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The Danger of Dissent: A Century of Targeting Immigrants

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The Danger of Dissent: A Century of Targeting Immigrants

65 N.Y.L. SCH. L. REV. 133 (2020–2021)

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THE DANGER OF DISSENT: A CENTURY OF TARGETING IMMIGRANTS

I. INTRODUCTION

Immigration law exists as a border guardian; its terms decide “who may enter” and “who may stay.”¹ At least, that is the basic policy assumption, for—in reality—immigration statutes are but the “blunt instrument[s]” deployed by human border guards, examiners, judges, and others assigned to operate the immigration apparatus and decide whether an individual qualifies for admission.² These bureaucratic borders are powerful and too frequently operate without transparency or judicial review.³

To complicate immigration law further, legislators also turn to immigration restrictions to realize domestic or foreign policy goals.⁴ For example, Congress reacted quickly to the 1995 bombing of the Oklahoma Federal Building by expanding the grounds for deportation to protect the public; however, the bombing proved to be the work of domestic terrorists.⁵ Both the legislative and the executive branches have repeatedly turned to immigration enforcement, particularly schemes of exclusion and deportation, to further unrelated policy goals.⁶

Immigration law exposes the vulnerability of noncitizens.⁷ When government restrictions impair the rights of noncitizens to speak, write, lecture, or advocate, the

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1. See *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018); see also *United States ex rel. Sejnensky v. Tod*, 285 F. 523, 525 (2d Cir. 1922).
 2. See Pooja R. Dadhania, *Deporting Undesirable Women*, 9 U.C. IRVINE L. REV. 53, 56 (2018).
 3. See Lenni B. Benson, *Breaking Bureaucratic Borders: A Necessary Step Toward Immigration Law Reform*, 54 ADMIN. L. REV. 203, 264–90 (2002) [hereinafter *Breaking Bureaucratic Borders*] (discussing the sources of bureaucratic borders); see also Lenni B. Benson, *Immigration Adjudication: The Missing “Rule of Law”*, 5 J. ON MIGRATION & HUM. SEC. 331, 331–55 (2017) (discussing border and immigration enforcement, its inefficiencies, and the lack of adequate procedural safeguards).
 4. See Zoe Lofgren, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL’Y REV. 349, 351 (2005) (discussing the use of immigration law for national security purposes).
 5. David Johnston, *Suspect Won’t Answer Any Questions*, N.Y. TIMES, Apr. 25, 1995, at A1, A18; Opal Tometi, *Black Lives Matter Co-Founder: The Immigration Challenge No One is Talking About*, TIME (Apr. 29, 2016), <https://time.com/4312628/immigration-1996-laws/>.
 6. See generally A. NAOMI PAIK, BANS, WALLS, RAIDS, SANCTUARY: UNDERSTANDING U.S. IMMIGRATION FOR THE TWENTY-FIRST CENTURY 74–94 (2020) (reviewing the history of immigration raids, deportations, and exclusions in the United States, including the so-called “Palmer Raids” and the travel ban); John Higham, *American Immigration Policy in Historical Perspective*, 21 L. & CONTEMP. PROBS. 213 (1956) (discussing the schemes of exclusion and deportation and how they have been used for purposes unrelated to immigration policy).
 7. See Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 3 (2008) (noting that immigrants are “a vulnerable population of human beings who come to this country in the hopes of a better life, who enter often without knowing the English language and culture, in economic deprivation, often in fear”); see also Enid Trucios-Haynes, *The Legacy of Racially Restrictive Immigration Laws and Policies and the Construction of the American National Identity*, 76 OR. L. REV. 369, 408–12 (1997) (providing examples where “the hierarchy of race and the ‘otherization’ of noncitizens of color” was reinforced through immigration policies, even though noncitizens are afforded “equal protection . . . [and] other constitutional protections”). This article uses the terms “immigrant” or “noncitizen” to distinguish people who do not hold U.S. citizenship. Our nation is home to a wide variety of noncitizens, from temporary workers or visitors to long term residents under orders of removal but allowed by executive discretion to remain. See generally *Breaking Bureaucratic Borders*, *supra* note 3 (discussing the immigration process and eligibility requirements).

greatest distinctions between the rights of noncitizens and citizens are exposed.⁸ History elucidates too many troubling examples of regulations spiraling into the xenophobic prosecution of entire immigrant communities.⁹ Rather than learning from these errors, however, the American society has acquiesced to a cyclical pattern of the usurpation of immigrant rights.¹⁰ The so-called “Palmer Raids” of 1919 and 1920¹¹ and the so-called “Muslim ban” of 2017 illustrate the consequences of allowing discrimination against noncitizens to lurk in the shadows of immigration policy for nearly 150 years.¹² After exploring the foundations of immigration law, this article primarily focuses on the Palmer Raids and political dissidents such as Emma Goldman¹³

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8. See David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, 25 T. JEFFERSON L. REV. 367, 388 (2003) [hereinafter *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*] (arguing that noncitizens are entitled to the same constitutional protections as citizens); see also Allison Hayward, *Aliens*, MIDDLE TENN. STATE UNIV.: THE FIRST AMEND. ENCYC., <https://www.mtsu.edu/first-amendment/article/904/aliens> (last visited Apr. 16, 2021) (outlining the development of law relating to First Amendment rights for noncitizens). See JAMES MORTON SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* (1956) and JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925* (Atheneum 2d ed. 1973), for a detailed history of attacks on noncitizens for political activity or speech.
 9. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring) (“But whether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress. Courts do enforce the requirements imposed by Congress upon officials in administering immigration laws . . . and the requirement of Due Process may entail certain procedural observances.”) (citations omitted).
 10. See PAIK, *supra* note 6, at 74–94; see also David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 988–1003 (2002) [hereinafter *Enemy Aliens Article*].
 11. The Palmer Raids, named after Attorney General A. Mitchell Palmer, targeted immigrants and immigrant rights activists suspected of having ties to communism. See generally LOUIS F. POST, *THE DEPORTATIONS DELIRIUM OF NINETEEN-TWENTY: A PERSONAL NARRATIVE OF AN HISTORIC OFFICIAL EXPERIENCE* (Charles H. Kerr & Co. 1923). For a more detailed discussion of the Palmer Raids, see *infra* Part III.
 12. See David Cole, *No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint*, 75 U. CHI. L. REV. 1329, 1349 (2008) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007)) (“The history of emergencies in the United States reflects a consistent pattern in which government officials target liberty-infringing security measures at the most vulnerable, usually foreign nationals, while reassuring the majority that their own rights are not being undermined. In World War I, the government targeted peace activists; in the Palmer Raids, Eastern European immigrants thought to have Communist affiliations; in World War II, Japanese immigrants and Japanese-Americans; in the Cold War, Communists; and in the raids launched in the wake of 9/11, Arab and Muslim immigrants.”).
 13. Emma Goldman (1869–1940) was a well-known anarchist born in present-day Lithuania. *Emma Goldman*, JEWISH WOMEN'S ARCHIVE: WOMEN OF VALOR, <https://jwa.org/womenofvalor/goldman> (last visited Apr. 16, 2021). Goldman emigrated to the United States in 1885, first landing in Rochester, New York, and then in New York City by 1889. *Id.* It was in New York City where she “plunged immediately into a life of political meetings, labor demonstrations and intellectual discussions.” *Id.* She advocated for free speech, women's equality and independence, workers' rights, and union organizing. *Id.* Many powerful political and economic figures despised her outspoken support of these unpopular ideas, which led to multiple arrests. *Id.* For more information about Goldman, see *infra* Part III.

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and Alexander Berkman;¹⁴ it also discusses some of the contemporary attacks on the liberty of immigrants in 2019 and 2020.

II. IMMIGRATION LAW FOUNDATIONS

American leaders have long recognized that “it is [in] the interest of the United States to open every possible [avenue to] emigration from abroad.”¹⁵ The Framers hoped that the country would become a bastion of liberty.¹⁶ Although early American immigration history is far from a model of equality,¹⁷ the United States was largely accessible for almost a century due to the absence of a comprehensive federal immigration scheme before 1875.¹⁸

Although the Alien and Sedition Acts of 1798 were the first restrictive immigration statutes, which, among other things, authorized the expulsion of any alien the president

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14. Alexander (Sasha) Berkman (1870–1936), a well-known anarchist born in present-day Lithuania, immigrated to New York City at the age of 18. *Alexander (Sasha) Berkman (1870–1936)*, PBS: AM. EXPERIENCE, <https://www.pbs.org/wgbh/americanexperience/features/goldman-alexander-sasha-berkman-1870-1936/> (last visited Apr. 16, 2021). He became a prominent activist in civil rights and social justice movements after attempting to assassinate Henry Clay Frick, who killed several civilians in response to a steel strike. *Id.* After spending fourteen years in prison for the attempted murder, Berkman was released. *Id.* He continued to participate in political movements up until 1936, when he committed suicide. *Id.* For more information about Berkman, see *infra* Part III.
 15. *Alexander Hamilton's Final Version of the Report on the Subject of Manufactures* (Dec. 5, 1791), in 14 THE PAPERS OF ALEXANDER HAMILTON 230–340 (Colum. Univ. Press 1966) (second alteration in original) (arguing that the government must promote immigration if the United States is to develop into a global manufacturing and industrial power because it must overcome the “scarcity of hands and dearth of labour” stemming from its small domestic population); see also, e.g., Miriam Jordan et al., *At Trump's Florida Resort Empire, a Quiet Effort to Eliminate an Undocumented Work Force*, N.Y. TIMES (Apr. 9, 2019), <https://www.nytimes.com/2019/04/09/us/mar-a-lago-undocumented-workers.html> (discussing President Donald Trump's personal use and political support of temporary visa programs that, among other things, allow domestic employers to hire foreign non-agricultural workers on one-time, seasonal, peak load, or intermittent bases).
 16. See Letter from John Adams to Edmund Jenings (Mar. 24, 1783), in 14 THE ADAMS PAPERS 360–61 (Gregg L. Lint eds., Harv. Univ. Press 2008) (“[O]ur Country will indeed be an Asylum for all good Men, and will produce Virtues, Arts and Talents in as great Perfection as human Nature and this World were made for.”); see also Anne E. Pettit, “One Manner of Law”: *The Supreme Court, Stare Decisis and the Immigration Law Plenary Power Doctrine*, 24 FORDHAM URB. L.J. 165, 175 (1996) (“In America's early days, Congress, insofar as it considered the question at all, believed that immigration was a natural right inherent in the peoples of the world.”) (footnote omitted).
 17. See, e.g., Rhonda V. Magee, *Slavery As Immigration?*, 44 U.S.F. L. REV. 273, 278 (2009) (“As seen through the lens of contemporary immigration law, Africans transported to British North America under the system of transatlantic slavery were in fact a certain kind of immigrant—what we would today call a ‘forced migration immigrant.’”) (footnote omitted).
 18. See *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (“The Nation's first 100 years was a period of unimpeded immigration.”) (citations omitted) (internal quotations omitted). *But see* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1833, 1840–80 (1993) (debunking the notion that “borders of the United States were legally open until the enactment of federal immigration legislation in the 1870s and 1880s” by discussing “five major categories of immigration policy implemented by state[s]” that later played a role in formulating federal legislation).

deemed dangerous,¹⁹ ultimately few were prosecuted and none were deported.²⁰ But in the limited legislative history that leads up to the passage of these acts, the seeds of seeing the foreigner as a source of political contagion are clear. In 1798, members of the Federalist Party in Congress enthusiastically passed these statutes, authorizing arrest and deportation for political activity.²¹ The rhetoric of fear of the “Wild Irish” or the “radical” French revolutionary was bandied about in the halls of Congress to justify passing legislation authorizing the president to deport government critics.²² This power to deport an enemy alien has survived in some form since this early period.²³

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19. The Alien and Sedition Acts of 1798 were composed of four separate acts: the Naturalization Act of 1798, ch. 54, 1 Stat. 566; the Alien Friends Act of 1798, ch. 58, 1 Stat. 570; the Alien Enemies Act of 1798, ch. 66, 1 Stat. 577; and the Sedition Act of 1798, ch. 74, 1 Stat. 596. *The Alien and Seditions Act*, PBS: AM. EXPERIENCE, <https://www.pbs.org/wgbh/americalexperience/features/adams-alien-and-seditions-act/> (last visited Apr. 15, 2021) [hereinafter *Alien and Seditions Act – PBS*].

The Naturalization Act increased from five to [fourteen] the number of years that immigrants must wait before obtaining U.S. citizenship and the right to vote. The Alien Acts [were] comprised [of] two separate acts: The Alien Friends Act, which empowered the president to deport any alien whom he considered dangerous; and the Alien Enemies Act, which allowed the deportation of any alien who hailed from a country at war with the United States. The Sedition Act authorized the punishment of any person authoring or printing ‘false, scandalous and malicious writing’ against the Congress or the president which was intended to ‘defame [. . .] or to bring them, or either of them, into contempt or disrepute; or to excite against them [. . .] the hatred of the good people of the United States.

Id. Some provisions of this legislation remain in effect today. See 50 U.S.C. §§ 21–24; see also *Alien and Sedition Acts*, HIST. (Nov. 9, 2009), <https://www.history.com/topics/early-us/alien-and-sedition-acts> (“By 1802, all of the Alien and Sedition Acts had been repealed or expired, save for the Alien Enemies Act, which has stayed on the books.”).

20. See *Alien and Seditions Act – PBS*, *supra* note 19 (reporting that “[t]he Alien Acts were never used” and “[s]ixteen indictments resulted from the Sedition Act”).
21. See Edward C. Carter II, *A “Wild Irishman” Under Every Federalist’s Bed: Naturalization in Philadelphia, 1789–1806*, 94 PA. MAG. HIST. & BIOGRAPHY 331, 334 (1970) (recalling the so-called “Wild Irishman” speech by Boston congressman Harrison Gray Otis, who “did ‘not wish to invite hords of wild Irishmen, nor the turbulent and disorderly of all parts of the world, to come here with a view to disturb our tranquility, after having succeeded in the overthrow of their own governments’”) (footnote omitted); see also EDWARD P. HUTCHINSON, *LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798–1965*, at 12–16 (1981) (noting that it was “[t]he Federalists[] who had pushed through the antialien legislation”). See generally GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 25–44 (2004) (discussing the “antagonism between the [Republican and Federalist] parties” and the “bitterness of the debate over the Alien and Sedition Acts of 1798”).
22. See Patricia I. Folan Sebben, *U.S. Immigration Law, Irish Immigration and Diversity: Céad Míle Fáilte (A Thousand Times Welcome)?*, 6 GEO. IMMIGR. L.J. 745, 748 (1992) (“These Alien Acts . . . were meant to discourage the granting of U.S. citizenship to French and Irish immigrants because of their ‘radical tendencies[.]’”) (footnote omitted).
23. See Andrew Glass, *Congress Initiates Alien and Sedition Acts, June 18, 1798*, POLITICO (June 18, 2018), <https://www.politico.com/story/2018/06/18/this-day-in-politics-june-18-1789-647018> (“All but one of the acts were allowed to expire after the Democratic-Republican party of President Thomas Jefferson came to power in 1801. . . . The Alien Enemies Act, however, which was revised in 1918 during World War I, remains in effect to this day.”).

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Following the Alien and Sedition Acts, Congress did not pass further restrictive immigration legislation until 1875, almost eight decades later.²⁴ In 1882, Congress enacted the first general federal immigration law.²⁵ That same year, Congress passed the Chinese Exclusion Act of 1882, banning Chinese immigrants who were once welcomed in the United States.²⁶ In 1888, an expansion of the Chinese Exclusion Act aimed the federal government's dormant deportation power at Chinese people "not lawfully entitled to be or remain in the United States."²⁷

In 1889, the Supreme Court held that Congress had the constitutional power to adopt the exclusionary statutes and "proclaimed the political branches' plenary power over immigration law."²⁸ Soon thereafter, in 1893, the Court extended that plenary authority beyond precluding admission, to include the power to expel or deport aliens.²⁹ Congress, and later the executive branch, wielded this apparently unlimited power³⁰ to expand the categories of excludable and deportable noncitizens.³¹

24. See Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (barring convicts and prostitutes from entering the United States); see also *Kleindienst v. Mandel*, 408 U.S. 753, 761 (1972) (noting that prior to the Act of March 3, 1875, "migration to the United States was unrestricted").

