 502, 510-11 (1982)).

216. See generally *Clark*, *supra* note 204.

217. See *Clark*, *supra* note 204, at 591-97.

218. See *supra* note 140-43 and accompanying text.

219. 558 F.2d 1153, 1158 (3rd Cir. 1977)

ported and take the citizen child with them.<sup>220</sup> An exception allows the illegal alien parent of a citizen child to have deportation suspended if they have been in the United States for the past seven years and have not acted in an immoral manner.<sup>221</sup>

The key to that exception is that the parent must prove extreme hardship, which has become a considerably easier task following the decision of *Wang v. Immigration and Naturalization Service*.<sup>222</sup> The *Wang* court stated that the statute involving the hardship exception to deportation "should be liberally construed to effectuate its ameliorative purpose . . . so that suspension of deportation will be granted to the alien for whom the hardship from deportation would be different and more severe than that suffered by the ordinary alien who is deported."<sup>223</sup> However, the court also noted that the statute that allows the suspension should not be used for every alien who can claim some adversity, but only to those that are able to establish a prima facie case of hardship.<sup>224</sup>

More recently, in *Reno v. Flores*,<sup>225</sup> illegal children detained at the border were denied the right to be released to a responsible adult other than their parent, guardian, or close relative.<sup>226</sup> The problem of releasing illegal alien children to a responsible adult other than a parent, guardian, or relative arises out of the fact that there are many instances where such an adult has already been deported or is not in the United States.<sup>227</sup> The *Reno* court concluded that there is no fundamental right to be released to a responsible adult willing to take temporary custody of the child other than a parent, guardian, or close relative.<sup>228</sup> In addition, the court declared that the manner in which the INS handled its detainees was at the Attorney General's discretion because "[f]or reasons

220. See also *Tischendorf v. Tischendorf*, 321 N.W.2d 405, 406-412 (Minn. 1982) (holding that a citizen-child of divorced parents has no independent right to remain in the United States when a foreign-resident parent holds a custody order), *cert. denied*, 460 U.S. 1037 (1983).

221. 8 U.S.C. § 1254(a) (1994); see *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1422 (9th Cir. 1987) (reasoning that the Board of Immigration Authority should weigh hardship in cases involving deportation of parents).

222. 622 F.2d 1341, 1347 (9th Cir. 1980) (making hardship easier to establish by broadening the inquiry to include the aggregate effect on other persons), *rev'd on other grounds*, 560 U.S. 964 (1981).

223. *Id.* at 1346 (citation omitted).

224. *Id.*

225. 113 S. Ct. 1439 (1993).

226. *Id.* at 1447.

227. *Id.* at 1443.

228. *Id.* at 1447.

long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government.<sup>229</sup>

In addition to facing potential problems related to deportation, illegal alien children are also denied Aid to Families with Dependent Children (AFDC) benefits.<sup>230</sup> This denial of benefits also attaches to illegal aliens granted amnesty by IRCA. Such aliens must wait five years before they are eligible to receive these benefits, despite their legal status.<sup>231</sup> However, a state cannot deny welfare benefits to citizens even if their parents are illegal aliens.<sup>232</sup> Nevertheless, in *Mathews v. Diaz*,<sup>233</sup> the Supreme Court upheld a five year residency requirement for aliens before qualifying for Medicare benefits.<sup>234</sup> The *Mathews* Court further declared that although due process is available for all persons including aliens, it does not necessarily follow "that all aliens must be placed in a single homogeneous legal classification."<sup>235</sup>

On several occasions, when the rights of illegal immigrant children have come under attack by legislative action, the courts have been called upon to protect these rights.<sup>236</sup> In *Darces v. Woods*,<sup>237</sup> the California

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229. *Id.* at 1449 (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976)).

230. 42 U.S.C. § 602(a)(33) (1988). See *Sudomir v. McMahon*, 767 F.2d 1456 (9th Cir. 1985) (holding that it is permissible to deny AFDC benefits to illegal aliens); see also Charles H. Wheeler & Robert Leventhal, *Alien Rights to Public Benefits*, 20 CLEARINGHOUSE REV. 913 (1986). For a more extensive overview on aliens' rights to receive aid from federal assistance programs, see Janet M. Calvo, *Alien Status Restrictions on Eligibility for Federally Funded Assistance Programs*, 16 N.Y.U. REV. L. & SOC. CHANGE 395 (1987-88).

231. 8 U.S.C. § 1255a(h)(1)(A)(i) (1988).

232. *Doe v. Rievitz*, 830 F.2d 1441, 1451 (7th Cir. 1987) (holding that a state could not deny AFDC benefits to citizen children and eligible alien children of illegal aliens based solely on their parents' citizenship status). This decision was incorporated by the adoption of IRCA 42 U.S.C. § 1320b-7(d)(1)(B)(i) (1988); see also *Doe v. Miller*, 573 F. Supp 461, 469 (N.D. Ill. 1983) (enjoining a law that forced parents to disclose their immigrant status or withdraw application for their childrens' food stamps); *Ruiz v. Blum*, 549 F. Supp. 871, 877 (S.D.N.Y. 1982) (finding that a citizen child could not be denied AFDC-provided daycare because of the illegal status of his mother); *Darces v. Woods*, 679 P.2d 458, 474 (Cal. 1984) (en banc) (prohibiting the state from excluding undocumented children for purposes of calculating welfare payments).

233. 426 U.S. 67 (1976).

234. *Id.* at 87.

235. *Id.* at 78. In addition, the Court said "the fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for All [sic] aliens." *Id.* at 80. State laws can be ruled unconstitutional by federal courts. See *Graham v. Richardson*, 403 U.S. 365, 382-83 (1971) (striking down a state law requiring that aliens reside in the state for fifteen years before becoming eligible for Social Security benefits as a violation of the Equal Protection Clause of the Constitution).

236. Although courts have stated that children have separate rights when it comes to privacy and autonomy, courts have also found that childrens' rights are less than

Supreme Court stated that a statute may not deny governmental aid to a child simply because the child is living in the same house with undocumented brothers or sisters.<sup>238</sup> This ruling is consistent with the concept that it is unjust to penalize an illegitimate child merely because the father has failed to marry the mother.<sup>239</sup> Additionally, an Idaho court held that health care payments may not be withheld simply because a child's parents are illegal aliens.<sup>240</sup> In attempting to escape responsibility for the child, the Idaho county involved in that case unsuccessfully argued that the child should be considered to possess the same residence as her illegal alien father, thus making the child a non-resident of Idaho.<sup>241</sup> By further example, a California court held that an alien residency rule was illegal.<sup>242</sup> The regulation at issue proposed to make a family ineligible for Federal Housing and Urban Development assistance if it had an illegal alien residing in the household.<sup>243</sup>

One of the most significant cases regarding the rights of illegal immigrant children is *Plyler v. Doe*.<sup>244</sup> *Plyler* involved children of illegal Mexican immigrants, living in Texas, who sued to strike down a Texas law that withheld state educational aid to any child who was not legally admitted into the United States.<sup>245</sup> The *Plyler* Court overturned the Texas law, finding that it failed to provide the equal protection guaranteed by the Constitution because the state could neither justify its interest as sufficiently compelling, nor could it demonstrate that the statute would

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those of adults. See *H.L. v. Matheson*, 450 U.S. 398, 413 (1981) (upholding a state law that required parental notice, but not absolute permission, before a minor child could obtain an abortion); *Bellotti v. Baird*, 443 U.S. 626, 651 (1979) (stating that a law which called for notice, but not parental consent, for minor child's abortion, was not unconstitutional); see also Nat Stern, *The Berger Court and the Diminishing Constitutional Rights of Minors: A Brief Overview*, 1985 ARIZ. L. J. 865 (1985).

237. 679 P.2d 458 (Cal. 1984).

238. *Id.* at 473-74.

