Unwitting and Unwelcome in Their Own Homes: Remedying the Coverage Gap in the Child Citizenship Act of 2000

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ABSTRACT: The Child Citizenship Act of 2000 has provided automatic U.S. citizenship to countless foreign-born adoptees. Within the Act exists a noticeable gap in coverage for those U.S. international adoptees who were over the age of 18 as of the Act's passage in 2001. As a result, tens of thousands of U.S. adoptees are considered deportable non-citizens. The deportation of a handful of U.S. adoptees, men and women who had lived nearly their entire lives in the United States, has generated significant media attention and public sympathy. However, Congress has yet to pass legislation, namely the Adoptee Citizenship Act, amending the Child Citizenship Act to retroactively grant citizenship status to those left unprotected. Adoptees and their advocates cannot wait for this protection to be granted. This Note provides alternative arguments and sources of law that adoptees and advocates should consider in deportation proceedings and in broader legislative lobbying efforts. In particular, this Note argues that the Child Citizenship Act, as it stands, cannot withstand equal protection scrutiny, encouraging courts to apply a more heightened standard than rational basis review. These arguments aim to persuade courts to reverse the deportable status of many U.S. international adoptees and to further motivate Congress to amend the Child Citizenship Act.

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I. INTRODUCTION

International adoption has long been a celebrated practice in the United States, providing U.S. citizens the opportunity to become loving parents to children born outside the United States.[1] As international adoptions grew in number and in response to international law developments regarding the rights of adoptees, the United States recognized the need for national legislation protecting foreign-born children.[2] In 2001, the United States enacted the Child Citizenship Act (the "Act") to automatically grant citizenship to all international adoptees parented by a U.S. citizen. However, the Act only extended citizenship to those children under the age of 18 at the time of the Act's passage.[3] The resulting lack of coverage for a significant number of U.S. international adoptees has led to deportation for some and fear of deportation for others.[4] Members of Congress have attempted[5] to correct the Child Citizenship Act so that all international adoptees are automatically granted U.S. citizenship regardless of their age relative to the statute.[6] As the media and recent scholarship have noted, however, these bills—namely the Adoptee Citizenship Act—have faced delays in passage.[7]

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1. *See* Kathleen Ja Sook Bergquist, *Right to Define Family: Equality Under Immigration Law for U.S. Inter-Country Adoptees*, 22 GEO. IMMIGR. L.J. 1, 1–2 (2007); DeLeith Duke Gossett, *"[Take From Us Our] Wretched Refuse": The Deportation of America's Adoptees*, 85 U. CIN. L. REV. 33, 56 (2017). Although adoption practices in the United States involved some unscrupulous dealings prior to World War II, this Note focuses on the legal, vetted adoption processes that developed following the War in conjunction with national legislation. Gossett, *supra*, at 55–56. Adoption practices involving coercion, stealing, and the sale of children were prohibited by international law, which the United States and other relevant foreign nations ratified. *See* Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, July 5, 2000, S. TREATY DOC. NO. 106-37. Of particular note to this discussion is the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children. *Id.*; Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990); *see also infra* Section II.A.4 (describing the impact of the United Nations Convention on the Rights of the Child).

2. Gossett, *supra* note 1, at 62–64; *see* Bergquist, *supra* note 1, at 5–6; *see also infra* Sections II.A–.B (depicting both international and U.S. responses to the necessity for laws protecting international adoptees).

3. Gossett, *supra* note 1, at 65–66. As will be discussed, this loophole was deliberate, although the full extent of its consequences were arguably unintended by Congress. *See infra* Section II.B.

4. *See infra* Part III. "Strife," as this Note has described it, also includes the emotional toll associated with: (i) discovering one is not a U.S. citizen after years living in the country and (ii) for those deported, losing one's connections to the United States and navigating an entirely unfamiliar country without knowledge of the language, customs, or ability to make a sound living. *See infra* Part III.

5. This Note does not discuss attempts prior to 2015 because they have been superseded by the Adoptee Citizenship Acts of 2015 and 2016. *See infra* Section III.B.

6. *See infra* Section III.A. Following their introduction, the Adoptee Citizenship Acts are discussed as essentially one piece of legislation for the purposes of this Note. *See infra* Part IV.

7. *See infra* Part III.

This Note argues that while passage of the Adoptee Citizenship Act is key to preventing unnecessary deportations and achieving equal rights for U.S. international adoptees,[8] adoptees facing deportation[9] and advocates of the pending legislation[10] do not have the luxury of waiting for this legislation. In the interim, those searching for support must turn to existing common law[11] and the international commitments made by the United States in relation to the rights of children.[12]

Part II introduces the recent history of international adoption practices in the United States and discusses how international law has evolved to encompass a more compassionate view of international adoption. Also, this Part shows the ways in which U.S. law has been enacted; both in direct response to such international law, and separately to provide additional protections considering the vast number of international adoptions conducted between the United States and several other nations. Finally, this Part describes the Child Citizenship Act.