25. See Immigration Act of 1882, ch. 376, 22 Stat. 214 (banning idiots, lunatics, and any person likely to become a public charge).

26. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943) (prohibiting Chinese laborers from immigrating to the United States for a period of ten years).

27. Act of Sept. 13, 1888, ch. 1015, § 13, 25 Stat. 476, 479 (repealed 1943). The law excluded even Chinese immigrant residents returning to the United States with certificates explicitly promising readmission. JULIA ROSE KRAUT, *THREAT OF DISSENT: A HISTORY OF IDEOLOGICAL EXCLUSION AND DEPORTATION IN THE UNITED STATES* 30–31 (2020) [hereinafter *THREAT OF DISSENT*].

28. Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 *YALE L.J.* 2134, 2184 (2014) (footnote omitted); see *Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606–11 (1889).

29. See *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) ("The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.").

30. The plenary power doctrine refers to the deference courts afford to the political branches in immigration decisions. See D. Bruce Janzen, Jr., *First Impressions and Last Resorts: The Plenary Power Doctrine, the Convention Against Torture, and Credibility Determinations in Removal Proceedings*, 67 *EMORY L.J.* 1235, 1246–54 (2018) (discussing the doctrine with respect to immigration law). Courts afford the government deference in the sphere of immigration "so long as [government] officers acted within the authority conferred upon them by Congress." *Lem Moon Sing v. United States*, 158 U.S. 538, 546 (1895); see also *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens.") (citation omitted).

31. See, e.g., Immigration Act of 1891, ch. 551, §§ 1, 8, 26 Stat. 1084, 1084–85 (providing the federal government with the exclusive authority to conduct immigration inspections and the ability to exclude those with certain loathsome or dangerous contagious diseases); Immigration Act of 1903 (Anarchist Exclusion Act of 1903), ch. 1012, § 2, 32 Stat. 1213, 1214 (amended 1918) (barring admission of, among others, insane persons, epileptics, professional beggars, and anarchists); Immigration Act of 1907, ch. 1134, § 2, 34 Stat. 898, 898–99 (expanding excludable classifications to include unaccompanied children, the feeble-minded, persons infected with tuberculosis, individuals that previously admitted to committing a crime of moral turpitude, and women arriving to the United States to pursue prostitution or other immoral activities).

After Leon Czolgosz fatally shot President William McKinley in 1901, members of Congress demanded harsher immigration controls.³² Theodore Roosevelt, who became president after the assassination, wrote:

I earnestly recommend to the Congress that in the exercise of its wise discretion it should take into consideration the coming to this country of anarchists or persons professing principles hostile to all government They and those like them should be kept out of this country; and if found here they should be promptly deported to the country whence they came.³³

Czolgosz was a U.S.-born anarchist of Polish descent, and some emphasized his foreign-sounding name and association with known foreign-born anarchists.³⁴ After the shooting, Czolgosz publicly declared that he was inspired to shoot McKinley by the anarchist Emma Goldman.³⁵ Several prominent anarchist writers were subsequently arrested and their homes were searched, including Goldman, who was detained for two weeks.³⁶ In 1901, Senator Julius Burrows of Michigan introduced a bill calling for the deportation of anarchists,³⁷ which Congress adopted in 1903.³⁸ It created a new power to both exclude and expel foreign-born people whose speech or activities could be associated with anarchism.³⁹

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32. See Arthur L. Rizer, III, *The Ever-Changing Boogeyman: How Fear Has Driven Immigration Law and Policy*, 77 LA. L. REV. 243, 251 (2016) (“In response to [President McKinley’s] assassination, Congress immediately enacted laws that allowed the government to remove any anarchist from the United States . . .”).
33. THEODORE ROOSEVELT, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, WITH THE ANNUAL MESSAGE OF THE PRESIDENT TRANSMITTED TO CONGRESS DECEMBER 3, 1901, H.R. Doc. No. 57-1, pt. 1 & 2, at XII (Gov’t Printing Off. 1902).
34. See *Assassin Know [sic] As a Rabid Anarchist*, N.Y. TIMES, Sept. 8, 1901, at A4 (reporting that “without a doubt Czolgosz [was] an Anarchist”); see also *McKinley is Shot Down*, CHI. EAGLE, Sept. 14, 1901, at 1 (reporting on the shooting of President McKinley).
35. See *McKinley is Shot Down*, *supra* note 34, at 1; see also Julia Rose Kraut, *Global Anti-Anarchism: The Origins of Ideological Deportation and the Suppression of Expression*, 19 IND. J. GLOB. LEGAL STUD. 169, 170 (2012) [hereinafter *Global Anti-Anarchism*] (“Czolgosz claimed he was a disciple of the notorious anarchist leader and lecturer Emma Goldman.”) (footnote omitted). Emma Goldman did not know Czolgosz well, but wrote an editorial on his behalf to explain why someone would turn to political assassination. See Emma Goldman, *The Tragedy at Buffalo*, FREE SOC’Y, Oct. 6, 1901, at 1, reprinted in EMMA GOLDMAN, 1 EMMA GOLDMAN: A DOCUMENTARY HISTORY OF THE AMERICAN YEARS: MADE FOR AMERICA 1890–1901, at 471–78 (Candace Falk et al. eds., Univ. Cal. Press 2003).
36. See EMMA GOLDMAN, 1 EMMA GOLDMAN: A DOCUMENTARY HISTORY OF THE AMERICAN YEARS: MADE FOR AMERICA 1890–1901, at 74–75 (Candace Falk et al. eds., Univ. Cal. Press 2003) (discussing Goldman’s arrest after being linked to Czolgosz); see also *She Fought the Law*, PBS: AM. EXPERIENCE, <https://www.pbs.org/wgbh/americanexperience/features/goldman-she-fought-law/> (last visited Apr. 13, 2021) (same).
37. *Bill Against Anarchists. Senator Burrows Will Introduce One Today Providing for the Deportation of Alien Disturbers*, N.Y. TIMES, Dec. 3, 1901, at 1.
38. Immigration Act of 1903 (Anarchist Exclusion Act of 1903), ch. 1012, § 21, 32 Stat. 1213 (amended 1918); see also HUTCHINSON, *supra* note 21, at 128–33 (discussing the bill).
39. See Anarchist Exclusion Act of 1903, § 2 (excluding “anarchists[] or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all government or of all

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One of the first tests of this statute came when Goldman and other political activists invited John Turner, an English union leader, to conduct a U.S. speaking tour in 1903.⁴⁰ The government allowed Turner to enter the country, but later arrested him and seized his papers just after his speech at the Murray Hill Lyceum in New York.⁴¹ He was searched and the police found a copy of *Free Society*, an anarchist newspaper.⁴² Turner was held at Ellis Island and then released on bail as he fought his deportation under the 1903 anarchist deportation statute.⁴³ In 1904, the Supreme Court reaffirmed the plenary authority of Congress to both prevent admission and deport, and knocked aside Turner's constitutional claims.⁴⁴

Ultimately, very few people were excluded or deported under the 1903 statute.⁴⁵ In 1917, Congress refined the law and created the first formal list of criteria that made people deportable based on conduct occurring within the United States.⁴⁶ The following year, the Anarchist Act of 1918 was promulgated, extending exclusion and deportation provisions to subversive aliens.⁴⁷ The 1918 Act allowed the government to deport those

forms of law, or the assassination of public officials"). This statute limited the power to deport to the first three years of physical residence within the United States. *Id.* § 21. In 1906, Congress amended the statute to remove the time limit. See Naturalization Act of 1906 (Alien Immigration Act of 1906), ch. 3592, 34 Stat. 596 (repealed 1940).

40. United States *ex rel.* Turner v. Williams, 194 U.S. 279, 280–83 (1904).

41. THREAT OF DISSENT, *supra* note 27, at 50–55 (discussing the events leading up to and after Turner's arrest).

42. *Id.* at 42, 51; see also Fozzie, Blog, *The Firebrand/Free Society Journal*, LIBCOM.ORG (Apr. 12, 2020), <https://libcom.org/library/firebrand-free-society-journal> (providing background on *Free Society*).

43. *Anarchist Turner Tells of His Fight; Was Starred at on Ellis Island as if a Wild Animal*, N.Y. TIMES, Mar. 14, 1904, at 14; Sidney Fine, *Anarchism and the Assassination of McKinley*, 60 AM. HIST. REV. 777, 796 (1955).

44. See *Turner*, 194 U.S. at 289–90.

45. See THREAT OF DISSENT, *supra* note 27, at 60–61 (describing the problems with proving that a person was an anarchist and with the lack of a coordinated federal police force that could track and deport anarchists).

46. See Immigration Act of 1917, ch. 29, § 19, 39 Stat. 874, 889–90 (repealed 1952).

47. Immigration Act of 1918 (Alien Anarchists Exclusion Act of 1918), ch. 186, 40 Stat. 1012; see also *Kleindienst v. Mandel*, 408 U.S. 753, 761 (1972) (discussing the history of political and ideological exclusion). The exact language of the 1917 statute raised the possibility that a person could defend themselves as only a philosophical anarchist, as opposed to one who was committed to violent actions. See, e.g., THREAT OF DISSENT, *supra* note 27, at 68 ("In 1918, Frank Lopez, an anarchist from Spain, challenged his deportation under the Immigration Act of 1917. . . . [H]e claimed he was a philosophical anarchist."); see also ALLAN ANTLIFF, ANARCHIST MODERNISM 4 (Univ. of Chi. Press, 2001) ("In the late 1800s [Benjamin] Tucker[, an editor of the *Liberty* journal,] coined the term 'philosophical anarchism' to distinguish theories of peaceful evolutionary anarchism, such as mutualism, from the movement's revolutionary variants, notably anarchist communism."). In the 1918 act, a single comma was replaced, which allowed the government to deport those who admitted they were anarchists or those the government believed to be anarchists. Compare Immigration Act of 1917, § 3 ("[A]narchists, or persons who believe in or advocate the overthrow by force of violence of the Government of the United States . . ."), with Alien Anarchist Exclusion Act of 1918, § 1 ("That aliens who are anarchists; aliens who believe in or advocate for the overthrow by force or violence of the Government of the United States . . ."). "The comma after 'anarchists' in the Immigration Act of 1917 could be interpreted to imply that the clause that followed the comma was the definition of an anarchist. . . . The revision in the [Alien] Anarchist Exclusion Act replaced the comma with a semicolon." THREAT OF DISSENT, *supra* note 27, at 69 (footnotes omitted).

who admitted they were anarchists or those the government believed to be anarchists.⁴⁸ The rapid buildup and codification of restrictive immigration and deportation policies placed immigration law atop a political powder keg, only a spark away from fulminating.

III. THE PALMER RAIDS

The setting of 1919 will sound distinctly familiar today: a viral pandemic infecting and killing people worldwide,⁴⁹ peaceful demonstrators filling U.S. city streets to protest institutional racism after a crescendo of police violence against minority communities,⁵⁰ and discriminatory government policies targeting immigrants for exclusion and deportation.⁵¹

In 1919, the United States also faced social and economic upheaval. President Woodrow Wilson was in the White House, but will suffer a debilitating stroke.⁵² His administration was preoccupied with international affairs and an attempt to create the League of Nations.⁵³ Domestically, the United States has suffered through the great

48. See Alien Anarchist Exclusion Act of 1918, §§ 1–2 (“[A]liens who are anarchists . . . shall be excluded from admission into the United States.”); see also *THREAT OF DISSENT*, *supra* note 27, at 69.

49. Considered the most severe pandemic prior to COVID-19, the novel H1N1, or Spanish flu, spread to over five hundred million people worldwide and claimed the lives of over fifty million people, including approximately six hundred and seventy-five thousand Americans. See *History of 1918 Flu Pandemic*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/pandemic-resources/1918-commemoration/1918-pandemic-history.htm> (last updated Mar. 21, 2018); Chelsey Cox, *Fact Check: COVID-19 is Deadlier than the 1918 Spanish Flu and Seasonal Influenza*, USA TODAY (Aug. 25, 2020), <https://www.usatoday.com/story/news/factcheck/2020/08/20/fact-check-covid-19-deadlier-than-1918-spanish-flu-seasonal-flu/3378208001/>. International responses varied and included measures such as isolation, quarantines, good personal hygiene, the use of disinfectants, and limitations on public gatherings. *History of 1918 Flu Pandemic*, *supra*.

50. See Carol Anderson, *In 1919, The State Failed to Protect Black Americans. A Century later, it's Still Failing*, THE GUARDIAN (June 2, 2020), <https://www.theguardian.com/us-news/commentisfree/2020/jun/02/in-1919-the-state-failed-to-protect-black-americans-a-century-later-its-still-failing> (“Groups of armed white men hunted down and slaughtered hundreds of black Americans across the country. The wave of lynchings and race riots came to be known as the Red Summer. The black community did its best to fight back, without protection from the state. In some cases, police actively participated in the lynchings. The US attorney general, A. Mitchell Palmer, claimed that leftwing radicals were behind the uprisings—a false charge and one that further endangered African American lives.”).

51. See *Editorial: What's Really Propelling Trump's Immigration Stances*, L.A. TIMES (Feb. 28, 2017), <https://www.latimes.com/opinion/editorials/la-ed-immigration-trump-bannon-20170228-story.html> (comparing the “clampdown on . . . civil liberties” due to restrictive immigration policies during the 1920s to similar policies promulgated by the Trump administration).

52. See Arthur S. Link, *Woodrow Wilson: A Cautionary Tale*, 30 WAKE FOREST L. REV. 585, 586–87 (1995) (“[President Wilson] suffered a devastating stroke on October 2, 1919. The stroke, which was due most likely to the infarction of the interior cerebral artery, resulted in paralysis of the left side of Wilson’s body.”).

53. See Joseph C. Sweeney, *Guantanamo and U.S. Law*, 30 FORDHAM INT’L L.J. 673, 687 n.63 (2006) (“[President Wilson] suffered a stroke on a speaking tour in favor of the League of Nations . . . and was incapacitated for the last eighteen months of his term.”). The League of Nations was “[a]n organization of countries formed in 1919 to promote international cooperation and peace.” *League of Nations*, BLACK’S LAW DICTIONARY (11th ed. 2019). Although President Wilson endorsed it, the United States never joined. *Id.* The League “dissolved in 1946 and turned its assets over to the United Nations.” *Id.*

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Spanish flu⁵⁴ and the economic dislocation caused by the return of thousands of soldiers after World War I.⁵⁵ Technology and the industrial revolution continued apace to alter labor realities.⁵⁶ Many in the budding labor movements were anxious and impatient, seeking fairer wages, better working conditions, and limits on exploitation.⁵⁷

The United States had entered the Great War in 1917 with strong domestic support. While American soldiers fought in Europe, the government branded domestic support for pacifism politically radical, un-American, and subversive. Burgeoning homegrown social, communist, and anarchist movements that sought the redistribution of wealth and power were of utmost concern and deemed “as dangerous as a contagious disease.”⁵⁸

Congress responded to these political critiques with the Espionage Act of 1917, which expanded the power of the executive to arrest, detain, and—later—deport those who threatened the war effort or belonged to organizations deemed disloyal.⁵⁹ Courts quickly affirmed this newly minted scheme, proclaiming the president’s authority to

54. See *supra* note 49 and accompanying text.

55. See Jennifer Jolly-Ryan, *Balancing Interests and Risk of Error: What Quarantine Process is Due After Ebolamania*, 96 NEB. L. REV. 100, 112–13 (2017) (“As World War I ended, thousands of soldiers came home from Europe, bringing the Spanish Flu virus with them. The Spanish Flu occurred in three different waves: the first beginning in the spring of 1918, the second in the fall of 1918, and the third in the spring of 1919.”) (footnotes omitted); see also Arjun K. Jaikumar, Note, *Red Flags in Federal Quarantine: The Questionable Constitutionality of Federal Quarantine After NFIB v. Sebelius*, 114 COLUM. L. REV. 677, 693 (2014) (“The outbreak of the devastating Spanish [flu] in 1918 and 1919 . . . underscored the successes of coordinated and timely public health responses, as well as the devastation caused by delayed action.”) (footnote omitted).