239. *Id.* at 469 (citing *Trimble v. Gordon*, 430 U.S. 762, 766 (1977)); see also *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (stating that the fact that a father has not married the mother is not a valid reason for denying the child the right to support).

240. *Intermountain Health Care, Inc. v. Board of Comm'rs*, 707 P.2d 1051, 1053 (Idaho 1985).

241. *Id.* The court rejected the county's argument as inapplicable, noting that a child only assumes the residency of its father where the parents do not reside together. *Id.*

242. *Yelano-Donnelly Tenant Ass'n v. Pierce*, No. S-86-0846 MLS (E.D. Cal. 1986).

243. *Id.*

244. 457 U.S. 202 (1982).

245. *Id.* at 205-06.

further its interest.<sup>246</sup>

Justice Powell's concurring opinion in *Plyler* frowned upon the creation of a subclass of illegal alien children, stating that "[a] legislative classification that threatens the creation of an underclass of future citizens cannot be reconciled with one of the fundamental purposes of the 14th Amendment."<sup>247</sup> While the Court was concerned with the creation of this subclass, Justice Brennan, writing for the majority, noted that illegal immigrant children were not a suspect class entitled to special protection under the strict scrutiny test.<sup>248</sup> According to the majority, illegal alien children fail as a protected subclass because the basis of their classification, unlike being a member of a particular race, was both criminal and part of some kind of voluntary action.<sup>249</sup>

However, the situation in *Plyler* did merit mid-level scrutiny.<sup>250</sup> The Court reasoned that the state failed to carry its burden of proving how the denial of educational benefits would stop illegal immigration, in light of the fact that most illegal aliens cross the border for jobs and not education.<sup>251</sup> Justice Brennan concluded that the children had little control over their situation and "were not accountable for their disabling status."<sup>252</sup>

*Plyler*, it should be noted, is not a broad and sweeping guarantee of illegal children's federal entitlement rights, because Justice Powell mentioned in his concurring opinion that, "[i]f the resident children of illegal

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246. *Id.* at 228-30. Texas claimed it had a substantial interest to protect its economy from the influx of illegal aliens. *Id.* at 228. However, the Court stated, "There is no evidence in the record suggesting that illegal entrants impose any significant burden on the State's economy. To the contrary, the available evidence suggests that illegal aliens underutilize [sic] public services, while contributing their labor to the local economy and tax money to the state fisc [sic]." *Id.* As described in notes 50-57, *supra*, there is much controversy over the financial impact of illegal aliens on a state's coffers. However, even if the *Plyler* Court had agreed that the state has a legitimate interest in stopping the flow of illegal aliens to protect its economy, the Court would still likely have overturned the statute since "[t]he dominant incentive for illegal entry into the State of Texas is the availability of employment; few if any illegal immigrants come to this country or presumably the state of Texas . . . to avail themselves of a free education." *Plyler*, 457 U.S. at 228.

247. *Id.* at 239 (Powell, J. concurring).

248. *Id.* at 223.

249. *Id.*

250. *Id.* at 223-24. Justice Brennan stated, "education [is not] a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population." *Id.* at 223.

251. *Id.* at 228.

252. *Id.* at 223. Sarah Clark, wrote in 1992 that, "alien children should possess the same fundamental rights as those generally enjoyed by all children. Fundamental rights should not be restricted based upon the children's potential illegal status, a status over which they usually have no control." Clark, *supra* note 204, at 601.

aliens were denied welfare assistance, made available by government to all other children who qualify, this also—in my opinion—would be an impermissible penalizing of children because of their parents' status.<sup>253</sup> Even if the holding was narrow, though, the cherished principle that a child should not suffer due to the crime of its parents was rightfully honored.<sup>254</sup>

### B. Corruption of Blood and the Sins of the Father

Simply stated, the corruption of blood principle is the label given to the act of punishing a child for the illegal or immoral behavior of its parents.<sup>255</sup> This concept finds its origins in Anglo Saxon history, which has always looked with disfavor upon the idea of chastising the child for what its parents have done.<sup>256</sup> William Blackstone once commented that it was unfair to punish children with the "future difficulties of inheritance, on account of the guilt of their ancestors."<sup>257</sup>

In the United States, the corruption of blood principle was important enough to the founding fathers that they incorporated it into the Constitution.<sup>258</sup> The applicable clause reads, "[T]he Congress shall have the Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained."<sup>259</sup> Some commentators have suggested that the reason for the inclusion of such a clause was not because this kind of penalty would be cruel and unusual punishment, but rather because the founding fathers did not wish to allow innocent children to suffer for the deeds of their parents.<sup>260</sup> James Madison believed that guilt should go

253. *Plyler*, 457 U.S. at 239 n.3 (Powell, J. concurring); see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (holding that children who are denied certain rights are a suspect class and are to be given "extraordinary protection from the majoritarian political processes"). Note that illegal alien children are not represented in the democratic process as their illegal alien parents do not possess the right to vote. See *supra* note 138 and accompanying text.

For a further discussion of *Plyler*, see Tom Gerety, *Children in the Labyrinth: The Complexities of Plyler v. Doe*, 44 U. PITT. L. REV. 379 (1983).

254. See *infra* notes 255-300 and accompanying text.

255. See Max Stier, Note, *Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter*, 44 STAN. L. REV. 727 (1992).

256. *Id.* at 729-30.

257. *Id.* at 730 (quoting William Blackstone).

258. *Id.*

259. U.S. CONST. art. III, § 3, cl. 2.

260. Stier, *supra* note 255, at 730.

no further than the person who committed the crime.<sup>261</sup> Commenting on the inclusion of the corruption of blood principle in the Constitution, Joseph Story reasoned that the framers of the new nation did not want the taint of guilt to pass to future generations.<sup>262</sup> Bills of Attainder were eliminated because they ordinarily carried the unwanted corruption of blood clause.<sup>263</sup>

Early in the history of the republic, several states, including Connecticut, Delaware, and Pennsylvania completely eliminated corruption of blood.<sup>264</sup> Then, in 1790, the First Congress passed a law eliminating the corruption of blood,<sup>265</sup> a law that would survive for almost 200 years.<sup>266</sup>

Through the years, the courts have upheld the basic theory that the usage of the corruption of blood principle is not acceptable.<sup>267</sup> As a general rule, cases have followed the proposition that a child should not be punished for the sins of the parents,<sup>268</sup> for example immoral behavior by the mother.<sup>269</sup> In *Weber v. Aetna Casualty and Surety*,<sup>270</sup> the Supreme Court cautioned that it is illegal to discriminate against an illegitimate child because "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear

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261. THE FEDERALIST, No. 43, at 269 (citing James Madison) (Henry Cabot Lodge ed. 1994).

262. Stier, *supra* note 255, at 730.

263. *Id.*

264. *Id.* at 731.

265. *Id.* at 732.

266. *Id.* The anti-corruption of blood law was eliminated in the Sentencing and Reform Act of 1984 as part of a complete overhaul of the laws. *Id.* at 732 n.41; see Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

267. See generally Stier, *supra* note 255.

268. See *King v. Smith*, 392 U.S. 309 (1968) (finding a state statute invalid that made a child ineligible for federal aid to dependent children simply because the mother was living with a man who was not the child's father). In *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944), the famous Japanese-American discrimination case heard during World War II, the majority found that an American citizen of Japanese descent, who displayed no treasonous conduct, could be punished for simply being in the general location of a "[m]ilitary [a]rea." *Id.* However, Justice Jackson said, in an impassioned dissent:

[T]he Constitution forbids its penalties to be visited upon him, for it provides that 'no Attainer of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.' But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parent as to who he had no choice, and belongs to a race from which there is no way to resign.

*Id.* at 243 (Jackson, J., dissenting) (citation omitted).

269. *King*, 392 U.S. at 320.