Part III analyzes the problems inherent in the Child Citizenship Act's coverage gap, in part by detailing the experiences of several high-profile cases in which U.S.-raised adoptees were deported following the commission of a crime. Specifically, Part III details the damaging deportation experience for these individuals and others similarly situated.

Finally, Part IV argues that, given the immediacy of their situations, deportable adoptees and their advocates cannot wait for Congress to pass the Adoptee Citizenship Act. This Part argues there is a basis for finding the Child Citizenship Act's coverage gap is contrary to the Constitution as supported by the Supreme Court's Equal Protection jurisprudence. As written, the Act arguably cannot withstand a "rational basis with bite" scrutiny—which courts should apply, because courts should recognize these adoptees as a discrete and insular minority deserving of protection. Furthermore, the gap is arguably misaligned with the United States' commitments under certain protocols of the United Nations Convention on the Rights of the Child (the "UNCRC"). This Part concludes that adoptees should focus lobbying efforts and defense strategies for deportation proceedings on these bases.

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8. *See infra* Part III.

9. Analogous to the situations of those deported individuals—or those facing deportation—presented in Part III. *See infra* Section III.A.

10. Analogous to the Adoptee Rights Campaign. *See infra* Sections III.A–.B. Although the Adoptee Rights Campaign is the advocacy group of primary interest in this Note, there are obviously a number of other advocates supportive of legislation amending the Child Citizenship Act to include retroactive coverage of those adults currently left exposed to deportation.

11. *See infra* Sections IV.A, IV.C.

12. *See infra* Section IV.B.4.

II. UNDERSTANDING THE DEVELOPMENT OF U.S. AND INTERNATIONAL LAW SURROUNDING INTERNATIONAL ADOPTIONS

The current plight of U.S. international adoptees who fail to qualify for automatic citizenship[13] is best understood when accompanied by knowledge of the foundations of U.S. international adoption and related law. By the 1940s, international adoption had developed into a legitimate, viable option for U.S. couples.[14] Shortly thereafter, both U.S. and international law expanded recognition of the rights of international adoptees. In addition to the historical context surrounding U.S. international adoptions, this Part explores the relevant developments in U.S. and international law including: (i) the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption ("Hague Convention on Intercountry Adoption");[15] (ii) the corresponding U.S. legislation called the Intercountry Adoption Act of 2000;[16] (iii) the UNCRC;[17] (iv) the optional protocols associated with this convention, including the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography;[18] and (v) the Child Citizenship Act of 2000.[19]

A. HISTORY OF INTERNATIONAL ADOPTION AND RELATED LAW IN THE UNITED STATES

1. The Origins and Development of International Adoption in the United States

International adoptions in the United States began in earnest after World War II[20] when U.S. citizens who wanted to have children, but were themselves

13. 8 U.S.C. § 1431(a) (2012); *see infra* Section II.B.

14. Gossett, *supra* note 1, at 56–57.

15. Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption art. 1, *concluded* May 29, 1993, S. TREATY DOC. NO. 105-51 (entered into force in United States Apr. 1, 2008).

16. Intercountry Adoption Act of 2000, Pub. L. No. 106-279, 114 Stat. 825 (2000).

17. Convention on the Rights of the Child, *supra* note 1, art. 2.

18. *See* Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *supra* note 1, at 1.

19. 8 U.S.C. § 1431(a) (2012).

20. This Note acknowledges but will not discuss in detail the more unscrupulous practices surrounding adoption prior to the Korean War. *See* Gossett, *supra* note 1, at 55. Such practices were most famously committed by Georgia Tann, owner of the Tennessee Children's Home Society in years leading up to World War II. *Id.* Tann significantly commercialized the adoption process, and her business thrived on adopting out an astronomical number of children as quickly as possible, to capitalize most efficiently. *Id.* Such practices were kept secret from the public and often involved anything from the theft of children "from poor, uneducated, single white women who had no recourse," to bribery of judges and those in positions of power in the family law realm. *Id.* at 56. This commercialization of adoption continued through World War II and came to involve scores of Irish children "taken forcibly from their unwed mothers, who were wards of

physically unable,[21] started adopting children from across Europe, Japan, and China.[22] However, since the process was unregulated, it sometimes involved unscrupulous practices including the removal of children from their birth mothers and falsifying documents to mask the transfer.[23]

Following the Korean and Vietnam Wars, hundreds of families began adopting children orphaned during these conflicts.[24] Also during this period, a number of U.S. soldiers fathered children with Vietnamese and Korean citizens.[25] The U.S. government responded by issuing the 1953 Refugee Relief Act, granting 4,000 visas for Korean children to join U.S. families. This Act formally solidified U.S.-Korea adoption relations.[26]

Shortly thereafter, Harry and Bertha Holt[27] started the Holt Adoption Program, a national organization focused on international adoptions, still in operation today as Holt International Children's Services.[28] Working to ease the adoption process, the Holts carried out significant lobbying efforts, which resulted in the United States' international adoption program evolving from refugee relief to a permanent option for U.S. adoptive families.[29] The Holt program and several additional agencies expanded the formal U.S.