56. See Steven G. Brandl, *Back to the Future: The Implications of September 11, 2001 on Law Enforcement Practice and Policy*, 1 OHIO STATE J. CRIM. L. 133, 137–38 (2003) (“By the mid-1800s, America was in the firm grip of the Industrial Revolution. The economy was increasingly based on capital, energy, and raw materials. . . . Industrialism affected every aspect of human life. . . . With the construction of factories came the creation of cities as work centers. The population of cities grew rapidly through immigration and with people moving to cities to find work. For the first time, the ‘urban’ problems of health, sanitation, and crime became a major concern to residents.”).

57. Erin Blakemore, *Why the Great Steel Strike of 1919 was One of Labor’s Biggest Failures*, HIST. (Sept. 23, 2019), <https://www.history.com/news/steel-strike-of-1919-defeat>; see also Bradley C. Bobertz, *The Brandeis Gambit: The Making of America’s “First Freedom,” 1909–1931*, 40 WM. & MARY L. REV. 557, 595 (1999) (discussing the 1919 labor movements). In 1919, there were hundreds of labor actions: strikes, slowdowns, and walkouts. See Blakemore, *supra*; see also William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States*, 2001 SUP. CT. REV. 375, 388 (2001). In the Western United States, the dockworkers called for a general strike that paralyzed trade. See Bobertz, *supra*. Labor unrest joined hands with racial animus, and Black and Asian workers were the targets of vigilantes and mob violence. See *id.*; see also Keisha N. Blain, *Violence in Minneapolis is Rooted in the History of Racist Policing in America*, WASH. POST (May 30, 2020), <https://www.washingtonpost.com/outlook/2020/05/30/violence-minneapolis-is-rooted-history-racist-policing-america/>.

58. See *Global Anti-Anarchism*, *supra* note 35, at 181–82 (“Thus, as a disease, anarchism had to be prevented, and the infected quarantined and expelled.”). Indeed, in support of the war effort, President Wilson declared that “[t]he world must be made safe for democracy.” Woodrow Wilson, President, War Message to Congress (Apr. 2, 1917).

59. See Espionage Act of 1917, ch. 30, § 3, 40 Stat. 217, 219 (making it a crime to “willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces”).

deport aliens and retroactively denaturalize subversive U.S. citizens.⁶⁰ Judicial decisions legitimized targeted deportations and emboldened the Department of Justice (DOJ) to expand expulsion programs.⁶¹ After the War ended, labor activists and minority political groups continued their advocacy with a series of strikes that shook the nation, which increased the hostility towards workers and the foreign-born.⁶²

Throughout the late 1890s and then during World War I, many claimed, not for the first time, that immigration was at the root of social and labor problems, and in some states unemployment was often blamed on immigrant workers.⁶³ Immigration was still mostly unrestricted in the first seventeen years of the twentieth century.⁶⁴ In 1917, Congress passed a much more comprehensive bill aimed at preventing the immigration of indigents and “imbeciles.”⁶⁵ It cemented much of the racial and national origin discrimination that had become part of immigration admissions since 1882, with the Chinese Exclusion Act and then the Asiatic exclusion statutes, by

Legislation during this period built on earlier legislation that already provided for the exclusion of “anarchist” immigrants. *See supra* notes 46–48 and accompanying text.

60. *See, e.g.*, *United States v. Stuppello*, 260 F. 483, 485–86 (W.D.N.Y. 1919) (revoking the citizenship of a naturalized American “anarchist” and observing that “a disbeliever in organized government is barred . . . from the privilege of naturalization, regardless of whether or not he is also an anarchist of any kind.”); *Ex parte Pettine*, 259 F. 733, 735–36 (D. Mass. 1919) (ordering deportation of two philosophical anarchists and stating that the “presence of alien anarchists is offensive to our society and dangerous to the government”).
61. *See The Attorney-General and Aliens: Unlimited Discretion and the Right to Fair Treatment*, 60 *YALE L.J.* 152, 157 (1951) (noting that “automatic expulsion” was borne from the judicial refusal to hold the DOJ accountable).
62. Harlan Grant Cohen, Note, *The (Un)favorable Judgment of History: Deportation Hearings, the Palmer Raids, and the Meaning of History*, 78 *N.Y.U. L. REV.* 1431, 1455–56 (2003) (describing the labor strikes of 1919 and 1920).
63. *See, e.g.*, BETH LEW-WILLIAMS, *THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA* 35–36 (2018) (“The encroachment of Chinese small businesses began to disquiet white employers as well as their white employees, widening the class base of the anti-Chinese movement.”) (footnote omitted). California activists pushed for the first major federal immigration restrictions, calling for a ban on the entry of Chinese workers. *See id.* at 40–45 (noting that “it became clear that federal action would be necessary to halt Chinese migration” after the West Coast states failed in enacting discriminatory state statutes).
64. *See* Alasdair Roberts, *Globalization and the Growth of Executive Power: An Old Story*, 24 *IND. J. GLOBAL LEG. STUD.* 497, 502 (2017) (“Immigration into the United States was largely unrestricted at the start of the twentieth century—except for immigration from China, which was prohibited by Congress in 1882. Until the early 1890s, immigrants never met a federal official when they landed at an American port. Between 1900 and 1909, roughly eight hundred thousand people arrived in the United States every year—an extraordinary number, given that the total population was only about eighty million.”) (footnote omitted).
65. Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 875–78 (repealed 1952); *see also* Roberts, *supra* note 64, at 502 (“From 1917 until the 1960s, the country was seized with the fear that ‘subversive red elements’ had insinuated themselves into major American institutions. The result of these anxieties was another buildup of executive power, through the adoption of immigration laws that granted broad discretion over the entry and removal of aliens . . .”).

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barring immigration from most of Asia and the Pacific islands.⁶⁶ Despite years of calls to restrict immigration, Congress had only been willing to curtail these disfavored racial groups and one other class—“anarchists.”⁶⁷

Of course, Congress may adopt legislation drawing lines and creating limits on immigration, and enforcement falls to the executive.⁶⁸ But how do you identify an anarchist? How do you determine who is Chinese—a subject of the emperor of China—and who is American, but born of Chinese parents? As immigration law grew more complex, so too did the mechanisms of enforcement.⁶⁹ A government inspector must determine who is covered by the statute but that official may be wrong; in the early twentieth century, immigrants refused admission were usually able to secure administrative review at the port of entry.⁷⁰

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66. See Immigration Act of 1917, § 3 (excluding “persons who are natives of islands not possessed by the United States adjacent to the Continent of Asia . . . or who are natives of any country, province, or dependency situate [sic] on the Continent of Asia”); see also Erika Lee, *The “Yellow Peril” and Asian Exclusion in the Americas*, 76 PAC. HIST. REV. 537, 558–59, 559 n.8 (2007) (outlining Anti-Asian policies between 1882 and 1917).
67. See Immigration Act of 1903 (Anarchist Exclusion Act of 1903), ch. 1012, § 2, 32 Stat. 1213, 1214 (amended 1918); see, e.g., *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904) (rejecting a First Amendment challenge to congressional authority to exclude anarchists).
68. See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 794 (1977) (“Nothing . . . suggests that Congress has anything but exceptionally broad power to determine which classes of aliens may lawfully enter the country.”) (citations omitted); *Ex parte Pettine*, 259 F. 733, 734 (D. Mass. 1919) (citations omitted) (“Supreme Court decisions . . . fully support the idea of the constitutional power of Congress to confer upon the executive branch of the government authority to deport aliens whose teachings or doings are dangerous to our government and to our institutions.”). The Department of Homeland Security (DHS), the federal agency responsible for national security, was created by Congress in 2002 and falls under purview of the executive. Lenni B. Benson, *As Old as the Hills: Detention and Immigration*, 5 INTERCULTURAL HUM. RTS. L. REV. 11, 32 n.58 (2010) [hereinafter *As Old as the Hills*]; *U.S. Department of Homeland Security*, USAGov, <https://www.usa.gov/federal-agencies/u-s-department-of-homeland-security> (last visited Apr. 16, 2021). The DHS now controls most agencies responsible for immigration law enforcement. See *DHS Public Organizational Chart*, DEP’T OF HOMELAND SEC. (July 13, 2015), <https://www.dhs.gov/organizational-chart> (select “Department Organizational Chart” hyperlink).
69. See Chinese Exclusion Act, ch. 126, §§ 8–9, 22 Stat. 58, 60–61 (1882) (repealed 1943) (describing immigration enforcement procedures for vessels arriving in the United States with Chinese passengers); see also Aaron Korthuis, *Detention and Deterrence: Insights from the Early Years of Immigration Detention at the Border*, 129 YALE L.J.F. 238, 246–48 (2019) (same). In the early twentieth century, much of the immigration law enforcement fell on the Department of Labor—there was no large scale enforcement through the Departments of Justice or State. See Judson MacLaury, *A Brief History: The U.S. Department of Labor*, U.S. DEP’T OF LAB., <https://www.dol.gov/general/aboutdol/history/dolhistoxford#> (last visited Apr. 17, 2021); see also *As Old as the Hills*, *supra* note 68, at 32 n.58 (2010) (“The authority for managing the immigration laws of the United States was not transferred from the Department of Labor to the Department of Justice until 1940.”).
70. See Immigration Act of 1891, ch. 551, § 8, 26 Stat. 1084, 1085–86; see also HIDETAKA HIROTA, *EXPPELLING THE POOR: ATLANTIC SEABOARD STATES & THE 19TH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY* 203 (2017) (“Throughout the nineteenth century, the landing of immigrants in these states depended on state officials’ subjective judgment on their conditions at the time of arrival.”); see also *Ekiu v. United States*, 142 U.S. 651, 662–64 (1892) (“But the statute does not require [immigration] inspectors to take any testimony at all, and allows them to decide on their own inspection and examination the question of the right of any alien immigrant to land.”).

Still, the voices petitioning for immigration restrictions were uneasy. There were too many immigrants who were out-of-work and poor, too many immigrants arrested for vagrancy, and too many immigrants willing to break a strike or cross a picket line.⁷¹ Congress heard the clamor for more restrictions and authorized the executive in 1919 to deport, not just refuse admission.⁷² Congress also lifted a three-year statute of limitations on deportations if government agents should not have permitted entry in the first place.⁷³ Lift a statute of limitations, and suddenly you have a world of immigrants who are vulnerable, deportable, and subject to expulsion.⁷⁴ However, to achieve that goal, the government must arrest and prosecute.⁷⁵ Perhaps these substantive new powers would have lain dormant had it not been for the bombs.

The powder keg finally blew in the spring of 1919, when anarchists unleashed two waves of targeted bombings across America.⁷⁶ The first mail bombs reached their targets at the end of April.⁷⁷ About a month later, anarchists dispatched the

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71. See Joseph Haker & Andrew Paul, *The Problem with Fearmongering About Russian Electoral Interference*, WASH. POST (Feb. 24, 2020), <https://www.washingtonpost.com/outlook/2020/02/24/problem-with-fearmongering-about-russian-electoral-interference/> (“The act of blaming outside actors for internal turmoil is a deeply rooted American tradition. . . . [This] strategy was used to undermine labor activism. . . . [B]usiness leaders made a concerted effort to depict all labor activities as the result of foreign agitation. They argued that native-born Americans could not possibly promote an anti-American activity like a strike; instead, they targeted immigrants from Southern and Eastern Europe as the source of labor unrest. The infamous Palmer Raids projected the idea that once the radical foreigners were gone, any labor unrest would subside.”).
 72. See Reuben Fink, *Congress Moves Against Immigration*, AM. HEBREW & JEWISH MESSENGER, July 4, 1919, at 188, 190 (highlighting newly proposed regulations that permit refusal of admission to, and deportation of, immigrants).
 73. See Immigration Act of 1924 (Johnson-Reed Act), ch. 190, § 14, 43 Stat. 153, 162 (repealed 1952) (“Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this Act to enter the United States . . . shall be taken into custody and deported . . .”); see also Andrew Tae-Hyun Kim, *Deportation Deadline*, 95 WASH. U. L. REV. 531, 567–69 (2017) (discussing the historical deportation statute of limitations, starting with one-year and up through the elimination of the statute entirely).
 74. See Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1716 (2009) (“Legislation passed in 1924 eliminated the statute of limitations for entering the United States without authorization, opening the way for deportation on a mass scale.”) (footnote omitted); see also *Out with the Alien!*, ST. LOUIS POST-DISPATCH, Feb. 20, 1925, at 20 (“Consider the alien who came here, say, 10 years ago and as an illiterate was liable to deportation within five years, under the law of 1917. That five-year period would be wiped out by the proposed law. Indeed, the statute of limitations, so far as the alien is concerned, would be repealed. If as an illiterate he was liable to deportation at the time of entry that liability is revived by this bill.”).
 75. See *Round up to Oust Alien Agitators: 54 Due from West Today are First of Groups to be Deported*, N.Y. TIMES, Feb. 11, 1919, at 1 (reporting on the arrest and deportation of “alien labor agitators” under the Immigration Act of 1917).
 76. See Cohen, *supra* note 62, at 1453–55.
 77. See *Bombs Sent 17 Prominent U.S. and State Officials and Others Seized in Mail*, LOUISVILLE COURIER J., May 1, 1919, at 1 (reporting on the several bombs seized at a post office that were addressed to “prominent Federal, State and municipal officials and others”). The first bomb exploded at the home of Senator Thomas Hardwick of Georgia. *Bomb for Hardwick: Mail Parcel Injures Senator’s Wife; Maid Loses Hands*, WASH. POST, Apr. 30, 1919, at 1. His housekeeper, Ethel Williams, and wife, Maude Hardwick,

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second wave, reaching their targets in early June.⁷⁸ These bombings led to immediate demands for the mass prosecution of anarchists.⁷⁹ Thus, the acts of a few helped legitimize a growing nationalist fervor and hostility toward American socialists, communists, and anarchists.

The bombings created an anxiety that gripped the nation. During the first wave, a very attentive clerk at the New York Post Office noticed a large number of Gimbel's⁸⁰ packages with insufficient postage.⁸¹ The parcels were addressed to members of Congress, judges, and major industry leaders.⁸² Soon after, the clerk read about a Gimbel's package exploding at a former senator's home.⁸³ The clerk quickly returned to the post office, saw the packages still lined up, and notified the police, who discovered that the packages contained crude pipe bombs.⁸⁴ Soon, politicians and the press were speculating about a coordinated plot by anarchists or communists who wished to bring about a collapse of the U.S. government by assassinating the elite.⁸⁵

were injured when they opened a package apparently sent from the New York department store, Gimbel's. *Id.* Hardwick had just completed a term as Chair of the Senate Committee on Immigration and had retired from the Senate. POST, *supra* note 11, at 37–38; *Postal Officials Begin Wide Search: Hardwick Believes His Immigration Bill Incensed an Anarchist*, N.Y. TIMES, May 1, 1919, at 1. The day before this bomb exploded, a mail bomb had been delivered to Seattle Mayor Ole Hanson's office, but it never detonated. DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS IN THE WAR ON TERRORISM 117 (2003) [hereinafter ENEMY ALIENS BOOK].