270. 406 U.S. 164 (1972).

some relationship to individual responsibility or wrongdoing.<sup>271</sup> The Court stated that "no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent's."<sup>272</sup> The *Weber* decision is in line with Justice Jackson's noteworthy dissent regarding the internment of Japanese-Americans during World War II in *Korematsu v. United States*.<sup>273</sup> In *Korematsu*, Justice Jackson stated, "[i]f any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. Even if all of one's antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him . . ."<sup>274</sup> Numerous other cases in addition to *Weber* and *Korematsu* have also supported the notion that the child should not be punished for the action of the parent.<sup>275</sup>

The courts have also looked upon disadvantaged children as a subclass that requires protection.<sup>276</sup> Even non-obvious classes involving alienage and illegitimacy should be protected according to Justice Stevens in his dissenting opinion in *Mathews v. Lucas*.<sup>277</sup> Justice Stevens asserted, "[t]he fact that illegitimacy is not as apparent to the observer as sex or race does not make this governmental classification any less odious."<sup>278</sup>

The question thus arises as to what rights should be granted to illegal immigrant children.<sup>279</sup> In response to that question, statutes affecting

271. *Id.* at 175.

272. *Id.* Writing for the majority, Justice Powell said, "[c]ourts are powerless to prevent the social opprobrium suffered by these helpless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where . . . the classification is justified by no legitimate state interest, compelling or otherwise." *Id.* at 175-76.

273. 323 U.S. 214, 242 (1944).

274. *Id.* at 243 (Jackson J., dissenting).

275. *See St. Ann v. Palisi*, 495 F.2d 423, 428-29 (5th Cir. 1974) (proclaiming that a child could not be suspended from school because her parent struck a school official); *Burris v. Willis Indep. Sch. Dist., Inc.*, 713 F.2d 1087, 1096 (5th Cir. 1983) (stating that the rule in *St. Ann* applies only when there is liberty and property involved); *see also Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974) (holding that illegitimate children could not be denied Social Security designed to aid dependent children); *Levy v. Louisiana*, 31 U.S. 68, 71 (1968) (asking "[h]ow under our constitutional regime can [an illegitimate] child be denied correlative rights which other citizens enjoy?"). *Cf., Labine v. Vincent*, 401 U.S. 532, 539-40 (1971) (upholding a state law giving collateral relatives inheritance rights over illegitimate children).

276. *See generally Clark, supra* note 204.

277. 427 U.S. 495, 516 (1976) (Stevens, J., dissenting).

278. *Id.* at 523 (Stevens, J. dissenting).

279. *See supra* notes 215-52 and accompanying text; *see also Clark, supra* note 204,



the status of illegal immigrant children in corruption of blood situations should be subject to the intermediate standard of review for four reasons.<sup>280</sup> First, the basic corruption of blood principle forbids punishment of the child for the action of the parent;<sup>281</sup> second, the children have already experienced discrimination; third, illegal immigrant children are not properly represented in the political process because they and their parents do not have the right to vote;<sup>282</sup> and finally, these children are being injured by their citizenship status and not by their individual actions.<sup>283</sup>

In *Plyler*<sup>284</sup> the Court noted, “[v]isiting . . . condemnation on the head of the infant is illogical and unjust. Moreover imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.”<sup>285</sup> Interestingly, while the *Plyler* court addressed the corruption of blood principle, it was not the sole basis for its decision.<sup>286</sup> The Court also based its reasoning on the state’s failure to prove that the denial of educational benefits was substantially related to the state’s interest in stopping illegal immigration.<sup>287</sup> This may have been due to the increased deference given to Congress in immigration cases.<sup>288</sup>

However, even with such deference given to the federal government in immigration cases, denying citizenship to a newborn child solely on the basis of the illegal conduct of its parent would require stricter scrutiny, as courts have already applied such a level of scrutiny in cases dealing with corruption of blood principles.<sup>289</sup> In the alternative, this greater dis-

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at 606. Clark maintains that “[a]lthough restricting alien children’s fundamental rights may discourage illegal immigration, courts should ignore this purely speculative effect to protect alien children’s dignity.” *Id.*

280. Stier, *supra* note 255, at 734 (noting that the Supreme Court has applied the intermediate standard of review in previous corruption of blood cases).

281. Stier, *supra* note 255, at 734; *see supra* notes 256-73 and accompanying text.

282. Stier, *supra* note 255, at 734; *see* U.S. CONST. amend. XIV, § 2.

283. Stier, *supra* note 255, at 734.

284. 457 U.S. 202 (1982).

285. *Id.* at 220 (footnoted omitted) (quoting *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164, 175 (1972)).

286. *Id.*

287. *Id.*

288. *See Fiallo v. Bell*, 430 U.S. 787, 793 (1977). The Court, in *Fiallo*, stated that cases involving the plenary power of Congress over immigration meant that “legislative distinctions . . . need not be as carefully tuned to alternative considerations as those in the domestic area.” *Id.* at 799 n.8 (citation omitted). The courts have generally not been strict in the enforcement of First Amendment rights in the matter of deportation and immigrants. Steven J. Burr, Comment, *Immigration and the First Amendment*, 73 CAL. L. REV. 1889, 1896-97 (1985); *see also supra* notes 64-72 and accompanying text.

289. Stier, *supra* note 255, at 754.

cretion given to lawmakers may also provide more reason to protect illegal alien children from being a congressional scapegoat in times of economic misfortune.<sup>290</sup>

For certain, there are several Constitutional bars to denying citizenship to native born children of illegal aliens.<sup>291</sup> Even in the event that the automatic citizenship birthright was stripped away by amending or repealing the Fourteenth Amendment, problems with contradicting the corruption of blood principles of the Constitution would still remain.<sup>292</sup> While it is possible to create an amendment to the Constitution that would both repeal the Fourteenth Amendment and eliminate the corruption of blood principle, such an amendment would clearly contradict the wishes of the founding fathers and oppose the entire legal and moral tradition of the United States.<sup>293</sup>

Further, any proffered state interest in saving money on service costs by denying citizenship to children born to illegal aliens would not be sufficient to satisfy the requisite level of connection between the amendments and the governmental interest in heightened scrutiny situations.<sup>294</sup> In order to recognize legitimate state interests in limiting unnecessary economic drains caused by illegal immigration or enforcing immigration laws, it would seem that a court would require proof that people are, in fact, entering the state for these benefits.<sup>295</sup> This would be difficult to establish because most studies show that employment is the driving force behind illegal immigration.<sup>296</sup>

Stated simply, any attempt to put an end to illegal immigration by punishing a child for the actions of the parent is not only in direct conflict with two sections of the Constitution,<sup>297</sup> but also contradicts Amer-

290. See *supra* notes 59-66 and accompanying text.

291. See *supra* notes 164-75, 258-78 and accompanying text.

292. See *supra* notes 164-75, 258-78 and accompanying text.

293. See *supra* notes 255-69 and accompanying text.

294. Cost savings alone does not justify invidious classification of a group of people. *Graham v. Richardson*, 403 U.S. 365, 374-75 (1971) (citing *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969)). The Court has stated, "The state must do more than justify its classification with a concise expression of an intention to discriminate." *Plyler v. Doe*, 457 U.S. 202, 227 (1982) (citing *Examining Board v. Flores de Otoro*, 426 U.S. 572, 605 (1976)).

295. See *supra* note 287 and accompanying text.

296. See *supra* note 246. See generally CONGRESSIONAL RESEARCH SERVICE, *ILLEGAL ALIENS: ANALYSIS AND BACKGROUND*, HOUSE COMM. ON THE JUDICIARY, 95th Cong., 1st Sess. (1977); also referenced in CONGRESSIONAL INFORMATION SERVICE, H522-12 (June 1977).