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the infamous Magdalene laundries." *Id.* at 57. This Note mentions these horrific practices to illustrate how public perception and conception of adoption has shifted since the 1960s. From early in U.S. history, adoptions were treated as a means to secure child labor as opposed to beloved members of the family unit. *Id.* at 55. Following the Korean War, and thanks to the efforts of the Holt family, discussed herein, international adoptions became celebrated as joyous unions between children, who would otherwise face uncertain futures in society, and loving parents who were simply unable to physically conceive a child. *Id.* at 57–58; *see infra* Section II.A.1. It is important to mention this historical change in attitude because it clearly identifies the reasons why both international and U.S. communities sought to protect the rights of these child adoptees cherished by U.S. parents. *See infra* Section II.A–.B. As an example of this intention on the international scale, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children specifically addresses commercialization of adoption-like practices, effectively combating (i) the international transfer of children for the purposes of labor, monetary gain, or other offensive means and (ii) the taking of children through force, coercion, or other means as mentioned above. *See* Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *supra* note 1, at 3–4.

21. *See* Gossett, *supra* note 1, at 55–56.

22. Bergquist, *supra* note 1, at 1–2.

23. Gossett, *supra* note 1, at 56.

24. Bergquist, *supra* note 1, at 2; Gossett, *supra* note 1, at 57.

25. Gossett, *supra* note 1, at 57. Children born as a result of U.S. involvement in the Korean War were destined to grow up as outcasts in Korean society. *Id.*

26. *Id.*

27. Harry and Bertha Holt adopted eight children from South Korea in 1955, marking among the first open adoptions of children of different ethnicity from their adoptive parents. *See The Legacy of Bertha "Grandma" Holt*, HOLT INT'L, https://www.holtinternational.org/historybg.shtml (last visited Apr. 9, 2019). Endeavoring to help as many Korean children as possible, the couple began an adoption agency to assist other families in international adoptions. *See id.*

28. *See* Gossett, *supra* note 1, at 58; HOLT INT'L, http://www.holtinternational.org (last visited Apr. 9, 2019).

29. Gossett, *supra* note 1, at 57–58.

international adoption program beyond Korea to Vietnam and several other countries.[30]

With the expansion in U.S. international adoptions over the past several decades, it became especially important that U.S. law recognize those adopted internationally. Originally, U.S. parents were required to file for their child's citizenship separately from the adoption process at the state and federal level.[31] The original filing process could take up to three years, which resulted in many couples failing to complete their children's applications.[32] Over the years, however, the United States and international community have passed a number of laws protecting the rights of international adoptees, including: the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption,[33] the Intercountry Adoption Act of 2000,[34] the UNCRC,[35] and the Child Citizenship Act of 2000.[36]

2. The Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption

The Hague Convention on Intercountry Adoption is an international agreement central to the discussion of international adoptee rights.[37] The Hague Convention on Intercountry Adoption "establishes international standards of practices for intercountry adoptions."[38] The United States is a signatory of the Hague Convention on Intercountry Adoption, and ratified

30. *Id.* at 58–59.

31. *Id.* at 60. This process involved two steps: (i) the parents first followed any state laws governing their adoption within the U.S., and (ii) the parents then went through the immigration stage of the process to obtain citizenship for their child. *Id.* This second step involved applying to INS, which could take up to three years in total. *Id.* This step also involved document production from both the adoptive mother, father, and any children of the family, "including birth and marriage certificates, photo identifications, immigrant cards and certified English translations of documents written in other languages." *Id.* (quoting Eric Schmitt, *75,000 Adoptees Gaining Automatic Citizenship*, CHI. TRIB. (Feb. 27, 2001), http://articles.chicagotribune.com/2001-02-27/news/0102270198_1_adoption-process-child-citizenship-act-naturalized). It is thus relatively easy to see, as Part III discusses, why so many adoptive parents simply stopped at some point after fulfilling their state-level adoption obligations. *Id.*; *see infra* Part III. For the purposes of this Note, it is also important to acknowledge that sometimes the fault existed at least in part on the adoption agency. Gossett, *supra* note 1, at 60.