78. *See Bombs Wreck Homes in Eight Cities in Nation-Wide Plot*, S.F. CHRON., June 3, 1919, at 1 (reporting that bombs, almost all “directed against the lives of public officials,” exploded in several cities); *see also* “Reds” *Wreck Buildings: Attempt to Dynamite Prominent Men Fails*, AUSTIN AM. STATESMAN, June 3, 1919, at 1.
79. *See, e.g., Hang Anarchists High as Haman, Says Mr. Blanton*, ARIZ. REPUBLICAN, June 5, 1919, at 1 (quoting Texas Representative Thomas Blanton, saying, “[T]ell these anarchists . . . that if they do not stop their practices . . . we are going to catch every one of them . . . and hang them as high as Haman”). Importantly, there was never any concrete proof tying the bombs to any particular social or political movement. *See* ENEMY ALIENS BOOK, *supra* note 77, at 118 (“Despite a nationwide hunt for the perpetrators, the bombers were never discovered.”).
80. Gimbel's was a “department store giant” that competed with Macy's. David K. Randall, *Only the Store is Gone*, N.Y. TIMES (Feb. 19, 2006), <https://www.nytimes.com/2006/02/19/nyregion/thecity/only-the-store-is-gone.html>.
81. *See As Old as the Hills*, *supra* note 68, at 26 (noting that a post office clerk “had set aside sixteen Gimbel's [sic] packages for insufficient postage”); *see also* POST, *supra* note 11, at 36–37.
82. *See 36 Were Marked as Victims by Bomb Conspirers*, N.Y. TIMES, May 1, 1919, at 1 (disclosing some of “the names of the persons to whom the bombs were addressed”); *see also Government Gives Warning to All Employees: Watch on All Packages*, WASH. POST, May 1, 1919, at 1 (disclosing the names of six “men high in Washington official life” set to receive the bombs).
83. *See 39 Bombs were Put in Mail in May Day Plot*, ST. LOUIS POST-DISPATCH, May 1, 1919, at 2 (reporting that the clerk had read about the bomb sent to Hardwick and rushed back to the post office to compare packaging); *see also As Old as the Hills*, *supra* note 68, at 26.
84. *See 39 Bombs were Put in Mail in May Day Plot*, *supra* note 83; *see also As Old as the Hills*, *supra* note 68, at 26 (revealing that “[i]t took six hours to disarm the first bomb” after the N.Y. police inspected each package).
85. *See 36 Were Marked as Victims by Bomb Conspirers*, *supra* note 82, at 1, 3 (highlighting the connection between some of the officials who were supposed to receive the mail bombs and “anarchists, radical Socialists, and other groups of extreme radicals” [who] were combining for the overthrow of the American Government through a ‘bloody revolution’”); *see also Terror Comes to U.S. Soil: The Bomb*

In Washington, D.C., during the second wave of bombings, a sensational explosion destroyed the first floor of Attorney General A. Mitchell Palmer's house and barely missed his family a floor above.⁸⁶ Illustrating the danger, the bomber charged with delivering the bomb failed to clear the explosion in time and his dismembered body was found in the wreckage.⁸⁷ An Italian-English dictionary was also found, as well as a leaflet warning U.S. government leaders that the anarchist empire would soon destroy those who stood as enemies to the good people of the United States seeking to bring about a more equitable world.⁸⁸

A bomb at your home can change your worldview.⁸⁹ Palmer wanted to root out the reds, the radicals, the anarchists—but how? His answer was decisive: hunt down and deport those he deemed responsible.⁹⁰ Palmer moved quickly, asking Congress for an appropriation of \$500,000 to increase enforcement of the 1918 immigration laws that authorized the removal of anarchists and communists.⁹¹ These plans are known today as the infamous “Palmer Raids.”

In November 1919 and January 1920, the Departments of Justice and Labor, alongside the Immigration Bureau, raided the homes and headquarters of so-called political radicals across the United States.⁹² These raids led to the arrest of thousands of people.⁹³ Even though most Palmer Raids detainees were innocent of any crime, they were imprisoned in filthy and cramped detention facilities, where they were

'Outrages' of 1919, F.B.I. (June 28, 2019), <https://www.fbi.gov/news/stories/early-fbi-terrorism-case-062819> (noting that “[a]ll signs pointed to anarchists, a group of radicals who wanted to get rid of capitalism, organized religion, and government itself”).

86. *See Terror Comes to U.S. Soil: The Bomb 'Outrages' of 1919*, *supra* note 85; *see also Palmer and Family Safe: On Second Floor When Explosion Wrecked Lower Part of House*, N.Y. TIMES, June 3, 1919, at 1.
87. *See As Old as the Hills*, *supra* note 68, at 28; *see also Palmer and Family Safe: On Second Floor When Explosion Wrecked Lower Part of House*, *supra* note 86, at 1.
88. *Man Killed by Own Bomb at Palmer's Home Identified: Anarchists' Plot Said to Center in Philadelphia*, ST. LOUIS POST-DISPATCH, June 3, 1919, at 1; *see also As Old as the Hills*, *supra* note 68, at 28 (noting that the bomb creator was found carrying a pamphlet entitled “Plain Words” which, in part, threatened to destroy “the world of your tyrannical institutions”).
89. *See As Old as the Hills*, *supra* note 68, at 28 (“Palmer was still reluctant to attribute all radical activity to immigrants or believe that there was a large organized revolutionary force at work in the United States. But all of that changed when . . . a bomb exploded in front of Palmer's house . . .”).
90. *See Palmer Asks for \$500,000 to Hunt for Bomb Throwers*, ST. LOUIS POST-DISPATCH, June 12, 1919, at 1 (reporting that Palmer “asked Congress for a special half million dollar appropriation to carry on the hunt for anarchists, bomb throwers and enemies of law and order”); *see also ENEMY ALIENS BOOK*, *supra* note 77, at 118 (“[T]he Justice Department, under Hoover's discretion, launched a series of dragnet raids directed at deporting radical foreign nationals.”) (footnote omitted). *See also As Old as the Hills*, *supra* note 68.
91. *See Palmer Asks for \$500,000 to Hunt for Bomb Throwers*, *supra* note 90, at 1; *see also* Adam Hochschild, *When America Tried to Deport Its Radicals*, THE NEW YORKER (Nov. 4, 2019), <https://www.newyorker.com/magazine/2019/11/11/when-america-tried-to-deport-its-radicals> (confirming that Palmer found statutory authority to deport in the 1918 immigration laws). *See generally supra* notes 47–48 and accompanying text (discussing the 1918 laws).
92. *See As Old as the Hills*, *supra* note 68, at 30–33.
93. *See ENEMY ALIENS BOOK*, *supra* note 77, at 127 (estimating a figure of “4,000 to 10,000 persons” arrested).

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beaten until they made false confessions that served as grounds for their deportation.⁹⁴ The tools Congress created leading up to 1919, now expanded by Palmer and the recently created Federal Bureau of Investigation (FBI), became the institutionalized tools of contemporary immigration law and enforcement.⁹⁵

Perhaps the most famous individuals caught up in the 1919 deportation cases were Alexander Berkman and Emma Goldman. Both were committed anarchists who advocated for individual freedom, and life without burdensome government controls.⁹⁶ Berkman had previously spent fourteen years in state prison for his attempted assassination of industrialist Henry Clay Frick in 1892.⁹⁷ The attack was prompted when Frick brought in private security guards to break a labor strike, which Berkman believed violated Pennsylvania law, but doubted that any government officials would dare to challenge Frick or the Carnegie Steel Corporation.⁹⁸ Berkman wanted to end the strike and demonstrate his support for the strikers. Instead, his violent act divided public opinion and many anarchists decried Berkman's use of violence.⁹⁹ The strike ended without the workers securing any concessions.¹⁰⁰

94. *See id.* (discussing how none of the people arrested in the Palmer Raids were “charged with complicity in [the bombings]. Instead, they were arrested for being members (or suspected members) of Communist organizations”); *see also* Gregory Dehler, *Palmer Raids*, ENCYC. BRITANNICA, <https://www.britannica.com/biography/A-Mitchell-Palmer> (last visited Apr. 18, 2021) (providing that after the Palmer Raids arrests, “[v]iolations and abuses were rampant” because “individuals were held without information of the charges against them, detainees were tortured, and signatures were forged on false confessions”).

95. *See* Hochschild, *supra* note 91 (stating that the build-up of anti-immigrant rhetoric led to the Palmer Raids and the formation of the FBI); *see also* Peter H. Irons, “*Fighting Fair*: Zechariah Chafee, Jr., the Department of Justice, and the “*Trial at the Harvard Club*”, 94 HARV. L. REV. 1205, 1218–19 (1981) (describing how Palmer created what later became the FBI).

96. *See supra* notes 13–14 and accompanying text.

97. PAUL AVRICH & KAREN AVRICH, *SASHA AND EMMA: THE ANARCHIST ODYSSEY OF ALEXANDER BERKMAN AND EMMA GOLDMAN* 360 (2012). Berkman shot and stabbed Frick in his office in Pennsylvania because he believed that no one was holding Frick responsible for his use of deadly force to end a strike in Homestead, Pennsylvania. *Id.* at 58–59, 66–67. Frick was injured but recovered. *Id.* at 68–69. Seven strikers and three hired guards known as “Pinkertons” died in the labor dispute. *Id.* at 54. Frick, who was the manager of the Carnegie Steel Company, had arranged for the hiring of the Pinkertons and authorized the use of deadly force. *Id.* at 53–54. Emma Goldman stated in her autobiography that she helped raise the money to purchase the gun and railway ticket for Berkman to travel to Pennsylvania and kill Frick. *See* EMMA GOLDMAN, 1 *LIVING MY LIFE* 89–92 (Da Capo Press unabr. reprinted ed. 1970) (1931) [hereinafter *LIVING MY LIFE* (unabr.)]. Berkman defended himself during the criminal trial, marked by many procedural irregularities. AVRICH & AVRICH, *supra*, at 91–95. He later wrote a prison memoir. *See generally* ALEXANDER BERKMAN, *PRISON MEMOIRS OF AN ANARCHIST* (Mother Earth Publ'g Ass'n 1912).

98. *See* AVRICH & AVRICH, *supra* note 97, at 58 (“Frick had broken off negotiations with the union, locked out the Homestead workers, and imported an army of Pinkertons to fight his battle. Therefore, believed the trio, he bore responsibility for the bloodshed.”).

99. *See id.* at 90–91 (“[T]he battle between those who supported Berkman and those who spurned his attack on Frick . . . engulfed the entire anarchist movement, splitting it into two irreconcilable camps, one of which advocated the use of terror, and one of which did not.”).

100. *Id.* at 57 (“The Homestead strike ended in utter defeat for the workers, inflicting wounds that never healed. After five months out on strike, they were forced to accept the company’s harshest terms,

The government did not try to deport Berkman after his release from prison and he became a frequent contributor to anarchist journals, such as *The Masses*, and a speaker and organizer for other political activists across the United States.¹⁰¹ He became one of the anarchists tracked by the DOJ; when he and Goldman formed the No-Conscription League to fight the military draft in 1917,¹⁰² the federal government planned for his arrest, conviction, and deportation.¹⁰³

While Berkman was in prison for the attempted assassination, Goldman continued speaking and writing about anarchism, the right to birth control, the right of workers to organize, and a wide range of other topics celebrating individual freedom.¹⁰⁴ At the turn of the twentieth century, doing so could be punished under various state antisindicalist or pornography statutes.¹⁰⁵

In 1901, the DOJ arrested Goldman but, except for the theory that her speeches had inspired McKinley's attempted assassination, had no basis to try her in connection with that crime.¹⁰⁶ Between 1901 and 1919, Goldman was repeatedly arrested and her speaking engagements raided.¹⁰⁷ All of the arrests alleged that her writings or speeches were likely to incite a riot or called for violence or opposition to the government.¹⁰⁸

While some members of the DOJ believed that Goldman could be deported because she had divorced her citizen spouse, others believed that she might still hold U.S. citizenship.¹⁰⁹ Goldman maintained that she was a U.S. citizen by virtue of her

including a twelve-hour day and a wage cut of almost one-half. Pinkerton spies were installed in the mill, grievance committees were done away with, and workers' meetings were banned.”)

101. *Id.* at 2 (“Between his release in 1906 and his deportation in 1919, he edited the two most prominent anarchist periodicals of the era, organized mass protests on behalf of radical and labor causes, and gave speeches around the country about his tribulations and beliefs.”).

102. *Id.* at 269 (“On May 9, 1917, Sasha, Emma, Fitz, and Leonard Abbott established the No-Conscription League in the office of *Mother Earth* on 125th Street.”).

103. *Id.* at 272 (“On the afternoon of June 15, the day the Espionage Act was signed, U.S. Marshal Thomas McCarthy arrived with a team of officials at Emma and Sasha’s headquarters at 20 East 125th Street. . . . Both Berkman and Goldman were charged with violating the Espionage Act and ‘conspiracy to interfere with the draft.’”).

104. *She Fought the Law*, *supra* note 36.

105. *See* THREAT OF DISSENT, *supra* note 27, at 42–46 (discussing how the government often “suppress[ed] expressions of dissent and public protest” through “‘breach of the peace’ or ‘unlawful assembly’ statutes”).

106. *She Fought the Law*, *supra* note 36; *see also* AVRICH & AVRICH, *supra* note 97, at 160–61.

107. *See* THREAT OF DISSENT, *supra* note 27, at 43–62 (providing an overview of Goldman’s arrests); *see also* *She Fought the Law*, *supra* note 36 (same).

108. *See* *She Fought the Law*, *supra* note 36. For example, after the attempted assassination, Czolgosz “explained how Goldman’s speeches had ‘set [him] on fire,’ resulting in “law enforcement rac[ing] to find and arrest her [for conspiracy to commit murder].” THREAT OF DISSENT, *supra* note 27, at 43. After further questioning, Czolgosz admitted that Goldman had nothing to do with the shooting, and she was released. *Id.*

109. *See generally* PATRICK WEIL, *THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC* 59–61 (2013) (discussing the denaturalization proceedings against Jacob Kershner and Goldman).

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marriage to Jacob Kershner in 1887;¹¹⁰ at the time, upon marriage to a citizen, a foreign-born woman would lose her other nationality and automatically become a U.S. citizen.¹¹¹ The couple divorced less than a year later, briefly remarried, and Goldman left Kershner for good in 1888.¹¹² The DOJ attorneys successfully denaturalized Kershner;¹¹³ they argued that Goldman too should lose her citizenship, as she had derived it by virtue of the marriage.¹¹⁴ While Goldman was never formally joined in the proceedings, she was aware that the government believed her claim was suspect; still, she did not believe it had the power to strip her citizenship.¹¹⁵

In the fall of 1919, the federal government arrested both Berkman and Goldman immediately upon their release from prison; they had served two years for their prior federal convictions for advocating against the military draft.¹¹⁶ Then-Immigration Commissioner Anthony Caminetti charged them as deportable anarchists.¹¹⁷ After a

110. See CANDACE FALK, LOVE, ANARCHY, AND EMMA GOLDMAN 21, 290–92 (Holt, Rinehart & Winson 1984).

111. See GORDON, MAILMAN, YALE-LOEHR & WADA, IMMIGR. L. & PROC. § 98.02 (citing Act of Feb. 10, 1855, ch. 71, § 2, 10 Stat. 604) (discussing the evolution of laws regarding U.S. citizenship and marriage). Goldman was correct that her citizenship continued even after divorce. See *id.* (citing Act of Mar. 2, 1907, ch. 2534, § 4, 34 Stat. 1228, 1229) (“The citizenship transmitted . . . was absolute and unconditional A 1907 statute provided that an [sic] noncitizen woman who had acquired U.S. citizenship as a result of her marriage to a U.S. citizen would retain such citizenship after termination of the marriage . . .”). In 1922, however, Congress repealed the automatic acquisition of citizenship. See 1922 Cable Act, ch. 411, § 2, 42 Stat. 1021, 1022.

112. See LIVING MY LIFE (unabr.), *supra* note 97, at 20–25 (discussing Goldman’s and Kershner’s relationship).

113. Letter from Oscar S. Straus to Charles J. Bonaparte (Feb. 11, 1909), in 2 EMMA GOLDMAN: A DOCUMENTARY HISTORY OF THE AMERICAN YEARS, MAKING SPEECH FREE, 1902–1909, at 410 (Candace Falk et al. eds., Univ. of Ill. Press 2003); see also WEIL, *supra* note 109, at 58–60.

114. WEIL, *supra* note 109, at 60–61 (quoting a memorandum from Charles Earl, solicitor of the Department of Commerce and Labor, to Oscar Strauss on March 21, 1908).