297. U.S. CONST. amend. XIV, § 1 (including citizenship birthright); U.S. CONST. art.

ican common law.<sup>298</sup>

Certainly children cannot choose their place of birth. Denying them the right to citizenship, despite circumstances beyond their control, unjustly labels them outlaws at birth.<sup>299</sup> A policy which allows for such treatment essentially designates the birth of these babies illegal in clear conflict with America's social values, the Judeo-Christian ethic, and many of the nation's most closely held beliefs.<sup>300</sup>

## VI. SOLUTION OR PROBLEM? THE EFFECT OF DENYING AUTOMATIC BIRTH RIGHTS TO CHILDREN BORN IN THE UNITED STATES OF ILLEGAL ALIEN PARENTS

If you are not part of the solution you are part of the problem.<sup>301</sup>

### A. *Legal and Judicial Ramifications*

Refusing to award automatic citizenship status to children born domestically to illegal alien parents would require repealing or somehow altering the language of the Fourteenth Amendment to the United States Constitution.<sup>302</sup> However, the Constitution has proven to be a venerable document, which has been subjected to very few changes in its two centuries of existence.<sup>303</sup> In addition, the process of amending the Constitution is extremely difficult. Just to bring a proposed change to vote requires either a two thirds majority of both houses of Congress or a vote by two thirds of the states' legislatures to convene a constitutional convention.<sup>304</sup> The proposed changes must then be ratified by three fourths of the states or by conventions in three fourths of the states.<sup>305</sup> Since the adoption of the first ten amendments in 1791, the Constitution has

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III, § 3, cl. 2 (disallowing corruption of blood prohibition).

298. See *supra* note 253; see also *supra* notes 265-73 and accompanying text.

299. Upon their birth, children of illegal aliens would be classified as illegal aliens in violation of the laws of the United States. See *supra* notes 69-72 and accompanying text.

300. See *Plyler v. Doe*, 457 U.S. 202, 220 (1982) ("Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."). See generally *Clark*, *supra* note 204.

301. This is a famous quote by Eldridge Cleaver which also served as a popular slogan in the 1960's.

302. See *supra* notes 151-62 and accompanying text.

303. The Constitution has been amended only 27 times, the first ten of which occurred in 1791. U.S. CONST. amend. I-XXVII.

304. U.S. CONST. art. V.

305. *Id.*

been amended only seventeen times,<sup>306</sup> and three of those Amendments were adopted only after a devastating Civil War.<sup>307</sup> Further, the purpose of nearly every amendment to date has been to define procedures or to *increase* or protect the rights and privileges of citizens, not to *narrow* or deprive rights as would be the case with the proposed denial of citizenship to domestically born children of illegal aliens.<sup>308</sup> The most notable exceptions were the subsequently repealed Eighteenth Amendment prohibiting the manufacture, sale, and transportation of alcohol<sup>309</sup> and the oft maligned Sixteenth Amendment,<sup>310</sup> which granted the federal government the power to levy and collect income taxes.<sup>311</sup>

The prerequisite to constitutional change for denial of citizenship to newborn children of illegal immigrants is the deletion of the Fourteenth Amendment's guarantee of citizenship birth rights.<sup>312</sup> Article III section 3 (2) would likely also require a change due to the Corruption of Blood reference.<sup>313</sup> Such a modification of Article III would effectuate the complete reversal of an entire body of common law court decisions and centuries of Anglo-Saxon tradition against holding children responsible

306. U.S. CONST. amend. I-XXVII.

307. The Thirteenth Amendment abolished slavery in 1865. U.S. CONST. amend. XIII. In 1868, Congress passed the Fourteenth Amendment which granted citizenship rights, due process, and equal protection. U.S. CONST. amend. XIV. Finally, the Fifteenth Amendment protected the voting rights of all races, including those of former slaves. U.S. CONST. amend. XV.

308. For example, Amendment XIII abolished slavery, Amendment XIV granted citizenship rights to those born on American soil and guaranteed due process and equal protection, Amendment XV guaranteed voting rights for members of all races, Amendment XIX guaranteed women the right to vote, Amendment XXI allowed the legal sale and consumption of alcohol, Amendment XXIV provided for the right of citizens to vote in primary elections, and Amendment XXVI granted the right to vote to any citizen over 18 years of age. U.S. CONST. amends. XIII, XIV, XV, XIX, XXI, XXIV, XXVI.

309. Amendment XVIII proclaimed the era of prohibition which lasted only 13 years. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

310. The shortest amendment since the Bill of Rights enactment of 1791 was the Sixteenth Amendment. It proclaims that "Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. CONST. amend. XVI.

311. *Id.* See generally George Cooper, *The Taming of the Shrewd: Identifying and Controlling Income Tax Avoidance*, 85 COLUM. L. REV. 657 (1985).

312. See *supra* notes 164-75 and accompanying text.

313. See *supra* notes 255-88 and accompanying text.

for the sins of their parents.<sup>314</sup>

The denial of citizenship to newborn children of illegal immigrants would likewise create numerous other significant legal issues which could spark a flood of litigation and otherwise severely impact the judicial system. Perhaps most importantly, such changes would adversely affect a defenseless group: the newborn children of illegal aliens.

Because the courts and judicial branch have generally deferred immigration matters to the plenary powers of Congress and the INS,<sup>315</sup> stripping newborn children of their citizenship rights would make an already defenseless group extremely vulnerable.<sup>316</sup> In a 1977 decision, *Fiallo v. Bell*,<sup>317</sup> the Court stated:

'[o]ver no conceivable subject is the legislative power of Congress more complete that it is over' aliens and their admission to the United States. Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control'<sup>318</sup>

Beginning in 1889 with *Chae Chan Ping v. United States*,<sup>319</sup> the Chinese Exclusion case, the courts have generally upheld immigration statutes, even if they exclude based upon race.<sup>320</sup> As a result, immigration matters have led to egregious decisions left untouched by the courts.<sup>321</sup> For example, the court has already let stand a decision that allowed the exclusion of an American citizen's wife based on confidential information that was never divulged to the husband, wife, or even the court.<sup>322</sup> Another court refused to reverse the detention of an alien resident for an

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314. See *supra* notes 255-88 and accompanying text.

315. See *supra* note 288; see also *infra* notes 317-29 and accompanying text.

316. See *supra* note 203 and accompanying text.

317. 430 U.S. 787 (1977).

318. *Fiallo v. Bell*, 430 U.S. 787, 792 (citations omitted); see also *Pena v. Kissinger*, 409 F. Supp. 1182, 1185 (S.D.N.Y. 1976) (stating that INS officials have great discretion in denying visas and that their decisions are not subject to judicial review); *INS v. Jong Ha Wang*, 450 U.S. 139, 145-46 (1981) (admonishing the court of appeal for encroaching upon the INS's right to construe immigration statutes narrowly); *INS v. Miranda*, 103 S. Ct. 281, 283-84 (1982) (stating that "appropriate deference must be accorded" to the decisions of the INS as it is "the agency primarily charged by Congress to implement the public policy underlying these laws").

319. 130 U.S. 581 (1889).

320. Schuck, *supra* note 9, at 14. Since the courts followed the desires of the legislature in immigration matters, immigration policy was initially driven by congressional concerns, which could include fear of the stranger, rather than the inclusive race-and-region-blind philosophical policy of open immigration. *Id.*

321. See *Fiallo*, 430 U.S. at 792. Generally, the courts grant great deference to the exclusionary standards of immigration statutes. *Jong Ha Wang*, 450 U.S. at 144 (granting approval to the Attorney General to deport citizen children of alien parents).

322. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 541-44 (1950).

indefinite period of time, even though no other country claimed him and he had resided in the United States for a lengthy period of time.<sup>323</sup>

The specter of deporting newborn children creates numerous major moral and administrative problems.<sup>324</sup> First, because deportation is considered a civil crime which courts address administratively,<sup>325</sup> certain rights accorded in criminal proceedings will not apply.<sup>326</sup> These include protection from ex post facto laws<sup>327</sup> and the heightened burdens of proof.<sup>328</sup> Further, there is no right to be heard before a jury of one's peers, nor to be heard before an independent judge.<sup>329</sup> The judge who hears the case is an immigration judge who is affiliated with the INS, the same agency that has the power to arrest, interrogate, and gather evidence against the alien.<sup>330</sup> It should be noted, however, that a person in a deportation hearing does retain the benefit of protections such as a notice of the hearing,<sup>331</sup> judicial review,<sup>332</sup> basic governmental burden of proof,<sup>333</sup> and the right to counsel.<sup>334</sup>

323. *Shaughnessy v. United States ex rel. Mazei*, 345 U.S. 206, 215-16 (1953).