32. Gossett, *supra* note 1, at 60.

33. Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, *supra* note 15; *see also* 8 U.S.C. § 1431(a) (2012) (codifying the Convention).

34. Intercountry Adoption Act of 2000, Pub. L. No. 106-279, 114 Stat. 825.

35. Convention on the Rights of the Child, *supra* note 1.

36. 8 U.S.C. §§ 1431–1433.

37. Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, *supra* note 15.

38. *Understanding the Hague Convention*, U.S. DEP'T ST.: BUREAU OF CONSULAR AFFAIRS, https://travel.state.gov/content/adoptionsabroad/en/hague-convention/understanding-the-hague-convention.html (last visited Apr. 9, 2019).

the agreement in 2008.[39] The convention protects the interests of children throughout the process of international adoption according to the following stated purposes:

> [T]o establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law . . . to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children . . . [and] to secure the recognition in Contracting States of adoptions made in accordance with the Convention.[40]

Under the Hague Convention on Intercountry Adoption, an international adoption may proceed only where the nation of the family intending to adopt has "determined that the prospective adoptive parents are eligible and suited to adopt."[41] The convention further dictates that selected "Central Authorities" for each nation "shall co-operate with each other and promote co-operation amongst the competent authorities in their States to protect children and achieve the other objects of the Convention."[42]

Although it is considered binding upon ratification in the United States, the U.S. government considers the Hague Convention on Intercountry Adoption to be non-self-executing.[43] As a result, "the implementing legislation (not the Convention) will be the basis for decision-making by U.S. courts."[44] Thus, Congress directs U.S. courts to follow U.S. legislation interpreting and implementing the Hague Convention on Intercountry Adoption over the language used in the convention.[45] As a non-self-executing treaty, the Hague Convention on Intercountry Adoption has, at best, "an

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39. *Id.*

40. Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, *supra* note 15, art. 1.

41. *Id.* art. 5. The Convention requires that each nation must further "prepare a report including information about [the prospective adoptive parent's] identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, as well as the characteristics of the children for whom they would be qualified to care." *Id.* art. 15.

42. *Id.* art. 7.

43. S. EXEC. REP. NO. 106–14, at 10 (2000). As a condition for ratification, the U.S. declared the Hague Convention on Intercountry Adoption to be non-self-executing. *Id.* As distinguished from a self-executing treaty, a non-self-executing requires legislative action, i.e., the creation of intervening legislation, to effect meaning to the treaty's provisions. Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 696–97 (1995) (explaining further distinctions between self-executing and non-self-executing treaties).

44. S. EXEC. REP. NO. 106-14, at 10.

45. *Id.*

indirect effect in U.S. courts."[46] International adoptees in the United States may only rely on the protections of the Hague Convention on Intercountry Adoption to the extent that they are expressed in corresponding U.S. legislation—in this case, the Intercountry Adoption Act of 2000.[47]

3. The Intercountry Adoption Act of 2000

The United States passed the Intercountry Adoption Act of 2000 in response to the Hague Convention on Intercountry Adoption.[48] The stated purposes of the Intercountry Adoption Act include: "to protect the rights of, and prevent abuses against, children, birth families, and adoptive parents involved in adoptions (or prospective adoptions) subject to the [Hague Convention on Intercountry Adoption], and to ensure that such adoptions are in the children's best interests."[49]

4. The United Nations Convention on the Rights of the Child

The United Nations also devised the UNCRC, ratified by the U.N. General Assembly in 1989.[50] The UNCRC intends to provide all children with "the equal and inalienable rights of all members of the human family" and to ensure that children are raised "in the spirit of peace, dignity, tolerance, freedom, equality and solidarity."[51] The treaty further "[r]ecogniz[es] the importance of international co-operation for improving the living conditions of children."[52] In relation to the rights of international adoptees, the UNCRC states that parties to the convention "shall ensure that the best interests of the child shall be the paramount consideration and they shall . . . [e]nsure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption."[53]

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46. Frederic L. Kirgis, *International Agreements and U.S. Law*, AM. SOC'Y OF INT'L LAW: INSIGHTS (May 27, 1997), https://www.asil.org/insights/volume/2/issue/5/international-agreements-and-us-law.

47. Intercountry Adoption Act of 2000, Pub. L. No. 106-279, 114 Stat. 825 (2000).

48. *Id.* In keeping with this Note's discussion of non-self-executing treaties, this national legislation, not the Hague Convention, serves as the U.S. authority for courts to consider as they weigh decisions based upon the Hague Convention's terms. *See* S. EXEC. REP. NO. 106-14, at 10 (2000).

49. Intercountry Adoption Act of 2000, § 2(b)(2).

50. Convention on the Rights of the Child, *supra* note 1, at 3.

51. *Id.* at 44–45.