115. See Emma Goldman, *A Woman Without a Country*, in 4 MOTHER EARTH 81–82 (1909), reprinted in 2 EMMA GOLDMAN: A DOCUMENTARY HISTORY OF THE AMERICAN YEARS, MAKING SPEECH FREE, 1902–1909, at 425–27 (Candace Falk et al. eds., Univ. of Ill. Press 2003) (“Poor, poor United States government! Yours is, indeed, a difficult task. True, your hard, persistent labors have been crowned with some success. You have Emma Goldman’s citizenship. But she has the world, and her heritage is the kinship of brave spirits—not a bad bargain.”). After she was denaturalized, Goldman wrote “A Woman Without a Country” to “narrate[] the government’s obsessive chase” WEIL, *supra* note 109, at 61.

116. WEIL, *supra* note 109, at 62. In 1917, “Goldman and Berkman were arrested and charged with conspiracy to ‘induce persons not to register’ under the newly enacted Espionage Act” *Id.* at 62; see also *Goldman v. United States*, 245 U.S. 474, 475 (1918) (citation omitted). The Espionage Act of 1917 criminalized the activity of advising people to refuse “duty[] in the military or naval forces of the United States” or to “willfully obstruct the recruiting or enlistment service of the United States.” Espionage Act of 1917, ch. 30, § 3, 40 Stat. 217, 219. After its amendments in 1918, this statute criminalized speech that was critical of the United States government or military. Sedition Act of 1918, ch. 75, § 1, 40 Stat. 553. In their defense, Goldman’s and Berkman’s attorney, Harry Weinberger, argued First Amendment limitations and questioned the authority of Congress to create forced conscription without participation of the states. See WEIL, *supra* note 109, at 62; see also Brief on Behalf of the Plaintiffs-in-Error, *Goldman*, 245 U.S. 474 (No. 702).

117. See WEIL, *supra* note 109, at 62 (“Just before the expiration of her sentence, on September 5, 1919, the Department of Labor ordered Goldman’s arrest in order to deport her on the basis of the 1918 Anarchist Exclusion Act.”); *She Fought the Law*, *supra* note 36 (providing that in September of 1919, “[f]ederal officials review[ed] Goldman’s immigration status and decide[d] she [could] be deported legally”); see also

brief trial at Ellis Island, the immigration tribunal found them deportable and they both appealed to the federal district court using habeas corpus to challenge deportation based on their political beliefs.¹¹⁸ In addition, Goldman's attorney argued that she was a U.S. citizen and, therefore, not subject to the power of deportation.¹¹⁹ The federal district court rejected their challenges in 1919 and the Supreme Court dismissed Berkman's appeal but agreed to hear Goldman's challenge.¹²⁰ When she learned that Berkman and others might be deported within a few weeks, Goldman changed her mind about the appeal, deciding that her long friendship required her to accompany Berkman.¹²¹ She likely also believed that her deportation for advocating for her beliefs would be, in and of itself, the greatest critique of the U.S. government as violative of the bedrock principles of freedom and liberty, fundamental to the creation of the United States.¹²²

In December 1919, Berkman, Goldman, and several hundred others were placed aboard a ship and deported to Russia.¹²³ In some ways, however, the massive effort to deport foreign-born radicals was empirically a failure; Louis F. Post, then-Assistant Secretary of Labor, quashed the vast majority of deportation orders due to the abusive

The Emma Goldman Papers: War Resistance, Anti-Militarism, and Deportation, 1917–1919, U.C. BERKELEY LIBR., <https://www.lib.berkeley.edu/goldman/MeetEmmaGoldman/warresistance-antimilitarism-deportation1917-1919.html> (choose “Federal Warrant for Goldman's Deportation”) (last visited Apr. 14, 2021); *Decide to Deport Emma Goldman*, N.Y. TIMES, Nov. 30, 1919, at 15 (announcing Goldman's deportation). The statutory authority to arrest was found in the 1903 Anarchist Exclusion Act and the 1918 amendment. *See supra* notes 38–48 and accompanying text.

118. *See* WEIL, *supra* note 109, at 62–63 (discussing the trial); *see also* AVRICH & AVRICH, *supra* note 97, at 295.
119. WEIL, *supra* note 109, at 62. Goldman may also have had an argument of derivative citizenship when her father naturalized, but the argument was never fully developed. *See* THREAT OF DISSIDENT, *supra* note 27, at 274 n.67 (citing DEIRDRE M. MOLONEY, NATIONAL INSECURITIES: IMMIGRANTS AND U.S. DEPORTATION POLICY SINCE 1882, at 175 (2012)).
120. EMMA GOLDMAN, *LIVING MY LIFE* 674–75 (Miriam Brody ed., Penguin Books abr. ed. 2006) (1931) [hereinafter *LIVING MY LIFE* (abr.)]; WEIL, *supra* note 109, at 62–63; *Goldman v. Caminetti*, 251 U.S. 565 (1919).
121. *LIVING MY LIFE* (abr.), *supra* note 120, at 674–75; *see also* AVRICH & AVRICH, *supra* note 97, at 295 (“Goldman's legal case against deportation was somewhat stronger than Berkman's but she decided they should not be separated.”).
122. *See The Emma Goldman Papers: War Resistance, Anti-Militarism, and Deportation, 1917–1919*, *supra* note 117 (choose “Goldman's Last Impassioned Plea”) (“Every human being is entitled to hold any opinion that appeals to her or him without making herself or himself liable to persecution. Ever since I have been in this country—and I have lived here practically all my life—it has been dinned into my ears that under the institutions of this alleged Democracy one is entirely free to think and feel as he pleases. What becomes of this sacred guarantee of freedom of thought and conscience when persons are being persecuted and driven out for the very motives and purposes for which the pioneers who built up this country laid down their lives?”). After their deportation to Russia, Berkman and Goldman published a book explaining their opposition to the deportation for long-term residents and for acts of political speech. *See generally* ALEXANDER BERKMAN & EMMA GOLDMAN, *DEPORTATION – ITS MEANING AND MENACE: LAST MESSAGE TO THE PEOPLE OF AMERICA* (1919).
123. WEIL, *supra* note 109, at 63. The U.S.S. Buford was dubbed “the Soviet” or “Red Ark” by the press. *See* Boris Egorov, *How the U.S. Deported Its Radicals to Soviet Russia*, RUSS. BEYOND (Sept. 27, 2019), <https://www.rbth.com/history/331044-how-us-deported-its-radicals>; *see also* Hochschild, *supra* note 91.

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forms of arrest, the lack of evidence, and inadequate due process protections before the immigration tribunals.¹²⁴

Berkman and Goldman's stories are emblematic of the dangerous weakness of protections for immigrant activism and the vulnerability of those who voice dissent. The seeds planted in 1919 are sadly still bearing fruit.¹²⁵

IV. THE TRAVEL BAN AND RECENT IMMIGRATION LAW ISSUES

One week after assuming office, President Donald Trump issued Order No. 13769, "Protecting the Nation From Foreign Terrorist Entry Into the United States" ("EO-1").¹²⁶ Invoking INA § 212(f),¹²⁷ codified as 8 U.S.C. § 1182(f),¹²⁸ and INA § 217(a)(12), codified as 8 U.S.C. § 1187(a)(12),¹²⁹ EO-1 suspended entry into the

124. See Post, *supra* note 11, at 167–87 (discussing his decisions to individually review the deportation orders); see also THREAT OF DISSENT, *supra* note 27, at 74–76 ("Palmer, Hoover, and Caminetti did not hold the ultimate authority to deport; only the secretary of labor could authorize deportation. One man would present the main obstacle in their way: Louis F. Post."). I have long spoken and written about the bravery and integrity of Post. See, e.g., *As Old as the Hills*, *supra* note 68. After the Palmer Raids, "Post cancelled nearly 3,000 arrests . . . [,] a number that prompted Palmer to urge President Wilson to fire Post and Congress to initiate impeachment proceedings against him." THREAT OF DISSENT, *supra* note 27, at 76; see also *Investigation of Administration of Louis F. Post, Assistant Secretary of Labor in the Matter of Deportation of Aliens*, 66th Cong. (1920), reprinted in *CIVIL LIBERTIES IN AMERICAN HISTORY* (Leonard W. Levy ed., Da Capo Press 1971).

125. See Jed Handelsman Shugerman, *Professionals, Politicos, and Crony Attorneys General: A Historical Sketch of the U.S. Attorney General as a Case for Structural Independence*, 87 *FORDHAM L. REV.* 1965, 1977 (2019) ("Palmer's tenure [during the First Red Scare and Palmer Raids] illustrates one reason why the Office of the Attorney General became so politically salient: it built up tremendous power over immigration, deportation, and national security over the twentieth century."). The Palmer Raids also ignited strong countermovements, which aimed to check the federal government's growing domestic enforcement authority, including in the immigration arena. See, e.g., Jonathan Goldman, *How New Yorkers Celebrated New Year's Eve 100 Years Ago*, *GOTHAMIST* (Dec. 31, 2019), <https://gothamist.com/arts-entertainment/how-new-yorkers-celebrated-new-years-eve-100-years-ago> ("The Palmer raids set off a wave of reactions, including the founding of the American Civil Liberties Union at a meeting in Greenwich Village on January 19, 1920, where the political and disabled rights activist Helen Keller was among the first signatories.").

126. Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

127. INA § 212(f) (codified as 8 U.S.C. § 1182(f)). The provision, in effect since the Immigration and Nationalization Act of 1952, authorizes the president "to suspend the entry of all aliens or any class of aliens" upon a finding that their entry "would be detrimental to the interests of the United States." *Id.*; see also BEN HARRINGTON & THERESA A. REISS, *CONG. RSCH. SERV.*, LSB10458, *PRESIDENTIAL ACTIONS TO EXCLUDE ALIENS UNDER INA § 212(f)*, at 1 (2020).

128. 8 U.S.C. § 1182(f). This statute provides:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

Id.

129. 8 U.S.C. § 1187(a)(12). This statute "restricts individuals from participating in the Visa Waiver Program (VWP) if they have traveled to [Iraq and Syria] since March 1, 2011." Steven Schulman et al., *Executive Order Suspends the Admission of Certain Immigrants and Nonimmigrants from Seven Countries and the U.S.*

United States of foreign nationals from seven Muslim-majority countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen; suspended the United States Refugee Admission Program for 120 days, and banned the entry of Syrian refugees indefinitely.¹³⁰ Shortly after that, multiple lawsuits were filed across the country, challenging the statutory and constitutional integrity of EO–1.¹³¹ Several district courts issued nationwide temporary injunctions preventing the government from enforcing EO–1 entry restrictions, which appellate courts largely upheld.¹³²

In response, about two months later, President Trump revoked the previous order and issued a revised one, Executive Order 13780 (“EO–2”),¹³³

which again directed the Secretary of Homeland Security to “conduct a worldwide review to identify whether, and if so what, additional information [would] be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the [Immigration and Nationality Act (“INA”)] . . . in order to determine that the individual is not a security or public-safety threat.”¹³⁴

Like its predecessor, EO–2 was immediately challenged in and enjoined by lower courts, but the Supreme Court stayed those injunctions, pending the disposition of the government’s appeals.¹³⁵

In September 2017, after EO–2 expired on its own terms, President Trump issued a more permanent version of the travel ban, Presidential Proclamation No. 9645, “Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats” (the “Proclamation”).¹³⁶ It removed Sudan from the EO–2 list and added three additional

Refugee Admissions Program, CASETEXT (Jan. 31, 2017), <https://casetext.com/analysis/executive-order-suspends-the-admission-of-certain-immigrants-and-nonimmigrants-from-seven-countries-and-the-us-refugee-admissions-program?sort=relevance&resultsNav=false&q=>.

130. See Exec. Order No. 13769, 82 Fed. Reg. 8977, 8978–79 (Jan. 27, 2017), *construed in* Trump v. Hawaii, 138 S. Ct. 2392, 2403–04 (2018).

131. See generally *Civil Rights Challenges to Trump Refugee/Visa Order*, UNIV. OF MICH. L. SCH.: CIV. RTS. LIT. CLEARINGHOUSE, <https://www.clearinghouse.net/results.php?searchSpecialCollection=44> (last visited Apr. 13, 2021) (summarizing the “series of Executive Orders relating to immigration and refugee policy” President Trump issued in 2017 and including information about the several cases filed against them).

132. See, e.g., *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017) (issuing a temporary restraining order blocking EO–1 entry restrictions, in which the Court of Appeals for the Ninth Circuit subsequently declined the government’s request to stay this order in *Washington v. Trump*, 847 F.3d 1151, 1157 (9th Cir. 2017) (per curiam)).

133. Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017). Though EO–2 revoked and replaced EO–1, the same countries remained on the EO–2 list. *Id.* at 13210–12, 13218.

134. *Int’l Refugee Assistance Project v. Trump*, 961 F.3d 635, 640 (4th Cir. 2020) (quoting Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017)) (alterations in original).

135. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 542 (2017) (mem.); *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2089 (2017).

136. Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017); see *Civil Rights Challenges to Trump Refugee/Visa Order*, *supra* note 131 (“[T]he second Executive Order expired on September 24, 2017 [and

non-Muslim-majority countries—North Korea, Venezuela, and Chad.¹³⁷ Among other things, the updated list of countries was compiled by considering whether a nation had sufficient identity-management and information-sharing capabilities to make an informed entry or national security determination.¹³⁸

The Constitution may condone entry restrictions for national security, but does not tolerate religion-based immigration restraints or animus towards a particular religion.¹³⁹ Highlighting the disputed motivations behind these policies, even the “travel ban” nomenclature has been the subject of extensive argument.¹⁴⁰ Indeed, commentators have contended that “[t]he flimsy proffered justifications for nationality bans go hand-in-hand with their pretextual purposes.”¹⁴¹ National security is not the real reason for

t]hat same day, the Trump Administration signed a proclamation . . . indefinitely restricting travel from . . . eight countries[.]”.

137. *Compare* Exec. Order No. 13780, 82 Fed. Reg. 13209, 13210–12 (Mar. 6, 2017), *with* Proclamation No. 9645, 82 Fed. Reg. 45161, 45164–65 (Sept. 24, 2017).
138. *See* Proclamation No. 9645, 82 Fed. Reg. 45161, 45162–64 (Sept. 24, 2017); *see also* *Trump v. Hawaii*, 138 S. Ct. 2392, 2404–06 (2018) (explaining the process the Trump administration used for determining “whose systems for managing and sharing information about their nationals . . . [were] deemed inadequate”).
139. *See* *Trump v. Hawaii*, 138 S. Ct. 2392, 2421 (2018) (confirming that the Establishment Clause forbids the government from preferring one religious group over another but finding it “difficult to see how exempting one of the largest predominantly Muslim countries in the region from coverage under the Proclamation can be cited as evidence of animus toward Muslims”); *see also* Tally Kritzman-Amir & Jaya Ramji-Nogales, *Nationality Bans*, 2019 U. ILL. L. REV. 563, 591 (2019) (summarizing Justice Sonia Sotomayor’s *Trump v. Hawaii* dissent in which she concluded that the travel ban was motivated by unconstitutional animus).
140. *See, e.g.*, Benjamin Wittes, *Reflections on the Travel Ban Case and the Constitutional Status of Pretext*, LAWFARE (July 6, 2018), <https://www.lawfareblog.com/reflections-travel-ban-case-and-constitutional-status-pretext> (reporting bipartisan opposition to the Proclamation despite some support for its legality). The Trump administration and President Trump himself have refuted this nomenclature despite their own irreconcilable rhetoric. *Compare* Remarks on Signing an Executive Order and Memorandums on Government Ethics, National Security Council and Homeland Security Council Organization, and Counterterrorism Strategy, and an Exchange With Reporters, 2017 DAILY COMP. PRES. DOC. 1–2 (Jan. 28, 2017), <https://www.govinfo.gov/content/pkg/DCPD-201700516/pdf/DCPD-201700516.pdf> (responding to the question of whether EO–1 is a “Muslim ban,” President Trump stated: “[EO–1 is] not a Muslim ban, but we are totally prepared. It’s working out very nicely. You see it at the airports; you see it all over. It’s working out very nicely. And we’re going to have a very, very strict ban, and we’re going to have extreme vetting, which we should have had in this country for many years.”), *with* Donald Trump (@realDonaldTrump), TWITTER (Oct. 27, 2016, 9:47 PM), <https://perma.cc/R2V4-VBQX> (“If I am elected President, I am going to keep RADICAL ISLAMIC TERRORISTS OUT of our country!”), and Donald Trump (@realDonaldTrump), TWITTER (Jan. 2, 2016, 8:23 AM), <https://perma.cc/9WZQ-NEAK> (“Hillary Clinton said that it is O.K. to ban Muslims from Israel by building a WALL, but not O.K. to do so in the U.S. We must be vigilant!”).
141. Kritzman-Amir & Ramji-Nogales, *supra* note 139, at 569; *see, e.g.*, Elizabeth S. Hurd, *Dangerous Logic at the Border: Religion and the Travel Ban*, RELIGION & POL. (July 2, 2019), <https://religionandpolitics.org/2019/07/02/dangerous-logic-at-the-border-religion-and-the-travel-ban/> (“The segregation of matters of religion from matters of national security fails to reflect the political or religious realities of the contemporary United States. It is not and has never been possible to disentangle religious and racial animus from practices of national security.”); Manar Waheed, *The Effects of the Muslim Ban One Year Later*, ACLU (Dec. 4, 2018), <https://www.aclu.org/blog/immigrants-rights/effects-muslim-ban-one-year-later> (“From its very start, the Trump administration has vilified and stigmatized Muslims through its rhetoric and its discriminatory policies, starting with the Muslim Ban.”).

the bans; their true aim—the religious and racial preference or discrimination—is hidden behind the smoke screen of security justifications.¹⁴² The debate over the travel ban’s national security justifications echoes efforts to oppress disfavored political, labor, religious, and economic ideologies during the Palmer Raids.¹⁴³ History stripped away the artificial pretexts of the Raids. Nevertheless, our leaders continue to commit the same errors through discriminatory measures like the travel ban.¹⁴⁴

Another centenarian measure on the rebound recently is the executive power to expel, deport, or refuse citizenship to any immigrant who cannot document their economic self-sufficiency.¹⁴⁵ Such person, in the words of the eighteenth-century law, is likely to become, or has become, a “public charge,” an economic burden relying on government assistance.¹⁴⁶ The public charge provisions are some of our oldest

142. *See supra* notes 139–141 and accompanying text.