324. See *infra* notes 33-83 and accompanying text.

325. *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913) (concluding that deportation is to be considered a civil penalty and not a criminal punishment); see also *Fong Yue Ting v. United States*, 149 U.S. 698, 728, 730 (1893). The Court once again deferred to the plenary powers of Congress by stating that a penalty is considered criminal only when it is so desired by Congress. *United States v. Ward*, 448 U.S. 242, 248 (1980).

326. See *infra* notes 327-34 and accompanying text.

327. See *Galvan v. Press*, 347 U.S. 522, 530-31 (1954) (holding that there is no ex post facto protection in immigration cases since deportation is not a punishment but a civil action).

328. See *Woodby v. INS*, 385 U.S. 276, 285-86 (1966) (holding that the appropriate burden of proof is clear and convincing evidence).

329. Schuck, *supra* note 9, at 27 n.146.

330. See 8 U.S.C. §§ 1252(a), 1357(a)-(c) (1982); see also *Abel v. United States*, 362 U.S. 217 (1960) (finding that the search and seizure was Constitutional, even though that which was found was unrelated to the INS search warrant).

331. 8 U.S.C. §§ 1105(a), 1252(b)(1) (1982).

332. 8 C.F.R. §§ 242.1-23 (1983).

333. See *Woodby v. INS*, 385 U.S. 276, 286 (1966) (noting that the government bears the burden of proving deportability by "clear, unequivocal, and convincing evidence").

334. 8 U.S.C. § 1252 (1982). The alien has the "privilege of being represented (at no expense to the Government) by . . . counsel, authorized to practice in such proceedings, as he shall choose." *Id.* The statute implicitly indicates that the government will not provide an alien with an attorney in a deportation proceeding, and this may effectively bar representation for an indigent alien. See, e.g., Note, *INS Transfer Policy: Interference with Detained Aliens' Due Process Right to Retain Counsel*, 100 HARV. L. REV. 2001, 2005-06 (1987).

Even though deportation is technically considered a civil penalty and not a punishment,<sup>335</sup> expulsion from a chosen country of residence can be one of the cruelest penalties inflicted upon a person or a family. In *Harisiades v. Shaughnessy*,<sup>336</sup> Justice Douglas said in dissent, “[B]anishment is punishment in the practical sense. If [people are] uprooted and sent to lands no longer known to them, no longer hospitable, they become displaced, homeless people condemned to bitterness and despair.”<sup>337</sup> Further, deportation can have a severe and lasting negative effect on the alien.<sup>338</sup> Once banished from the United States, a person may be permanently barred from becoming a United States citizen or even reentering the country without the express consent of the Attorney General.<sup>339</sup> In fact, once deported, merely applying for citizenship without prior approval is a felony.<sup>340</sup>

Turning to native-born non-citizen children, it is unclear whether they would be given any rights at all under immigration statutes. According to *United States v. Verdugo-Urquidez*,<sup>341</sup> a Mexican National, residing in Mexico is not one of “the people” protected by the First, Second, Fourth, or Fourteenth Amendments.<sup>342</sup> The Court in that case reasoned that a Mexican citizen was not part of the United States national community and had not otherwise developed sufficient connection with the United States to be considered a member of the national community.<sup>343</sup> It is uncertain how the courts would interpret the sufficient connection with the United States requirement in the case of a newborn who has not had time to develop any such connection.

Such a child could conceivably be viewed as a non-person, devoid of many important rights.<sup>344</sup> This potential destruction of rights could become the first step down the slippery slope toward government sanctioned discrimination against the stateless child, as intolerance and prejudice are easier to accept when one can think of the target as a “non-citizen” instead of a “non-person.”<sup>345</sup>

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335. *Bugajwitz v. Adams*, 228 U.S. 585, 591 (1913).

336. 342 U.S. 580 (1952).

337. *Id.* at 600 (Douglas, J., dissenting).

338. Schuck, *supra* note 9, at 26-27.

339. *Id.*

340. *Id.*

341. 494 U.S. 259 (1990).

342. *Id.* at 265, 274-75.

343. *Id.* at 265-67, 274-75.

344. *See supra* notes 127-50 and accompanying text.

345. *See* ALEXANDER BICKEL, *THE MORALITY OF CONSENT*, 31-54 (1975). Other writers have commented on the dangerous door that can be opened by the stripping of citizenship rights. ARENDT, *supra* note 130, at 296.

[T]he Nazis started their extermination of the Jews by first depriving them of all legal status (the status of second class citizenship) and cutting them off

B. *Social and Practical Ramifications of the Newly Created Non-citizen Child*

The legacy of class exclusion and separation can wreak havoc on societies.<sup>346</sup> Notable examples are the riots and unrest in South Africa<sup>347</sup> and the ethnic strife in the states of the former Soviet Union.<sup>348</sup> However, one need not look outside America's borders for examples, as the United States has by no means been immune to the misery and upheaval caused by discrimination.<sup>349</sup>

Creating a new category of native born non-citizen children would establish a subclass with less rights and privileges.<sup>350</sup> These children, not belonging to any nation, would probably remain in the United States despite being susceptible to deportation.<sup>351</sup> This lesser caste would have

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from the world of the living by herding them into ghettos and concentration camps; and before they set the gas chambers into motion, they had carefully tested the ground and found out to their satisfaction that no country would claim these people.

*Id.*

346. KARST, *supra* note 41, at 1-14.

347. *See When Violence Soars*, THE GUARDIAN, Aug. 3, 1993 at 17. In the last three years, 10,000 people have lost their lives as the result of political unrest in South Africa. *Id.*

348. WILLIAM PFAFF, THE WRATH OF NATIONS: CIVILIZATION AND THE FURY OF NATIONALISM 224-26 (1993). The author postulates that the rise of nationalism is the most profound and troubling issue facing nations in the last part of this century. *Id.* He cites the Balkans and other states of the former Soviet Union as examples of the growing ethnic strife. *Id.*

349. William Rees-Mogg, *The Sheriff Fiddles While the Town Burns*, THE INDEPENDENT, May 4, 1992, at 17. Racial unrest has precipitated violence throughout American history. The causes have been deficient economic opportunities, poor housing and education, break down of the family unit, child abuse, drug addiction, discrimination, and a general feeling of despair. *Id.* These same social patterns were present during the Watts riots of 1965 in Los Angeles and the riot in the same city following the Rodney King beating trial in 1992.

350. *See supra* notes 125-50 and accompanying text. While non-citizens are afforded many of the same rights as citizens, a non-citizen suffers most from the absence of suffrage, as well as the lack of United States representation and protection while abroad. *Id.* They also suffer from whatever psychological problems arise from possessing a lesser status. *Id.*

351. *Plyler v. Doe*, 457 U.S. 202, 222 n.20 (1982). Commenting on the plight of non-citizen children in the United States, the *Plyler* court noted, "The courts below concluded that many [illegal alien children] will remain here permanently and that some indeterminate number will eventually become citizens. The fact that many will not is not decisive, even with respect to the importance of education to participate in core political institutions." *Id.*



a stigma from the lack of being welcomed into the national community, and the stigmatized person is "reduced in our minds from a whole and usual person to a tainted, discounted one . . . By definition, . . . we believe that the person with a stigma is not quite human."<sup>352</sup>

When a nation espouses the principles of freedom, democracy, and equality, and in effect, simultaneously allows government sanctioned intolerance, it cannot be anything but frustrating to those who are the subject of the scorn, bigotry, and unjust separation encouraged by this same nation.<sup>353</sup> Furthermore, it would be hypocritical to have officially welcomed the alien in the Bracero programs,<sup>354</sup> and unofficially welcomed the person through lax border patrols<sup>355</sup> and collusion with employers,<sup>356</sup> and then proclaim that their children are unwelcome and subject to exclusion.<sup>357</sup> The situation becomes even more difficult when one considers that these immigrants have developed substantial family and social ties with the United States.<sup>358</sup> As one commentator noted: "The harms of exclusions unquestionably happen to people one by one, but these individual harms result from subordination of groups. When the instrument for excluding a group is the law, the hurt is magnified, for

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352. KARST *supra* note 41, at 25 (quoting Erving Goffman, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963)).