52. *Id.* at 46.

53. *Id.* art. 21. The UNCRC further requires parties to

> [e]nsure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary.

Id.

The UNCRC has been "the most rapidly and widely ratified human rights treaty in history."[54] The United States signed the treaty in 1995 but as a non-party to the convention is not bound to its terms.[55] In fact, the United States is now the only remaining non-party country to the UNCRC.[56] In 2008, then-presidential candidate Barack Obama called the nation's failure to ratify the UNCRC "embarrassing" and pledged to "review" the treaty.[57] While the United States has not joined the UNCRC, the nation has adopted two optional protocols to the convention: (1) the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict (the "Children in Armed Conflict Protocol")[58] and (2) the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (the "Sale of Children Protocol").[59] The Sale of Children Protocol is intended to address child trafficking, prostitution, and pornography, and it defines the "sale of children" as "any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or other consideration."[60]

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54. *25th Anniversary of the Convention on the Rights of the Child: Questions and Answers*, HUM. RTS. WATCH (Nov. 17, 2014, 11:50 AM), https://www.hrw.org/news/2014/11/17/25th-anniversary-convention-rights-child.

55. Convention on the Rights of the Child, *supra* note 1.

56. B. Shaw Drake & Megan Corrarino, *U.S. Stands Alone: Not Signing U.N. Child Rights Treaty Leaves Migrant Children Vulnerable*, HUFFINGTON POST (Oct. 13, 2016), http://www.huffingtonpost.com/b-shaw-drake/children-migrants-rights_b_8271874.html.

57. Patrick Geary, *United States: Is Obama's Win Also a Victory for Children's Rights?*, CHILD RTS. INT'L NETWORK (Nov. 17, 2008), http://www.crin.org/en/library/news-archive/united-states-obamas-win-also-victory-childrens-rights (quoting Barack Obama at the Walden University Presidential Youth Debate). Despite these words, and despite numerous campaigns attempting to effectuate such change, then-President Obama did not ratify the Convention during his time in office. *See* Caryl M. Stern, *Obama Should Take Action to Protect the World's Children*, TIME (Apr. 19, 2016), http://time.com/4293977/convention-on-the-rights-of-the-child ("U.S. ratification of the CRC is 21 years overdue. . . . [N]o president has ever sent the CRC to the Senate for ratification as our Constitution requires. With Somalia's ratification of the CRC in 2015, the U.S. is now the only country left in the world that hasn't ratified it."); *Tell President Obama: Send the CRC to the Senate*, UNICEF USA, https://www.unicefusa.org/stand-for-childrens-rights (last visited Apr. 9, 2019). It is unclear why exactly the matter has not been brought before the Senate, given that bipartisan support was expressed during the 2008 presidential campaign, in which John McCain also voiced his support for such action. *Id.* ("I strongly support the goal of this treaty, protecting the world's most vulnerable children.").

58. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, July 25, 2000, S. TREATY DOC. No. 106-37 (2000).

59. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *supra* note 1. The U.S. conditions its ratification of the optional protocols, however, on the understanding that "the United States does not assume any obligations under the Convention on the Rights of the Child by becoming a party to the Protocol." *Id.* at VI (clarifying the United States' commitment in the letter of submittal).

60. *Id.* art. 2.

B. CHILD CITIZENSHIP ACT OF 2000

Outside of the obligations imposed by international conventions and related protocols, the United States has enacted its own protections for international adoptees. In 2000 Congress passed the Child Citizenship Act which amended the Immigration and Nationality Act,[61] providing a solution for the tens of thousands of U.S. international adoptees facing deportation simply because they had not naturalized.[62] Under the Child Citizenship Act, a child adopted from outside the United States automatically acquires citizenship if the following conditions are met:

> [1] At least one parent of the child is a citizen of the United States, whether by birth or naturalization. [2] The child is under the age of eighteen years. [3] The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.[63]

The Child Citizenship Act allows children whose adoptions are finalized in a foreign country to gain U.S. citizenship at time of entry.[64] The Child Citizenship Act granted automatic citizenship to approximately 75,000 adoptees on its enactment date.[65] However, the Act was prospective and required the child to be under the age of 18 at the time of its enactment.[66] As a result, U.S. international adoptees who were over the age of 18 on February 27, 2001 were not covered by the Child Citizenship Act.[67]

Lack of coverage under the Child Citizenship Act has left a significant number of adult adoptees vulnerable to deportation.[68] Some refer to this gap in citizenship coverage as a "political compromise" balancing the granting of citizenship to adoptee children with the prevention of citizenship for criminal adult adoptees.[69] In effect, by eliminating the possibility of citizenship for adult adoptees, the Child Citizenship Act "ensured that adult adoptees were treated no differently than illegal aliens and terrorists."[70] In the wake of the World Trade Center attacks of September 11, 2001, the United States began enforcing strict immigration laws providing for the deportation of non-

61. Immigration & Nationality Act § 320, 8 U.S.C. § 1431 (2012).

62. Child Citizenship Act of 2000, Pub. L. No. 106-395, § 101, 114 Stat. 1631, 1631 (2000); Bergquist, *supra* note 1, 5–6.