143. *See generally* J. Hafetz, *Immigration and National Security Law: Converging Approaches to State Power, Individual Rights, and Judicial Review*, 18 ILSA J. INT’L & COMPAR. L. 625 (2012).

Following the Palmer Raids of 1919–1920, foreigners were portrayed as dangerous to the public safety to justify harsh immigration restrictions and removal policies. The trend continued throughout the Cold War, and was manifested by, for example, the exclusion of noncitizens based on political viewpoints deemed inimical to the country’s security. The conflation of immigration control and national security has increased steadily since the mid-1990s, especially with the post-9/11 focus on combatting global terrorism. In immigration law, the debate is typically framed as a zero-sum contest between security on the one hand, and the rights and welfare of immigrants, on the other. The more concerns about global terrorism permeate that debate, the sharper that line becomes. Fears about terrorism raise the stakes, as public officials, lawmakers, and commentators create and sustain a narrative in which the country’s safety depends on restricting the rights of noncitizens both inside and outside America’s borders.

Id. at 628 (footnotes omitted).

144. *See* Matt Ford, *Trump’s Day of Terror*, NEW REPUBLIC (July 12, 2019), <https://newrepublic.com/article/154468/trump-ice-immigration-raid-day-terror> (comparing the Palmer Raids to ICE raids under President Trump during the summer of 2019); *On This Day, Massive Raids During the Red Scare*, NAT’L CONST. CTR.: CONST. DAILY BLOG (Jan. 2, 2021), <https://constitutioncenter.org/blog/on-this-day-massive-raids-during-the-red-scare> (noting that future Supreme Court Justice Harlan Fiske Stone called [then-Attorney General] Palmer’s acts “lawless and subversive of constitutional liberty for citizens and aliens alike”) (internal quotations omitted). The Trump administration has continued to issue new travel bans and suspended other aspects of immigration adjudication, using executive authority that may not be supported by the INA. *See supra* notes 126–138 and accompanying text; *see also* *Immigration Executive Under the Trump Administration*, NAFSA, <https://www.nafsa.org/professional-resources/browse-by-interest/immigration-executive-actions-under-trump-administration> (last visited Apr. 15, 2021) (tracking the Trump administration’s executive actions in immigration).

145. *See Public Charge Fact Sheet*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/archive/public-charge-fact-sheet> (last updated Mar. 10, 2021) (noting that requiring immigrants to prove their economic self-sufficiency has “been a part of the U.S. immigration laws for more than 100 years” and outlining the requirements implemented on February 24, 2020).

146. *See* INA § 212(a)(4), 8 U.S.C. § 1182(a)(4); NAT’L IMMIGR. L. CTR., PUBLIC CHARGE: AN OVERVIEW 1 (Oct. 2013) (“‘Public charge’ . . . refers to an individual who is likely to become ‘primarily dependent on the government for subsistence . . .’”).

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grounds for inadmissibility, long used as a backdoor method to restrict legal immigration.¹⁴⁷

Another issue of concern is selective prosecution where immigrants, especially community activists, are subjected to uneven enforcement of civil immigration law.¹⁴⁸ For many years, scholars and community advocates have been concerned about the lack of proportionality in the power to deport, especially for those facing deportation as a collateral sanction to criminal punishment.¹⁴⁹ Immigrants and experts worry that this issue will intensify if the Department of Homeland Security (DHS) continues to proliferate mass enforcement policies.¹⁵⁰

147. See *Public Charge Fact Sheet*, *supra* note 145; see also Anna Shifrin Faber, Note, *A Vessel for Discrimination: The Public Charge Standard of Inadmissibility and Deportation*, 108 GEO. L.J. 1363, 1373 (2020) (discussing the broadly interpreted public charge rule and noting its underlying “discriminatory application . . . toward racism and nativism”). For examples of public charge laws dating back to the late 1800s and early 1900s and how they were upheld, see Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943) and *Lam Fung Yen v. Frick*, 233 F. 393 (6th Cir. 1916).

148. *E.g.*, *Ragbir v. Homan*, 923 F.3d 53, 70–71 (2d Cir. 2019) (finding that, under the First Amendment, the government unconstitutionally singled out a removable alien following a criminal conviction “for deportation based not only on the viewpoint of his political speech, but on the public attention it received[,]” notwithstanding the fact that “deportation is indeed a punishment for lawful permanent residents who” commit specified crimes); Jennifer Doherty, *ICE Settles Retaliatory Deportation Suit with Activists*, LAW360 (Oct. 28, 2020), https://www.law360.com/immigration/articles/1323799/ice-settles-retaliatory-deportation-suit-with-activists?nl_pk=ff458f5d-7a7c-47e4-bbe7-7f636f089b8c&utm_source=newsletter&utm_medium=email&utm_campaign=immigration (discussing a settlement agreement between U.S. Immigration and Customs Enforcement and immigration activists in a retaliatory lawsuit). In 2020, The New York University School of Law Immigrant Rights Clinic and New Sanctuary Coalition launched an interactive map that documents thousands of instances where immigration activists were retaliated against by federal agencies. IMMIGRANT RTS. VOICES, <https://www.immigrantrightsvoices.org/#/> (last visited Apr. 17, 2021). See generally Alina Das, *Administrative Constitutionalism in Immigration Law*, 98 B.U. L. REV. 485, 485 (2018) (discussing the “current state of administrative constitutionalism” and criticizing the executive branch’s limited and inconsistent implementation and interpretation of constitutional issues with respect to immigrants).

149. See generally Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171 (2018).

150. See *id.* at 174–75. When framed in the context of the Palmer Raids, today’s confluence of restricted judicial review and expedited removal from the United States is particularly worrisome. Recent policies, including the elimination of deportation priorities by executive order, made all who are subject to removal of equal priority. See, e.g., Exec. Order No. 13768, 82 Fed. Reg. 8799, 8800 (Jan. 25, 2017) (directing agencies “to employ all lawful means to ensure the faithful execution of the immigration laws . . . against all removable aliens”). In the summer of 2020, the Immigration Court was facing a backlog of over one million cases, many of which the Trump administration reopened after the Obama administration had declined to enforce under its discretion. See Jennie Kneeder, *Impact of COVID-19 on the Immigration System*, A.B.A., https://www.americanbar.org/groups/public_interest/immigration/immigration-updates/impact-of-covid-19-on-the-immigration-system/. Moreover, the Trump administration has proposed and tried to implement policies that expand the power to deport without hearings. See, e.g., Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409 (July 23, 2019) (extinguishing the previous hundred-mile border proximity requirement for expedited removal, subjecting to expedited removal all noncitizens who have not been admitted or paroled by immigration authorities and who are apprehended anywhere in the U.S. within two years of entering the country); *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1963–64 (2020) (upholding statutory limits on judicial review, including elimination of habeas to challenge the constitutionality of limited procedure used in expedited removal).

V. A BRIDGE BETWEEN CENTURIES

The unique and troubling status of noncitizens in the law is at the root of many shameful examples of government discrimination against immigrants.¹⁵¹ As a scholar and professor of immigration law, I have been teaching for twenty-five years and working in this field for thirty-five; I have often heard, “Immigration Law! Well, that certainly is in the news a lot now.” “Yes,” I answer, “. . . it is.” And the questions grabbing the attention of politicians and the media are perennial:

- Are immigrants hurting domestic labor?¹⁵²
- Are immigrants destabilizing our communities, committing crimes,¹⁵³ or hurting our education system?¹⁵⁴
- Are immigrants learning English and learning to adapt to “American” customs?¹⁵⁵

review of negative credible-fear asylum determinations). *See generally* Peniel Ibe, *Trump’s Attacks on the Legal Immigration System Explained*, AM. FRIENDS SERV. COMM., <https://www.afsc.org/blogs/news-and-commentary/trumps-attacks-legal-immigration-system-explained> (last updated Apr. 23, 2020) (providing a “list of Trump’s attacks on the legal immigration system”).

151. *See Enemy Aliens Article*, *supra* note 10, at 978–85 (arguing that various early excesses of the post-9/11 security state were enabled by existing legal distinctions between citizens and noncitizens and examining the nature and validity of such distinctions); *see also Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, *supra* note 8, at 388 (criticizing the view that foreign nationals can be treated differently than citizens because they are not entitled to the same constitutional rights).
152. *See generally* Elise S. Brezis & Paul Krugman, *Immigration, Investment and Real Wages* (Nat’l Bureau of Econ. Rsch., Working Paper No. 4563, 1993), https://www.nber.org/system/files/working_papers/w4563/w4563.pdf (examining the economic impact of immigration on real wages and labor markets); Pia M. Orrenius & Madeline Zavodny, *Immigrants in the U.S. Labor Market* (Fed. Rsrv. Bank of Dall. Rsch. Dep’t, Working Paper No. 1306, 2013), <https://www.dallasfed.org/-/media/documents/research/papers/2013/wp1306.pdf> (discussing immigration and its effect on economic trends).
153. *See* NAZGOL GHANDNOOSH & JOSH ROVNER, THE SENT’G PROJECT, IMMIGRATION AND PUBLIC SAFETY 5 (Mar. 16, 2017), <https://www.sentencingproject.org/wp-content/uploads/2017/03/Immigration-and-Public-Safety.pdf> (“Foreign-born residents of the United States commit crime less often than native-born citizens.”).
154. *See* Margarita Pivovarova & Jeanne M. Powers, *Are Immigrant Students Disproportionately Consuming Educational Resources?*, BROOKINGS: BROWN CTR. CHALKBOARD (Oct. 3, 2019), <https://www.brookings.edu/blog/brown-center-chalkboard/2019/10/03/are-immigrant-students-disproportionately-consuming-educational-resources/> (“While an increasing share of students [with limited English] creates additional challenges for schools, there is no evidence of negative effects on [domestic] students’ educational outcomes.”).
155. *See* Michelangelo Landgrave, *Immigrants Learn English: Immigrants’ Language Acquisition Rates by Country of Origin and Demographics Since 1900*, CATO INST. (Sept. 17, 2019), <https://www.cato.org/publications/immigration-research-policy-brief/immigrants-learn-english-immigrants-language> (“English language acquisition among immigrants in the 1980–2010 period is higher than in the 1900–1930 period. Without controls and by just comparing the two cohorts, modern immigrants have better English language skills than those of the past.”); Noah Smith, Opinion, *Immigrants Do a Great Job at Becoming Americans*, BLOOMBERG: OP. (Nov. 21, 2017), <https://www.bloomberg.com/opinion/articles/2017-11-21/immigrants-do-a-great-job-at-becoming-americans> (“Recent waves of immigrants have integrated into American culture—changing it, and being changed by it—just as quickly and completely as their European predecessors.”).

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- Are immigrants trying to undermine our political order or, worse, leading subversives and radicals to violence?¹⁵⁶
- Are there just too many immigrants?¹⁵⁷

This article cannot answer all these questions. But I am sure the themes are recognizable. The freedoms we hold so dear—of speech, political association, family protection, and economic stability—are not always equally available to immigrants.¹⁵⁸

The Palmer Raids are a clear example of the difference that alienage creates.¹⁵⁹ If members of Congress and the public believe that a strong source of labor unrest is the foreigners amongst us, then remove the foreigners or limit their ability to organize, and we help reduce the risks to the current order.¹⁶⁰ While the labor movement had few protections of speech and organizing in the early twentieth century, union members who were fighting to strengthen their coalitions also often perceived immigrant labor as self-centered and desperate—workers who would desert the union brotherhood.¹⁶¹ With vested interests and workers against the immigrants,

156. See Alex Nowrasteh, *The 14 Most Common Arguments Against Immigration and Why They're Wrong*, CATO INST. (May 2, 2018), <https://www.cato.org/blog/14-most-common-arguments-against-immigration-why-theyre-wrong>.

157. See Shikha Dalmia, Opinion, *Actually, the Numbers Show that We Need More Immigrants, Not Less*, N.Y. TIMES (Jan. 15, 2019), <https://www.nytimes.com/2019/01/15/opinion/trump-immigration-myth.html> (“[W]e desperately need to pick up the pace of immigration to maintain our work force and economic health.”).

158. See *Enemy Aliens Article*, *supra* note 10, at 1004 (“As politically tempting as the trade-off of immigrants’ liberties for our security may appear, we should not make it. As a matter of principle, the rights that we have selectively denied to immigrants are not reserved for citizens. The rights of political freedom, due process, and equal protection belong to every person subject to United States legal obligations, irrespective of citizenship. As a pragmatic matter, reliance on double standards reduces the legitimacy of our struggle, and that legitimacy may be our most valuable asset, both at home and abroad.”); see also *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, *supra* note 8, at 388 (discussing how foreign nationals are not entitled to the same constitutional freedoms as citizens).

159. See Irene Scharf, *Second Class Citizenship? The Plight of Naturalized Special Immigrant Juveniles*, 40 CARDOZO L. REV. 579, 600 (2018).

160. See Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA Patriot Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051, 1067 n.60 (2002) (“Union organizers were labeled ‘communists’ and ‘anarchists,’ labor unrest was blamed on immigrants, and informants and agents provocateur were frequently used to create incidents which gave government troops and the private vigilante forces they collaborated with an excuse to crush peaceful demonstrations for better wages and working conditions.”) (citation omitted). Although the underlying or explicit anti-immigrant sentiment was often undeniable, “the government has often justified its actions” to quell such political movements “on the ground that these were actually movements for anarchy or communism, ‘alien’ ideologies promoted by foreign powers.” *Id.* at 1067. See generally HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES: 1492–PRESENT*, at 206–357 (Cynthia Merman & Roslyn Zinn eds., HarperCollins Publishers 2003) (detailing several labor strikes and movements that occurred, and organizations that were created, that affected and assisted foreigners and minorities).