353. *Plyler*, 457 U.S. at 219. Allowing these people to enter the United States, but denying them the benefits that U.S. citizens enjoy presents a "difficult problem for a nation that prides itself on adherence to principles of equality under the law." *Id.* at 219.

354. *See supra* notes 101-07 and accompanying text.

355. Schuck, *supra* note 9, at 77.

356. IRCA calls for sanctions against employers who hire illegal aliens, yet it is still to be seen how strictly this will be enforced. IRCA Pub. L. No. 99-603, 100 Stat. 3359 (1986). In the past, employers generally have been given hands off protection from the INS. Employers have also benefitted from statutes like the "Texas Proviso" of 1952 which classified the hiring of undocumented workers as not harboring law breakers. INA § 274 (1952), *repealed by* IRCA, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

357. M. WALTZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY*, 49 (1983). There are some commentators who say that the blame for the problem of illegal immigration lies with the United States immigration policies since:

Mexican aliens in the United States have entered at the behest and through the active solicitation and encouragement of many of the same economic interests that today proselytize for their expulsion and exclusion through the rigorous application or change in immigration laws . . . The "illegal alien" problem is . . . one whose seed has been planted time and again by the United States when it has been in need of Mexican labor. Illegal immigration is . . . a problem perceived as having been created by illegal aliens, when in fact it is largely of the United States' own making.

Gilberto Cardenas, *United States Immigration Policy Toward Mexico: An Historical Perspective*, 2 CHICANO L. REV 66, 88-89 (1975).

358. *See supra* notes 106-07 and accompanying text.

the law is seen to embody the community's values.<sup>359</sup>

In addition, denying citizenship to children born in the United States of illegal immigrants would condemn this innocent group to living as "natives" in a country that is not theirs.<sup>360</sup> This would, in practical terms, deny them of basic human needs—the need to be part of a social group and the need to belong. For a child, "Some kind of answer to the question, 'Where do I belong?' is necessary to the question 'Who am I?'"<sup>361</sup> Denial of citizenship would block the child's ability to take part in society, and would keep the child separate from the surrounding culture. Without the hope of participation in American society and the participation itself, native born non-citizen children will lack incentives to develop respect and responsibility for others, themselves or for a community that is not theirs, one denied to them by state-sanctioned second-class status.<sup>362</sup> They would be a shadow class, stripped of country and identity, and divested of an otherwise guaranteed birth right.<sup>363</sup> In essence, the child's status is altered to match its parents' social position, effectively reverting back to the days when children were the property of their parents.<sup>364</sup>

While prejudice, intolerance, and the process of separation are generally perpetrated quietly, the continuing struggles and frustrations of African-Americans, Native Americans, Hispanics and others in the United States may eventually explode with frightening force.<sup>365</sup> Sanctioning a new class of have-nots, the native born non-citizen-child who would be stateless, possessing limited rights, and illegal by virtue of being born, would create nothing less than another potential social time bomb.

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359. KARST, *supra* note 41, at 4.

360. See *Vance v. Terrazas*, 444 U.S. 252, 270 (1980) (validating the expatriation of a citizen who had dual Mexican citizenship because Mexican law required him to renounce his American citizenship to gain benefits of Mexican citizenship). Mexican law would allow the children to be considered Mexican nationals; however, both parents would probably have to be Mexican citizens. *Id.* In addition, since these children are born outside of Mexico, they would have to relinquish all allegiances with other countries if they desire Mexican citizenship. *Id.* at 257. See generally Lawrence Abramson, *United States Loss of Citizenship Law After Terrazas: Decisions of the Board of Appellate Review*, 16 N.Y.U. J. INT'L L. & POL. 829 (1983).

361. KARST, *supra* note 41, at 4 (quoting HELEN MERRIL LYND, *ON SHAME AND THE SEARCH FOR IDENTITY*, HARDCOURT BRACE & WORLD (1958)).

362. KARST, *supra* note 41, at 181-82.

363. See *supra* notes 164-75 and accompanying text.

364. See *supra* note 204.

365. See *supra* note 346.

Health risks to the newborn would also likely increase. Because births of illegal aliens in hospitals can easily be documented, illegal immigrant parents would likely shun those facilities and take their chances elsewhere.<sup>366</sup> This could be tragic, because immigrants lacking proper health care in their original country may bring diseases with them.<sup>367</sup> Health and safety would also be at issue if there is an active movement towards deportation.<sup>368</sup> During deportation hearings, aliens can be detained under deplorable circumstances, as overcrowded and unsanitary conditions are the norm.<sup>369</sup> Babies could be subjected to the disease, violence, and despair that runs rampant in these holding cells. One can only imagine the irreparable harm done to tiny infants.<sup>370</sup>

From a practical standpoint, there would be an immediate loss of administrative clarity regarding who is a citizen and who is not.<sup>371</sup> Many disturbing questions arise with regard to who would be granted citizenship and who would be denied this privilege. For example, what would

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366. Theoretically a hospital can demand an accounting of the parents' citizenship status. While the hospital probably cannot deny emergency medical aid to the illegal alien, it may report the illegal status of the baby. Because a change in the citizenship birthright would render the baby as a non-citizen, the baby is subject to deportation because it is illegal and has not established any sufficient connection to the United States. See *supra* notes 338-40 and accompanying text.

367. *Public Hearing Before the Select Commission on Immigration and Refugee Policy*, (1980) (testimony of Richard A. Berman).

368. Irene Scharf & Christine Hess, *What Process Is Due? Unaccompanied Minors' Rights to Deportation Hearings*, 1988 DUKE L.J. 114, 114-15 n.2. The treatment of illegal immigrant children detainees can be very harsh. *Id.* They are placed for indefinite amounts of time in staging facilities before being deported. *Id.* at 114. "[T]hese [children] are refused contact with the outside . . . one eleven year old was held at a detention center for nearly six weeks." *Id.* at 114 n.2.

369. Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 1003. In 1983, undocumented workers in Oregon knew of a typhoid epidemic, yet still refused to get medical help for fear of being deported. *Id.*

370. Schuck, *supra* note 9, at 29 (citing *Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1983)).

371. David S. Schwartz, *The Amoralty of Consent*, 74 CAL. L. REV. 2143, 2150 (1986) (reviewing PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985)). Schwartz quotes the authors as stating that denying automatic citizenship to U.S. born children of illegal immigrants would destroy

the administrative clarity and simplicity of the current birthright citizenship rule. Clarity and simplicity are unquestionably important virtues in any citizenship test. America's experiences under the Alien and Sedition Act and with loyalty investigations during the McCarthy era are grim reminders . . . that individualized inquiries into the delicate, often ineffable questions of loyalty and political allegiance can be oppressive and dangerous.

*Id.*

be the citizenship status of the child if birth occurs while the parents are in judicial hearing to determine the parents' citizenship status? What would happen if the parents later attain legal naturalization? Would that cure the illegality of the child? What would be the result if only one parent is illegal, and how could this child, or any other non-citizen child, then attain United States citizenship?