63. Immigration & Nationality Act § 320(a), 8 U.S.C. § 1431(a).

64. Bergquist, *supra* note 1, at 5.

65. Gossett, *supra* note 1, at 64–65 (citing Kristin R. Pak et al., *Deporting Adult Adoptees*, FOREIGN POL'Y IN FOCUS (July 4, 2012), https://fpif.org/deporting_adult_adoptees).

66. 8 U.S.C. § 1431(a)(2); Gossett, *supra* note 1, at 65. The statute was enacted on February 27, 2001. *Id.*

67. Gossett, *supra* note 1, at 65.

68. *See id.*

69. *Id.* at 65–66.

70. *Id.*

citizens convicted of any "aggravated felony."[71] Despite what the term "aggravated" implies, immigration statutes widened the definition of an aggravated felony to encompass state crimes such as "battery, forged checks and selling drugs."[72]

III. THE PROBLEM CREATED BY A GAP IN COVERAGE IN THE CHILD CITIZENSHIP ACT AND FAILED ATTEMPTS TO RECTIFY LACK OF COVERAGE

This Part discusses the coverage gap in the remedies provided by the Child Citizenship Act and how this gap has impacted affected adoptees. The media has covered several tragic cases in which adult international adoptees were deported to their birth countries after spending most of their lives in the United States.[73] Although these deportations occurred after the commission of certain crimes, the adoptees' criminal acts ranged significantly in severity. Further, most of those involved were unaware they lacked citizenship until reaching adulthood. As discussed herein, both Congress and governments outside the United States recognize the misfortune associated with the coverage gap inherent in the Child Citizenship Act.[74] However, Congress has not passed legislation amending the Act.[75]

A. ADULT ADOPTEES LEFT UNPROTECTED FOLLOWING THE PASSAGE OF THE CHILD CITIZENSHIP ACT

The most publicized deportations of U.S. international adoptees involved Adam Crapser, Monte Haines, and Phillip Clay.[76] The New York Times took particular interest in the plight of these men and has published a number of articles covering their deportations.[77] All three adoptees were born in South Korea and expressed frustration with the lack of mercy shown by both the U.S. and South Korean governments.[78] Because none of these men had spent any

71. *Id.* at 66.

72. Maggie Jones, *Adam Crapser's Bizarre Deportation Odyssey*, N.Y. TIMES MAG. (Apr. 1, 2015), https://www.nytimes.com/2015/04/01/magazine/adam-crapsers-bizarre-deportation-odyssey.html.

73. *See id.*; Choe Sang-Hun, *Deportation a 'Death Sentence' to Adoptees After a Lifetime in the U.S.*, N.Y. TIMES (July 2, 2017), https://www.nytimes.com/2017/07/02/world/asia/south-korea-adoptions-phillip-clay-adam-crapser.html.

74. *See supra* Part II.

75. *See infra* Section III.B.

76. *See* Sang-Hun, *supra* note 73.

77. Jones, *supra* note 72; Sang-Hun, *supra* note 73; Liam Stack & Christine Hauser, *A South Korean Man Adopted by Americans Prepares for Deportation*, N.Y. TIMES (Nov. 1, 2016), https://www.nytimes.com/2016/11/02/us/adam-crapser-deportation-south-korea.html; Choe Sang-Hun, *Korean Mother Awaits a Son's Deportation to Confess Her 'Unforgivable Sin,'* N.Y. TIMES (Nov. 16, 2016), https://www.nytimes.com/2016/11/17/world/asia/korea-adoption-adam-crapser.html.

78. Sang-Hun, *supra* note 73. These individuals argued that nations receiving deportees should refuse to accept adoptees—especially those deported after believing themselves to be American citizens for decades. *Id.* This exact scenario, in which a birth country refuses to accept a deported international adoptee, has yet to play out. On the contrary, birth countries such as

significant time in South Korea prior to deportation, they all suffered from extreme culture shock, were unable to read the Korean language, and had difficulties finding sustainable job opportunities, suitable living arrangements, and mental health support services.[79]