161. See Geoffrey D. Berman, *A New Deal for Free Speech: Free Speech and the Labor Movement in the 1930s*, 80 VA. L. REV. 291, 299–302 (1994) (reviewing the labor movement’s free speech concerns). Cf. *People v. Lloyd*, 136 N.E. 505, 515 (Ill. 1922) (“It would be a pitiful situation, indeed, if this nation or state could

the two natural antagonists—management and labor—could unify against the immigrants. Citizens have greater rights.¹⁶² Immigrants are much easier to arrest, detain, or remove.¹⁶³ The refusal of the courts and Congress to fully incorporate immigrants into the constitutional protections available for the native-born generates a culture of intolerance and disruption for immigrant communities.

Congress has long employed immigration controls and the threat of deportation as a method of strengthening national security. In my ears, that rhetoric plays like a broken record. From the Alien and Sedition Acts, to the Red Scare and Palmer Raids, to the recent travel ban, Congress has been enabling the executive to target immigrants.¹⁶⁴ Recent Supreme Court cases concerning the rights of aliens charged with national security offenses discuss the infamous Alien and Sedition Acts.¹⁶⁵ The Alien Enemies Act, although implemented centuries ago and slightly modified, remains in effect today.¹⁶⁶ While the other statutes comprising the Alien and Sedition Acts were short-lived, the Adams administration tried to restrict publishers

not protect itself against a group of undesirable aliens who were organizing for the purpose of destroying our established government. And would not Illinois be an object of pity and contempt if she could not prevent her own citizens from advocating to this group of foreigners the forcible reformation and overthrow of our state government!”).

162. See *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002) (“While the Bill of Rights jealously protects citizens from such laws, it has never protected non-citizens facing deportation in the same way. In our democracy, based on checks and balances, neither the Bill of Rights nor the judiciary can second-guess government’s choices.”); see also *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, *supra* note 8, at 368–69.
163. See *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, *supra* note 8, at 367 (“In short, we have adopted the easy choice of sacrificing the liberties of a vulnerable minority . . . for the purported security of the majority.”); see also César Cuauhtémoc García Hernández, *Of Inferior Stock: The Two-Pronged Repression of Radical Immigrant Birth Control Advocates at the Turn-of-the-Twentieth Century*, 20 ST. THOMAS L. REV. 513, 528–31 (2008) (explaining how the United States government turned to immigration law as a means to deport anarchists when they could not be prosecuted under criminal laws).
164. See Daniel Fisher, *The President Has as Much Immigration Authority as Congress Gives Him*, FORBES (Nov. 21, 2014), <https://www.forbes.com/sites/danielfisher/2014/11/21/the-president-has-as-much-immigration-authority-as-congress-gives-him/?sh=2b27f3e73251> (discussing the separation of powers between Congress and the president in immigration law and providing historical examples of Congress stepping in to counteract an executive decision). See generally Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U. L. REV. 801 (2013) (detailing non-citizen’s rights under the Constitution and current Supreme Court decisions); *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, *supra* note 8 (criticizing the “ambivalent” approach the Court has taken in protecting noncitizens’ constitutional rights and arguing that noncitizens are entitled to the same constitutional protections as citizens).
165. See, e.g., *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (describing the Alien and Sedition Acts as “[a]n early effort to empower the President to order the deportation of those immigrants he ‘judge[d] dangerous to the peace and safety of the United States’” and as “short lived and unpopular.”) (second alteration in original) (citations omitted).
166. See *Lopez-Aguilar v. Marion Cnty. Sheriff’s Dep’t*, 296 F. Supp. 3d 959, 977 n.14 (S.D. Ind. 2017) (“The constitutionality of the Alien Enemies Act . . . was not seriously questioned, apparently because [it is] understood to be predicated on the Congressional war-making power.”) (citations omitted); see also *supra* note 19 and accompanying text.

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sympathetic to the French Revolution or freedom for Ireland, and arrested and imprisoned some immigrant writers.¹⁶⁷

From 1789, to 1903, to 1919, I would say that the targeting of immigrants never truly went away, but went into dormant phases.¹⁶⁸ From time to time and for a myriad of reasons, anti-immigrant sentiment grows, and the targeting returns, raising its flags and raids and detentions.¹⁶⁹ Congress acted again and again to pass legislation that curtailed the political and immigration rights of those who joined the communist movement or parties, among others.¹⁷⁰

But Congress used fear of the immigrant to generate other regressive legislation. Fearing a growing population of immigrants from Eastern and Southern Europe, Congress created in 1921 a benign quota system,¹⁷¹ which enshrined a great deal of national origin discrimination until 1965.¹⁷² With the passage of another national origin quota act in 1924, immigration was severely curtailed;¹⁷³ the highest number

167. See *Alien and Seditious Act* – PBS, *supra* note 19 (“The Sedition Act, however, hadn’t even been signed into law before its effects were felt. Several Republican newspaper editors softened their tone or eliminated offending material altogether. Other journalists, outraged by the act and exercising the freedom of speech it forbid, hammered away at Adams. As promised, they were met with fines and arrests.”); see also Mary Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75, 102–03 (2013) (“The history surrounding the enactment of the law shows that the targets were the bogeymen of the times—the French and the Irish.”) (footnote omitted).

168. See *U.S. Immigration Timeline*, HIST. (Dec. 21, 2018), <https://www.history.com/topics/immigration/immigration-united-states-timeline> (“Attitudes and laws around U.S. immigration have vacillated between welcoming and restrictive since the country’s beginning.”); see also *Modern Immigration Wave Brings 59 Million to U.S., Driving Population Growth and Change Through 2065*, PEW RSCH. CTR. (Sept. 28, 2015), <https://www.pewresearch.org/hispanic/2015/09/28/modern-immigration-wave-brings-59-million-to-u-s-driving-population-growth-and-change-through-2065/> (showing actual and projected immigration trends from 1850 to 2065).

169. See *Enemy Aliens Article*, *supra* note 10, at 994–1003 (noting periods of increased anti-immigrant sentiment, including the Palmer Raids and the Red Scare).

170. See *supra* Part II. Ideological exclusion based on political party membership is not exclusive to the annals of history, as current immigration policy continues to employ such restrictions. See, e.g., Press Statement, Michael R. Pompeo, Secretary of State, U.S. Dep’t of State, U.S. Department of State Imposes Visa Restrictions on Chinese Communist Party Officials for Undermining Hong Kong’s High Degree of Autonomy and Restricting Human Rights (June 26, 2020) (announcing visa restrictions on Chinese Communist Party members “believed to be responsible for, or complicit in, undermining Hong Kong’s high degree of autonomy . . . or . . . human rights and fundamental freedoms”).

171. Act of May 19, 1921 (Emergency Quota Act), ch. 8, 42 Stat. 5 (repealed 1952). This Act “established the nation’s first numerical limits on the number of immigrants who could enter the United States.” *Closing the Door on Immigration*, NAT’L PARK SERV., <https://www.nps.gov/articles/closing-the-door-on-immigration.htm> (last updated July 18, 2017). In 1924, Congress “made the quotas stricter and more permanent.” *Id.*; see also Immigration Act of 1924 (Johnson-Reed Act), ch. 190, 43 Stat. 153 (repealed 1952).

172. See *Closing the Door on Immigration*, *supra* note 171 (providing that the quota systems “were specifically designed to keep out ‘undesirable’ ethnic groups and maintain America’s character as nation of northern and western European stock”); see also Immigration and Nationality Act of 1952 (McCarran-Walter Act), ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.) (ending the quota system).

173. See Theresa Alfaro-Velcamp & Robert H. McLaughlin, *Immigration and Techniques of Governance in Mexico and the United States: Recalibrating National Narratives Through Comparative Immigration Histories*, 29 L. & HIST. REV. 573, 589 (2011) (“In 1924, the [Immigration Act of 1924] was enacted in

of visas was allocated to the countries with a considerable population of immigrants from the 1890 census: England, Germany, and France, but not Russia, Poland, Italy, or the southern portions of Europe.¹⁷⁴ These quotas were part of the schemes to limit the immigration of “nonwhites” and those who were more likely to be Jewish or Catholic.¹⁷⁵ These statutes have been condemned as a “Whites only” scheme.¹⁷⁶ Asian immigration remained banned from 1882 until 1943.¹⁷⁷ African immigration was also extremely curtailed.¹⁷⁸

Additionally, race was and is openly a tool of immigration control.¹⁷⁹ With its power to define who could be admitted and qualify for naturalization, Congress had an openly “Whites only” requirement.¹⁸⁰ Native Americans and some free Blacks acquired

the United States to limit immigration of each nationality to two percent of the number of persons of that nationality as determined in the 1890 Census and set a minimum of 100 persons for each authorized country.”) (footnote omitted).

174. See Zsea Bowmani, *Queer Refuge: The Impacts of Homoantagonism and Racism in U.S. Asylum Law*, 18 GEO. J. GENDER & L. 1, 12 (2017) (“Both pieces of legislation set immigration quotas based on the number of people from their country of origin country [sic] who were already living in the United States at the time of the 1890 census (at 3% and 2% respectively), thereby giving preference to ‘white’ Europeans.”); see also Rachel Silber, Note, *Eugenics, Family & Immigration Law in the 1920’s*, 11 GEO. IMMIGR. L.J. 859, 881 (1997) (affirming that the “basis for the new immigration quota” was the 1890 census).
175. See Bowmani, *supra* note 174, at 12 (stating that the quota system “limited the number of people from eastern and southern Europe, particularly Jews, Italians, and Slavs, who at the time were typically racialized as non-white, and other, non-European countries”) (footnote omitted).
176. See Alfaro-Velcamp & McLaughlin, *supra* note 173, at 589 (noting that the quota laws are “[w]idely criticized in current immigration scholarship as racist and eugenic”); see also Bowmani, *supra* note 174, at 12 (confirming that the quota laws gave “preference to ‘white’ Europeans”).
177. See Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943).
178. See generally Bill Ong Hing, *Immigration Policies: Messages of Exclusion to African Americans*, 37 HOW. L.J. 237 (1994) (providing a history of U.S. immigration policies and detailing several reasons why African immigration remained limited).
179. See Patrick Weil, *Races at the Gate: A Century of Racial Distinctions in American Immigration Policy (1865–1965)*, 15 GEO. IMMIGR. L.J. 625, 627 (2001) (“While new arrivals had long been asked to report their country of origin, it was not until the end of the nineteenth century that authorities began to compile statistics classifying immigrants on explicitly ethnic grounds. The list of races and people, which provided the basis for the Immigration Bureau to develop these racial statistics, was implemented on July 1, 1898.”) (footnote omitted); see also Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After “9/11?”*, 7 J. GENDER RACE & JUST. 315, 316 (2003) (“Since the earliest days of the republic, immigrants have been excluded for . . . race and class”); Charles J. Ogletree, Jr., *America’s Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755, 761 (2000) (“[I]mplicit and explicit racial biases still pervade all four major avenues of legal immigration: family-sponsored, employment-based, diversity and refugee.”).
180. See Naturalization Act of 1790, ch. 3, 1 Stat. 103 (1790) (repealed 1870) (“[A]ny alien, being a free white person . . . may be admitted to become a citizen”); see also Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. REV. 307, 325 (2009) (“The Nationality Act of 1790 limited naturalization to ‘free white persons’ and specifically excluded African Americans and Native Americans.”).

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citizenship in the 1870s,¹⁸¹ but we did not lift our “Whites only” requirement for naturalization until 1952, when Congress passed the Immigration and Nationality Act.¹⁸²

As the world changed and the number of people embracing communism grew in the 1930s and through the Cold War in the 1950s, Congress added to the criminal sanctions grounds for deportation and barriers to naturalization.¹⁸³ Anyone who was a member of the Communist Party, advocated tenets of communism or a dictatorship, or advocated violence or sabotage, was barred from citizenship.¹⁸⁴ While noncitizens may have joined the American Communist Party or sister organizations at a time when there were no prohibitions on such membership, they were now suddenly vulnerable to deportation.¹⁸⁵ Even today, the United States has a long list of people, including former communists, who are ineligible for citizenship.¹⁸⁶ And noncitizens are subject to the government’s power to deport.¹⁸⁷

In the 1940s and 1950s, there were thousands of labor activists, writers, and ordinary men and women who worked in labor movements targeted by the federal

181. See Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256 (repealed 1952) (“That the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent.”).

182. Immigration and Nationality Act of 1952 (McCarran-Walter Act), ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.); see Trucios-Haynes, *supra* note 7, at 393, 388 n.83 (1997) (discussing the history of racially restrictive naturalization laws through 1952).

183. See, e.g., Alien Registration Act of 1940 (Smith Act of 1940), ch. 439, 54 Stat. 670 (codified as amended at 8 U.S.C. §§ 2385, 2387) (requiring all aliens to register and get fingerprinted and expanding deportation grounds to those who were affiliated with the Communist Party, even if an individual did not personally engage in violence or subversive acts); *Galvan v. Press*, 347 U.S. 522, 528, 530–32 (1954) (affirming deportation based on Communist Party membership). The ideological grounds of both exclusion and deportation grew in the Immigration and Nationality Act of 1952. See generally Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY’S L.J. 833, 843 (1997) (discussing Congress’s power to pass legislation deporting noncitizens for ideological reasons). See THREAT OF DISSENT, *supra* note 27, for more history of these statutes.

184. See INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(3)(D); see also, e.g., *Lopez v. Howe*, 259 F. 401, 404–05 (2d Cir. 1919) (affirming the deportation of an admitted anarchist); *United States v. Stuppiello*, 260 F. 483, 486 (W.D.N.Y. 1919) (affirming the denaturalization of a citizen immigrant after he admitted to being an anarchist).

185. See, e.g., *Bonetti v. Rogers*, 356 U.S. 691, 694–95 (1958) (holding that the 1918 exclusionary statute could be applied to any person who was a member of the Communist Party when they entered the United States or joined the Communist Party after entry).

186. See, e.g., INA § 313, 8 U.S.C. § 1424 (barring the naturalization of those who do not demonstrate attachment to the U.S. Constitution). Other categories excluded under this provision are those who are or were communist, those who have belonged to or written in support of any organization that advocates violence in support of political change, or those who opposed organized government. *Id.* Exceptions may be made for those who have past party memberships. *Id.*

187. See Ilona Bray, *Grounds of Deportability: When Legal U.S. Residents Can Be Removed*, NOLO, <https://www.nolo.com/legal-encyclopedia/grounds-deportability-when-legal-us-residents-can-be-removed.html> (last visited Apr. 18, 2021) (“Only immigrants who have successfully become U.S. citizens are safe from the grounds of deportability.”); see also Jill E. Family, *The Future Relief of Immigration Law*, 9 DREXEL L. REV. 393, 396 (2017) (noting that Congress expanded “the list of deportable offenses” and “legislated away the *de facto* statute of limitations for many deportation grounds by making a deportation ground applicable no matter how long an individual had been in the United States”).

government for deportation and detention.¹⁸⁸ The desire to deport was so important to members of the executive and the legislature that the operation and enforcement of immigration laws was transferred in 1940 from the “soft” and careful Secretary of Labor Frances Perkins to the more robust and forceful DOJ and its investigation branch—the FBI.¹⁸⁹ Until the DHS was created in 2002, the DOJ remained at the center of immigration law.¹⁹⁰

The Supreme Court’s twentieth-century case law, still mostly intact today, established several fundamental principles:

- Immigrants do not have the same associational or political rights;¹⁹¹
- Immigrants can be deported for behavior that was permissible at the time of the conduct, i.e., retroactivity is not forbidden in deportation;¹⁹² and

188. See Saito, *supra* note 160, at 1078, 1067 n.60 (providing that the government investigated millions of Americans in social and labor organizations, justifying its actions by claiming that these organizations were composed of communists and anarchists); see also *Enemy Aliens Article*, *supra* note 10, at 996–97 (recounting the abuses of the McCarthy era).