Other questions also arise, such as who would keep track of all of these records and how much would it cost? As previously discussed, there is also a question as to whether any country would grant these children citizenship, potentially relegating them with no country of allegiance.<sup>372</sup> Further, how would this illegal baby be detained? Would there be any retroactivity to include those children already born of illegal immigrants in the United States? Would the loss of basic rights due to the plenary powers of Congress and the INS in matters of immigration<sup>373</sup> bring new misfortunes to these innocent infants? If no other nation will claim them, could they be detained indefinitely as in *Mazei*,<sup>374</sup> because these children are "no more ours than theirs."<sup>375</sup>

Perhaps even more disturbing is the notion of allowing national policy to be driven by fear of the foreigner, the stranger as enemy.<sup>376</sup> Is this not condoning race and class hatred which risks the type of violence that has occurred in Germany, where Turks have been harassed and killed?<sup>377</sup> This could potentially place many Hispanics, or any other target group perceived to be illegally entering the United States, at risk. This would, of course, even include members of the "suspect" group who are already United States citizens, some who have been United States

372. See *supra* notes 338-40.

373. See *supra* note 288.

374. See *Shaughnessy v. United States ex rel. Mazei*, 345 U.S. 206 (1953) (holding that exclusion of an alien without a hearing was not unlawful detention). While these children could be eligible for Mexican citizenship, they would have to renounce any ties that they might have to the United States or other countries. See *supra* note 357.

375. *Mazei*, 345 U.S. at 216.

376. See *supra* notes 37-48 and accompanying text.

377. *Ciller, Kohl to Discuss Turkish Immigrant Issue*, AGENCE FRANCE PRESSE, Sept. 13, 1993. Until recently, Germany had one of the most liberal immigration policies in Europe. The promise of economic opportunities in Germany lured many people from Turkey. About two million Turkish nationals or persons of Turkish descent now live in Germany. *Id.* Over the past several years Turks have been the target of ultra-nationalist right wing groups. *Id.* Many Turks have been injured; one firebomb attack in May, 1993 killed two women and three little girls. *Id.*; see also *supra* note 62.

citizens for generations.<sup>378</sup> Hatred and fear of the other is as old as human nature and, as we have seen in the anguish of Yugoslavia,<sup>379</sup> Somalia,<sup>380</sup> Rwanda,<sup>381</sup> and the former Soviet Union,<sup>382</sup> it can be deadly.<sup>383</sup> As Ernst Uhrlau, regional chief of Germany's anti-extremist watchdog agency, lamented, "This is not a short-term phenomena. We will have to deal with this for years."<sup>384</sup>

C. *Would Denying Citizenship Rights to Their Children Actually Help Stem the Tide of Illegal Aliens?*

The simple answer is no, it would not. Denying the American citizenship birth right has been justified with various dubious theories, generally in the name of stemming the tide of illegal aliens.<sup>385</sup> The theories, however, miss the point. People migrate to the United States for two

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378. See generally Nunez, *supra* note 65.

379. See generally Richard F. Ilgar, Comment, *The Constitutional Crisis in Yugoslavia and the International Law of Self-Determination: Slovenia's and Croatia's Right to Secede*, 15 B.C. INT'L & COMP. L. REV. 213 (1992). The hatred between the Serbs and Croats has a long history, including serving as the trigger point for World War I. *Id.* Because of this history, there are those who were not surprised when the current conflict exploded. *Id.*

380. David Binder & Barbara Crisette, *As Ethnic Wars Multiply, U.S. Strives for a Policy*, N.Y. Times, Feb. 7, 1993, at A2. Somalis have been fighting along clan lines in a civil war ever since their national government disintegrated. The conflict has cost over 300,000 lives including those of humanitarian peace keepers. *Id.*

381. See generally, *In Rwanda, United Nations Should Forgo War Crimes Tribunal*, N.Y. TIMES, Aug. 22, 1994, at A12. (commentary on the Hutu genocide of Tutsis).

382. See *supra* note 345.

383. Thousands have lost their lives in ethnic conflicts and civil wars in Bosnia, states of the former Soviet Union, South Africa, Angola, Somalia, Iraq, and other countries. See *supra* notes 344-46, 374 and accompanying text.

384. *Arsonists Attack Again in Germany*, USA TODAY, June 9, 1993, at 4A.

385. See PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1986). Schuck and Smith argue in favor removing the automatic birth right. *Id.* at 119-43. They hold the position that even children of American citizens should be required to declare citizenship at majority. *Id.* They support their point of view with the highly theoretical argument that there is mutual consent in the citizenship process. *Id.* at 30-31, 37-38, 47-48, 72-73.

While a sovereign nation has the right to make some decisions regarding its citizenship and borders, returning all power to the government is not a liberal American idea as the authors propose, but rather is a dangerous idea that could actually put each person at the mercy of a nativist or discriminatory Congress which could restrict citizenship along racial, economic, and political lines. See *supra* notes 34-68 and accompanying text. Given the hands-off policy of the courts in matters of immigration, this is not an idle fear. Schuck, *supra* note 9. See Schwartz, *supra* note 42; Janet Wong, *Recent Publications*, 21 HARV. C.R.-C.L. L. REV. 746 (1986) (reviewing PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985)).

reasons: first and foremost, to find employment or better wages, and secondly, to join family already in the United States.<sup>386</sup> The disparity of wages across the border is a de facto or de jure invitation to cross the border.<sup>387</sup> In *Plyler*,<sup>388</sup> the court stated, "The evidence demonstrates that undocumented persons do not immigrate in search for a free public education. Virtually all of the undocumented persons who come into this country seek employment opportunities and not educational benefits."<sup>389</sup>

Denying citizenship would cause harm to the children of immigrants while not affording any real benefit to society.<sup>390</sup> The nation's fabric would most likely be harmed as well, since it would be populated with a subclass devoid of hope and a basic respect for the law of the land, which fails to include or protect them.<sup>391</sup>

## VII. A SYNOPSIS OF ALTERNATIVES

The country can and should control its borders. That's an issue on which there is a general consensus. The real question is how to do it.<sup>392</sup>

Immigration, especially illegal immigration, poses a very real and very complex problem.<sup>393</sup> Not only does an increase in illegal aliens affect the economy, but an unchecked flow allows the law to be broken readily, hundreds of times each day.<sup>394</sup> This comment does not attempt

386. See generally Wayne A. Cornelius, *Mexican Immigration to the United States: The Limits of Government Intervention*, WORKING PAPERS IN U.S. MEXICAN STUDIES 5 (1981).

387. *Id.*; see *supra* note 354.

388. *Plyler v. Doe*, 457 U.S. 202, 228 n.24 (1982).

389. *Id.* (quoting *In re Alien Children Educ. Litig.*, 501 F. Supp. 544, 578 (S.D. Tex. 1980)). The desire and ability of immigrants, both legal and illegal, to obtain jobs seems to mirror the domestic population. Fierman, *supra* note 16. A study reveals that 74% of immigrant adult males hold jobs as compared to 72% of the general male population. *Id.* at 76. In addition, virtually all of the adult illegal aliens granted amnesty by 1986 IRCA are making more than the minimum wage, according to Demetrious Papademetriou, immigration expert in the Bush Administration. *Id.*

390. See generally Clark, *supra* note 204.

391. See *supra* notes 185-97 and accompanying text.

392. *All Things Considered*, National Public Radio (KCRW Santa Monica, CA, Feb. 3, 1994). Spoken by Cecilia Munoz, Senior Policy Analyst with the National Council of La Raza, which represents over 160 Latino neighborhood organizations on a network news program. *Id.*

393. See generally ALEINIKOFF & MARTIN, *supra* note 4; see also notes 78-124 and accompanying text; Schuck, *supra* note 9; James A. R. Nafziger, *The General Admission of Aliens Under International Law* 77 AM. J. INT'L. L. 804 (1983).

394. *All Things Considered*, *supra* note 392. In a speech to a group of Democratic

to address the complicated and elusive solutions to the illegal immigration issues. However, it would not be beneficial to reject the citizenship denial solution without at least mentioning some steps that could be taken to alleviate the immigration problem.