Major news outlets covered Crapser's deportation in real time, bringing light to the crises caused by the Child Citizenship Act's lack of protections for certain adult adoptees.[80] Adam Crapser was adopted from South Korea at the age of three, but his adoptive parents never completed his citizenship paperwork. Under U.S. law, Crapser was left legally deportable from a young age.[81] By the age of ten, his adoptive family had abandoned him to the U.S. foster care system.[82] After he was adopted by a new family, Crapser endured significant abuse before leaving home at 16 years old.[83] Crapser was then involved in a series of crimes,[84] and served time in prison.[85] Upon improving his situation and learning that he was not a citizen, Crapser attempted to remedy this by applying for his green card—frustrated by failed attempts to obtain his adoption papers from his second adoptive father.[86] During this process, the Department of Homeland Security learned of Crapser's criminal history and declared him deportable.[87]

Crapser was deported in 2016 despite significant media attention and lobbying attempts of NGOs and adoptee organizations to keep him in the country.[88] "[A] spokesman for ICE[] says that although Crapser's criminal history ma[de] him potentially deportable, 'ICE was not aware of Mr. Crapser's childhood history' when it made the decision to pursue his case and

South Korea have offered some aid to deported adoptees. *Id.* This aid has come in the form of limited social adoption-related agencies—including Holt International. *Id.* Korea Adoption Services, a South-Korean government-organized institution, has also played a role in attempting to assist Korean-born deported adoptees in their efforts to assimilate in their birth country. *Id.*; KOREA ADOPTION SERVS., https://www.kadoption.or.kr/en/index.jsp (last visited Apr. 9, 2019). These services, particularly for deported U.S. adoptees, appear to be absent from the agency's webpage. *Id.* Lack of advertisement on the webpage, however, does not necessarily mean the agency does not provide significant resources to Korean-born deported adoptees. *Id.*; *see also* Sang-Hun, *supra* note 73 (discussing further the difficulties of these adoptees both in South Korea and the U.S.).

79. Jones, *supra* note 72; Sang-Hun, *supra* note 73; Stack & Hauser, *supra* note 77.

80. Jones, *supra* note 72; Stack & Hauser, *supra* note 77; *see also* Sang-Hun, *supra* note 77 (chronicling Crapser's deportation journey in parallel with his biological mother's preparations for his deportation to South Korea).

81. *See* Sang-Hun, *supra* note 73.

82. Gossett, *supra* note 1, at 68; Jones, *supra* note 72; Sang-Hun, *supra* note 73.

83. Gossett, *supra* note 1, at 68; Jones, *supra* note 72 (noting that Crapser's second adoptive father was convicted of sexual abuse); Sang-Hun, *supra* note 73.

84. Including burglary, assault and unlawful possession of a firearm. Sang-Hun, *supra* note 73; Sang-Hun, *supra* note 77.

85. Gossett, *supra* note 1, at 68–69 n.297; Jones, *supra* note 72; Sang-Hun, *supra* note 73.

86. Sang-Hun, *supra* note 73.

87. Gossett, *supra* note 1, at 68–69; Jones, *supra* note 72; Sang-Hun, *supra* note 73.

88. Sang-Hun, *supra* note 73.

would take it into consideration."[89] As shown by the outcome of Mr. Crapser's hearing and subsequent appeal, the courts did not give significant weight to Crapser's hardships in light of his criminal history.[90]

Now located in Seoul, South Korea, Adam Crapser lives away from his wife and children and struggles with housing, employment, and depression.[91] Crapser's widely-publicized ordeal evinces that ICE and the U.S. legislature have not been sufficiently persuaded to reconsider deportation for those who have lived the vast majority of their lives in the United States, most under the impression that they were U.S. citizens.[92] Furthermore, the U.S. government appears to view these individuals as criminals worthy of deportation regardless of whether they have already served extensive sentences in the U.S. justice system and despite the fact that they faced tremendous difficulties in remedying their citizenship status.[93]

Another deported adoptee, Monte Haines, was adopted from South Korea in 1981.[94] For much of his life in the United States, Haines was under the same impression as his parents—that his adoption into the United States yielded automatic citizenship.[95] He was allowed to enlist and serve in the U.S. Army, but Haines was deported following a prison sentence for a drug offense.[96] Haines arrived in Seoul in 2009 with only $20 and no knowledge of the Korean language.[97] Monte Haines now works as a bartender and says that even after eight and a half years in South Korea, he is still struggling to survive.[98]

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89. Jones, *supra* note 72.