189. See Peter Irons, *Politics and Principles: An Assessment of the Roosevelt Record on Civil Rights and Liberties*, 59 WASH. L. REV. 693, 711–13 (1984) (detailing “the campaign to deport Harry Bridges” and its effect on immigration enforcement). In 1934, Bridges, a noncitizen, was the director of a San Francisco strike. *Id.* at 711. Because members of the Communist Party supported the strike, and Bridges openly expressed radical views, the Seattle director of the Immigration and Naturalization Service (INS), an agency under the Labor Department at the time, sought to deport Bridges based on allegations that he was a communist. *Id.* at 712. Despite her “distaste for the crusade to deport Bridges,” Secretary Perkins issued the deportation warrant because of “mounting political pressure.” *Id.* She selected James Landis as trial examiner, an individual with a reputation as a “New Deal liberal.” *Id.* Upon review of the evidence, Bridges was cleared of any communist affiliation. *Id.* As a result, conservative politicians successfully campaigned to move the INS from the Department of Labor to the DOJ, effectively bypassing Perkins. *Id.* Soon after the move, deportation proceedings were renewed against Bridges and Attorney General Robert Jackson “promptly ordered the FBI to reopen its investigation.” *Id.* at 713. The renewed proceedings were initially successful and Bridges was to be deported. *Id.* However, the Supreme Court vacated the order before Bridges was deported. *Id.* at 714; see also *Bridges v. Wixon*, 326 U.S. 135 (1945).

190. See *Leia v. Ashcroft*, 393 F.3d 427, 430 n.4 (3d Cir. 2005) (“Effective March 2003, the INS ceased to exist as an independent agency within the United States Department of Justice and its functions were transferred to the newly formed United States Department of Homeland Security.”); see also Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135. See generally U.S. CITIZENSHIP & IMMIGR. SERVS., OVERVIEW OF INS HISTORY (2012), <https://www.uscis.gov/sites/default/files/document/fact-sheets/INSHistory.pdf>.

191. See *Galvan v. Press*, 347 U.S. 522, 528–29 (1954) (affirming deportation of a civil rights activist who was briefly a nonactive member of the Communist Party); see also Lenni B. Benson, *Separate, Unequal, and Alien: Comments on the Limits of Brown*, 49 N.Y.L. SCH. L. REV. 727, 728–31 (2005) [hereinafter *Separate, Unequal, and Alien*] (discussing the lack of equal protection for noncitizens and the *Galvan v. Press* case).

192. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 593–96 (1952) (holding that retroactivity is not a violation of the ex post facto clauses of the U.S. Constitution when applied to people deported for membership in the Communist Party, despite no grounds of deportation existing at the time of their membership); see also *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy*, HUM. RTS. WATCH (July 16, 2007), <https://www.hrw.org/report/2007/07/16/forced-apart/families-separated-and-immigrants-harmed-united-states-deportation#> (“The [1996] laws render someone deportable for crimes committed at any point prior to the change in law, including crimes that were not deportable

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- An immigrant who is alleged to be a subversive, anarchist, communist, or threat to U.S. security can be detained, deported, and, if they travel, barred from reentering the United States to resume lawful residence.¹⁹³

The Court repeatedly refused to require either procedural or substantive due process rights for those who had not been able to or did not seek naturalization.¹⁹⁴

It may not be readily evident from this narrative, but race has always been a part of the immigration debate. Some of the hardest working activists seeking full civil rights protections for Latinos and Blacks were immigrants who had been socialists or members of the Communist Party.¹⁹⁵ One man, Roberto Galvan, was targeted in the 1950s by the California State Committee on Unamerican Activities.¹⁹⁶ What were his frightening actions? He marched with Latino leaders to stop police harassment in San Diego and Los Angeles.¹⁹⁷ Galvan had lived in the U.S. since 1918, but the Supreme Court in 1954 affirmed his deportation order for being a former member of

offenses at the time of their commission.”). See generally Vashti D. Van Wyke, Comment, *Retroactivity and Immigrant Crimes Since St. Cyr: Emerging Signs of Judicial Restraint*, 154 U. PA. L. REV. 741 (2006) (discussing the history and application of retroactivity in immigration law).

193. See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215–16 (1953) (holding that a long-term U.S. resident who traveled to communist countries could be excluded and detained indefinitely); see also Charles D. Weisselberg, *The Exclusion and Detention of Aliens, Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 967–70 (1995) (“[T]he rule of *Mezei* is simple and straightforward: *Mezei* came to the border without permission to enter. Based upon the executive’s national security concerns, he was properly excluded and detained without a hearing. Though *Mezei* had made it to U.S. soil, he would be treated the same as someone who had not. Indefinite detention may be regrettable, but the length of confinement does not diminish the executive’s power to detain.”).
194. See, e.g., *Demore v. Kim*, 538 U.S. 510, 531 (2003) (holding that detainment during removal proceedings is not a violation of due process); see also *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, *supra* note 8, at 386 (summarizing *Demore* and criticizing the Court for “assert[ing], but [] not justify[ing], differential treatment of foreign nationals’ due process rights”).
195. See generally ENRIQUE M. BUELNA, *CHICANO COMMUNISTS AND THE STRUGGLE FOR SOCIAL JUSTICE* (2019) (showcasing Mexican American activists and the relationship between the Chicano Movement and the Communist Party); ROBERT D. G. KELLEY, *HAMMER AND HOE: ALABAMA COMMUNISTS DURING THE GREAT DEPRESSION* (Univ. of N.C. Press, 25th ed., 2015) (1990) (highlighting the Alabama Communist Party’s contributions to the Civil Rights Movement).
196. See *Galvan*, 347 U.S. at 528–29 (holding that Galvan was deportable for being a member of the Communist Party, even if he was “unaware of the Party’s advocacy of violence[,]” because he “[did] not claim he joined the Party ‘accidentally, artificially, or unconsciously in appearance only[.]’”); see also *Separate, Unequal, and Alien*, *supra* note 191, at 729–30 (“[Robert Galvan] was among several other Latino leaders targeted by Jack Tenney, a California state senator who chaired the California Un-American Activities Committee . . .”).
197. See *Separate, Unequal, and Alien*, *supra* note 191, at 729–30 (“[Robert Galvan] was active in civil rights demonstrations for Latino workers.”). See generally Carlos Larralde, *Roberto Galvan: A Latino Leader of the 1940s*, 52 J. SAN DIEGO HIST. 151 (2006) (describing Robert Galvan’s leadership and deportation).

the Communist Party.¹⁹⁸ The Court denied his constitutional challenges the same term it ruled to end segregation in *Brown v. Board of Education*.¹⁹⁹

The injustices created by immigration law beg the question of what responsibility Congress should bear for creating this perilous, quasi-constitutional status of the foreign-born. We must move Congress to dismantle the detention and deportation machine it has assembled over the last century. Congress is funding and growing the most extensive immigration law enforcement and detention mechanism in the world—comprised of more than two hundred and forty thousand employees.²⁰⁰ This complex system has few protections for immigrants when the government uses its resources for ideological or political purposes.

VI. CONCLUSION

It is easy to draw parallels between the dark elements of the Palmer Raids and the travel ban, and it is sometimes easy to forget that these events are separated by an intervening century touted for political, legal, and judicial progress. Not even various intermediary immigration law “reforms” can avert the blurring of temporal lines. Although laws and regulations have changed, 1919 and 2017 noncitizens are almost indistinguishable when viewed through a constitutional lens.²⁰¹ *Trump v. Hawaii* confirmed the soundness of the federal government’s plenary power in the immigration realm.²⁰² If courts continue affording the executive such deference,

198. *Galvan*, 347 U.S. at 528–29.

199. See *Separate, Unequal, and Alien*, *supra* note 191, at 727. Ironically, only a week before it decided *Galvan*, the Supreme Court decided *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), which overruled *Plessy v. Ferguson*, 163 U.S. 537 (1896). The Court’s decision in *Plessy* is described as “a decision of the same vintage as the cases upholding the Chinese exclusion laws and reflecting the same general attitude toward discrimination on the basis of race.” Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 324 (1977).

200. See *About DHS*, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/about-dhs> (last visited Apr. 15, 2021).

201. Compare *Ex parte Kurth*, 28 F. Supp. 258, 263 (S.D. Cal. 1939) (“To say that once the alien has landed he can claim the right to remain is to grant him a right against the United States which he does not have. The United States, in its sovereign capacity, has the right to say who shall be admitted to its borders or remain therein and who shall be refused admission. No law of the United States allows the assertion by an alien of a right against its sovereignty unless the right appears clearly somewhere in the law. . . . There is nothing in the Constitution or the laws of the United States which confers any special right upon any alien within the United States.”) (citations omitted), with *Louhghalam v. Trump*, 230 F. Supp. 3d 26, 33 (D. Mass. 2017) (“There is a distinction, however, between the constitutional rights enjoyed by aliens who have entered the United States and those who are outside of it. The decision to prevent aliens from entering the country is a ‘fundamental sovereign attribute’ realized through the legislative and executive branches that is ‘largely immune from judicial control.’”) (citations omitted).

202. See 138 S. Ct. 2392, 2418–20 (2018) (first citing *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); and then citing *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952)) (“For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a ‘fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.’”); see also *supra* notes 28–31 and accompanying text.

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presidents—from Wilson to Trump and beyond—will continue to wield immigration law to accomplish otherwise illegal policy goals and motivations.

Statutory and regulatory reforms are crucial to bringing the legal status of noncitizens into parity with citizens. But until the Supreme Court augments the constitutional guarantees afforded to immigrants, progress will remain slow. Guarantees of equal protection are enshrined in the Constitution, but such rights are curtailed by courts when applied to noncitizens.²⁰³ Indeed, an 1886 Supreme Court case arguably remains the high-water mark for immigrant rights under the Equal Protection Clause.²⁰⁴ Perhaps it is time to demand more from our judiciary.²⁰⁵

The repetition of centuries-old errors will remain the topic of future symposia on immigration law so long as the law permits our leaders to treat immigrants differently than citizens. In 2019, more than seventy-five thousand children were apprehended at our southwest border, while countless others were forcefully separated from their parents and detained by Immigration and Customs Enforcement (ICE).²⁰⁶ In the spring of 2020, based on public health law and the COVID-19 pandemic as the statutory authority to control the borders, thousands have been summarily rejected and deported at the border without any hearings or procedures.²⁰⁷ Over the past few years, ICE has conducted large-scale raids across the country, targeting undocumented immigrants for deportation.²⁰⁸ In July of 2019, the Trump administration expanded

203. *See Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, *supra* note 8, at 379–80 (discussing the difficulties in applying the Equal Protection Clause to noncitizens). For example, the Supreme Court recently found that Congress had violated the Equal Protection Clause by setting harsher standards for citizenship through blood descent for fathers as opposed to automatic citizenship for children born to citizen mothers, but the Court ruled that only Congress could implement a remedy to reduce burdens. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017).

204. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (holding for the first time that the Constitution protects all individuals inside the United States, including aliens, from invidious discrimination); *see also* Hiroshi Motomura, *Immigration Law After A Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 *YALE L.J.* 545, 611 (1990) (“If we heed the plenary power doctrine, there is no real doubt to be avoided, but courts, perhaps hearing the echo of *Yick Wo*, nonetheless assume the existence of a constitutional question and answer it by relying on a phantom norm.”).

205. *See generally* Tamra M. Boyd, Note, *Keeping the Constitution’s Promise: An Argument for Greater Judicial Scrutiny of Federal Alienage Classifications*, 54 *STAN. L. REV.* 319, 320 (2001) (arguing for the judiciary’s adoption of “an equitable and consistent framework for evaluating [alien’s] rights and obligations . . . to the government”).

206. *Family Separation: By the Numbers*, ACLU (Oct. 2, 2018), <https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/family-separation>; *see also* *Ms. L. v. U.S. Immigr. & Customs Enf’t*, 415 F. Supp. 3d 980, 984 (S.D. Cal. 2020) (seeking to enjoin the policy of family separation at the border).

207. *How the Trump Administration is Using COVID-19 to End Asylum*, INT’L RESCUE COMM. (July 29, 2020), <https://www.rescue.org/article/how-trump-administration-using-covid-19-end-asylum>.

208. Olivia B. Waxman, *A Century Before Trump’s ICE Raids, the U.S. Government Rounded Up Thousands of Immigrants. Here’s What Happened*, *TIME* (July 18, 2019), <https://time.com/5625012/palmer-raids/>; *see also* Chris Mills Rodrigo, *ACLU Sues Trump Admin Ahead of Planned Immigration Raids*, *THE HILL* (July 11, 2019), <https://thehill.com/regulation/court-battles/452652-aclu-sues-trump-admin-ahead-of-planned-immigration-raids> (discussing a preemptive lawsuit against ICE “seek[ing] to protect people who would be targeted by the raids” by “arguing that constitutional due process requires immigrants be

the power of DHS agents to arrest people within the United States and to summarily deport them using expedited removal procedures if an individual could not establish lawful admission and inspection within the past two years.²⁰⁹

What is clear is that the Trump administration believed that the power over immigrants gave the DHS authority to control the lives of noncitizens.²¹⁰ During the COVID-19 pandemic, the administration took more than forty-five actions that directly or indirectly impacted immigrants inside and outside the United States.²¹¹ Today, approximately 14 percent of the U.S. population was born abroad and—while most people are residing with some lawful status or have naturalized—we have a population of over ten million who cannot immediately document their status.²¹² Of these ten million, more than 60 percent have lived in the United States for over ten years and millions are living in mixed-status households.²¹³ Four million U.S. citizen children have at least one parent who is vulnerable to deportation.²¹⁴

While some may see the use of expedited procedures and the current expansion of border controls as properly within the DHS's purview, those interpreters do not fully understand how the machinery of enforcement is likely to impact us all. Who will be stopped and interrogated? Who will be questioned about their citizenship?

given a hearing in front of an immigration judge before being deported"); *Nava v. Dep't of Homeland Sec.*, 435 F. Supp. 3d 880, 885–86 (N.D. Ill. 2020) (class action against ICE, DHS, and public officials for targeted, warrantless immigration sweeps).

209. *See supra* note 150 and accompanying text.

210. *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). *See generally* Adam Cox & Cristina Rodriguez, *Trump's COVID-19 Immigration Proclamation May Be Legal, But It's Still an Abuse of Power*, JUST SEC. (Apr. 30, 2020), <https://www.justsecurity.org/69952/trumps-covid-19-immigration-proclamation-may-be-legal-but-its-still-an-abuse-of-power/> (discussing potential limits on the executive authority over immigration); ADAM B. COX & CRISTINA M. RODRIGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* (2020) (providing a detailed examination of the predominant role played by American presidents in immigration policy throughout history).

211. *See* Danilo Zak, *Immigration-Related Executive Actions During the COVID-19 Pandemic*, NAT'L IMMGR. F. (Nov. 18, 2020), <https://immigrationforum.org/article/immigration-related-executive-actions-during-the-covid-19-pandemic/>; *see also* David J. Bier, *Timeline and List of U.S. Immigration Actions on COVID-19*, CATO INST. (Mar. 19, 2020), <https://www.cato.org/blog/timeline-list-us-immigration-actions-covid-19>. Some of the steps taken enhanced regulatory flexibility and allowed adaptations to required distancing; others were an outright ban on the entry of some immigrants as well as a suspension of regular removal procedures. *See* Zak, *supra* (providing that some policies were “necessary proportional response[s] to . . . COVID-19” whereas other policies “used the pandemic as a pretext to implement dramatic immigration restrictions that have been part of the Trump Administration’s immigration objectives since long before the spread of COVID-19”).

212. Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/fact-tank/2019/06/17/key-findings-about-u-s-immigrants/>.

213. Vivian Yee et al., *Here's the Reality About Illegal Immigrants in the United States*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/interactive/2017/03/06/us/politics/undocumented-illegal-immigrants.html>.

214. Randy Capps et al., *Fact Sheet: A Profile of U.S. Children with Unauthorized Immigrant Parents*, MIGRATION POL'Y INST. (Jan. 2016), <https://www.migrationpolicy.org/research/profile-us-children-unauthorized-immigrant-parents>.

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How many immigrants and citizens will live in fear of enforcement? Is this attack on immigrants really separable from attacks on U.S. families?

Traveling through time and capturing the status of noncitizens at flashpoints in American history, it becomes clear that today's challenges are vestiges of our nation's dark and painful past of discrimination against immigrants. The more we learn about this history and the recent attacks on the liberties of immigrants, the more we see that the freedoms that serve as cornerstones of our democracy are perhaps more fragile than we believe.