The most obvious solution to stop the infiltration is to increase the personnel involved in border patrols.<sup>395</sup> This would involve a great expense, but is the most direct solution to the problem. Attorney General Janet Reno has introduced such a plan.<sup>396</sup> Her plan calls for better trained border guards and access to better equipment to stop the illegal border crossings.<sup>397</sup> Improved training would promote a strict, but humane, treatment of those who initially succeed in crossing the border illegally.<sup>398</sup> Other commentators have suggested harsher measures such as building walls and trenches to make crossing more difficult.<sup>399</sup>

Another solution calls for the strict enforcement of deportations.<sup>400</sup> The majority of illegal aliens caught in the United States and deported

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and Republican congressmen from California, Attorney General Janet Reno, in announcing a new offensive on illegal immigration, stated, "We saw the frustration of agents who arrest, book, and return to Mexico, hundreds of people each night, only to watch them return the next night or maybe the next." *Id.*

395. The INS is severely under financed. While there are as many as 16,500 staff members working with a one billion dollar budget, it can hardly handle the nearly one million or more aliens that cross the borders into the United States annually. Brown, *supra* note 3, at A6.

Attorney General Reno announced a new two-year, \$540 million plan to beef up border patrols between the United States and Mexico. *See supra* note 389. This would amount to a 22% increase in the INS budget. *Id.* This would include over 1000 more border guards and better equipment and lighting at the border crossings. *Id.* After witnessing the problems of the border guards at two major crossing points, El Paso, Texas and San Diego, California, Reno said, "We saw agents working with radios that are not secure and equipment inferior to that used by smugglers. We saw trained law enforcement personnel who should have been on the . . . border who were instead pecking out booking papers on manual typewriters." *Id.*

396. *See All Things Considered, supra* note 392.

397. *Id.*

398. *Id.* INS Commissioner Doris Meisner has indicated that border agents will be better trained with an emphasis on civil rights. *Id.* In addition she said the agency will be creating a civilian advisory board and upgrading internal discipline. *Id.*

399. *See supra* note 16. Some people are concerned that building such obstacles will hurt the economy of the United States border towns, which benefit from Mexican nationals who cross the border to shop in American stores. *See supra* note 18 and accompanying text. Others are afraid that the border will become militarized, creating a "virtual Berlin Wall." *All Things Considered, supra* note 392 (quoting Roberto Martinez of American Friends Service Committee).

400. Some statistics have shown that the INS is lax in procuring the actual deportation of illegal aliens. *See generally* David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1318-19 (1990) (explaining problems associated with the deportation process and giving statistical evidence of the low rate of actual deportations).

through judicial proceedings are released and not actually physically escorted out of the country.<sup>401</sup> Stricter enforcement of the IRCA employer sanctions has also been proposed.<sup>402</sup> This would decrease the incentive for U.S. employers to lure undocumented workers who are willing to work for lower wages than United States citizens.<sup>403</sup>

Still other observers have decried the lengthy time of the naturalization process, especially for people from regions where illegal immigration is a problem.<sup>404</sup> For example, it can take as long as ten years for a Mexican National to legally secure United States citizenship.<sup>405</sup> Possible solutions include increasing the number of Mexicans eligible for legal immigration,<sup>406</sup> and fostering greater political and economic cooperation with Mexico and other target countries through better trade agreements.<sup>407</sup> Some advocate the creation of a national identity card and the fingerprinting of all aliens caught illegally at the border.<sup>408</sup> Additionally, politi-

401. *Id.*

402. See U.S. General Accounting Office, *Immigration Reform: Employer Sanctions and the Questions of Discrimination*, March 1990, 102-09. Active crackdowns on employers would also help prevent abuse of illegal aliens, who rarely complain about low wages or working conditions, as they are afraid of being reported and deported. *Id.* Initial indications are that IRCA has been somewhat effective in reducing the amount of illegals caught at the border. See generally Susan H. Welin, Note, *The Effect of Employer Sanctions on Employment Discrimination and Illegal Immigration*, 9 B.C. THIRD WORLD L. J. 249 (1989).

403. Welin, *supra* note 402.

404. ALEINIKOFF & MARTIN, *supra* note 4, at 305.

405. *Id.*

406. *Id.* The number of legal immigrants allowed in the United States has been periodically reduced. For example, in 1965, the United States limited the number of eligible Mexicans to only 20,000, down from a number at least twice that total in past years. "When we artificially limit the number of people who can come into the United States, we, ourselves, are responsible for illegal immigration." *Undocumented Workers in the United States*, 76 AM. SOC'Y INT'L L. PROC. 36, 41 (1982) (report of panel discussion).

407. One such solution, the NAFTA agreement, was the subject of heated debate before passage. Jill Dutt, *NAFTA Passes; House OKs Trade Pact, 234-200, After Heated Debate*, NEWSDAY, Nov. 18, 1993; Dudley Althaus, *Gore Says NAFTA a Beginning; Community of Democracies Seen for Hemisphere*, HOUS. CHRON., Dec. 2, 1993. According to economist Sherman Robinson of the university of California at Berkeley, for every percentage point increase in the value of Mexican capital in new factories, building, and businesses, approximately 25,000 less Mexicans will seek a better life in the U.S. by illegally crossing the border. Fierman, *supra* note 16.

408. See generally *All Things Considered*, *supra* note 392. Fingerprinting aliens who have been caught and deported is part of Attorney General Reno's plan to discourage illegal immigration. *Id.*



cians have called for an entry fee to be charged to every person crossing the border into the United States.<sup>409</sup>

Some approaches to alleviate the problem do not directly confront the problem of the massive flow of illegal immigrants, but rather attack the problem from a financial standpoint. Cost cutting measures, including general health care reforms, have been designed to save tax dollars spent on emergency health care and expenses due to immigrant children.<sup>410</sup> In addition, an overhaul of the welfare system and all federal entitlement programs could limit the amount of federal and state money that would be required.<sup>411</sup> However, these welfare reforms would affect not only the citizen children of illegal immigrants, but also the general population.

Protecting the laws and the national borders from invasion should be accomplished without unjustly harming the innocent child. Denying the citizenship birthright to children of illegal immigrants would fail to achieve its purpose and would injure the children. Accordingly, nativist fears should not be allowed to dictate immigration policy in light of these more humane solutions.

#### VIII. CONCLUSION

There exist powerful reasons for stopping the flow of illegal aliens. Ignoring the illegal immigrant problem is patently unfair to those immigrants who have gone through the process of becoming naturalized citizens. In addition, the increasing flow of illegal aliens arguably creates an initial and perhaps more lasting financial burden upon the states and federal coffers. However, attempting to stem the tide of illegal aliens by amending the Fourteenth Amendment to deny citizenship to native born children of illegal aliens is neither an effective nor humane answer to this problem.

First, this solution ignores the American notion of justice, that all men and women are created equal. Further, denying the citizenship birthright to children of illegal immigrant parents creates a new subclass from an already disadvantaged group. This government sanctioned inferior status, the non-citizen native born child, creates a time bomb of dissatisfaction, degradation, and suffering for future generations to defuse.

Second, this plan reinvents the detestable corruption of blood principle by passing on the consequences of the sins of the parents on to their innocent children. This concept has rightfully been dismissed as unfair and thoroughly unacceptable from the beginning of the nation.

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409. See *supra* note 18.

410. See *supra* notes 50-56 and accompanying text.

411. See *supra* notes 50-56 and accompanying text.

Finally, the plan to deny citizenship to native born children of illegal immigrants simply would not alleviate the problem of illegal immigration. The vast majority of illegal aliens come to this country for better living conditions. They come for social, political, and most importantly, economic opportunities that they cannot find in their home countries. They do not risk their life and liberty crossing the border simply to have their children obtain United States citizenship. Denying citizenship to United States born children of illegal aliens would unnecessarily harm children as well as society. It would prove to be administratively unworkable and would accomplish very little toward diminishing the tide of illegal immigrants flowing through the United States' porous borders.

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