90. Gossett, *supra* note 1, at 68–69.

91. Sang-Hun, *supra* note 73. Though Crapser was able to establish contact with his birth mother in Korea, it appears she has not been able to give him much aid as he transitions to life in an unfamiliar country. Sang-Hun, *supra* note 77. Crapser's birth mother stated intentions to provide him with a room in her home, food, and was trying to learn English in time for his arrival. *Id.* When the media found him in South Korea following his deportation, however, Crapser had been "[l]iving out of suitcases in a tiny studio in Seoul" and had tremendous difficulty finding work. Sang-Hun, *supra* note 73. It is unclear from a reading of these two portrayals whether Crapser has obtained aid from or formed a relationship with his birth mother. *See id.*; Sang-Hun, *supra* note 77. In January, 2019, Crapser filed private action against the South Korean government and the Holt adoption agency for gross negligence and fraudulent paperwork. Kim Tong-Hyung, *Adoptee Deported by US Sues S. Korea, Agency*, ASSOCIATED PRESS (Jan. 23, 2019), https://apnews.com/12472d8f87944f12ae63f74a2829a410.

92. Jones, *supra* note 72.

93. *Id.*

94. Tara Bahrampour, *They Grew Up as American Citizens, Then Learned That They Weren't*, WASH. POST (Sept. 2, 2016), https://www.washingtonpost.com/local/social-issues/thousands-of-adoptees-thought-they-were-us-citizens-but-learned-they-are-not/2016/09/02/7924014c-6bc1-11e6-99bf-focf3a6449a6_story.html.

95. *Id.*

96. *Id.*

97. Sang-Hun, *supra* note 73.

98. *Id.*

Among the most tragic deportation stories is that of Phillip Clay, a Korean-born U.S. adoptee.[99] Clay was deported to South Korea following a number of arrests.[100] Like Haines, Clay spoke no Korean and knew no one upon his arrival in Seoul.[101] Phillip Clay also struggled with significant mental health issues, and in 2017, he committed suicide in South Korea.[102]

While the deportation stories illuminated thus far involve the commission of aggravated felonies, it is also true that mere presence in the United States without proper authorization makes one deportable. As described in the Irish media in January 2018, an estimated 2,000 Irish children were adopted by U.S. families between the 1940s and 1960s—many of whom failed to naturalize due to incorrect or missing paperwork or to the illegality of the adoption itself.[103] As a result of the coverage gap, these adoptees cannot rely upon the Child Citizenship Act to save them from deportation.[104]

Some U.S. international adoptees who have unwittingly committed crimes directly stemming from their lack of citizenship, such as voter fraud, now live in fear of deportation.[105] One unnamed individual risked deportation when the individual obtained a Social Security number, voted, and served on a jury.[106] Another adoptee, Justin Ki Hong, was shocked to learn he was not a citizen upon applying for employment, as he had a seemingly valid Social Security number and driver's license.[107]

Other U.S. international adoptees, like Kairi Shepherd, who suffers from Multiple Sclerosis ("MS"), have physical health concerns including disabilities that complicate a deportation order.[108] Shepherd's mother passed away before she completed her daughter's citizenship paperwork.[109] When Shepherd was charged with and served time for drug crimes, the U.S.

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99. *Id.*

100. *Id.* Mr. Clay's crimes were numerous and included robbery, theft, and drug offenses. Chris Fuchs, *Deported Adoptee's Death Heightens Calls for Citizenship Bill*, NBC NEWS (June 2, 2017, 3:44 PM), https://www.nbcnews.com/news/asian-america/deported-adoptee-s-death-heightens-calls-citizenship-bill-n767341.

101. *See* Fuchs, *supra* note 100.

102. *Id.*; *see* Sang-Hun, *supra* note 73.

103. Rosita Boland, *The Irish Babies Adopted to the US, Now Adults in a Legal Limbo*, IRISH TIMES (Jan. 20, 2018, 6:00 AM), https://www.irishtimes.com/life-and-style/abroad/the-irish-babies-adopted-to-the-us-now-adults-in-a-legal-limbo-1.3360195.

104. *Id.*

105. Bahrampour, *supra* note 94.

106. *Id.*

107. *Id.*

108. Kristin R. Pak et al., *Deporting Adult Adoptees*, FOREIGN POL'Y IN FOCUS (July 4, 2012), http://fpif.org/deporting_adult_adoptees; *see also* Gossett, *supra* note 1, at 69 (explaining the circumstances surrounding Shepherd's deportation order).

109. Gossett, *supra* note 1, at 69; Christine Futia, *Adoptees Without Citizenship Deserve our Mercy*, HILL (Nov. 23, 2016, 11:40 AM), http://thehill.com/blogs/congress-blog/judicial/307258-adoptees-without-citizenship-deserve-our-mercy; Pak et al., *supra* note 108.

government declared her deportable.[110] Shepherd's deportation was stayed following the involvement of the External Affairs Minister of India, who contacted then-Secretary of State Hillary Clinton, "declaring that Kairi's deportation [to India] would be a human rights violation."[111] Although Clinton herself did not have the authority to remove the order, agreements between the U.S. and Indian governments eventually ended in ICE staying the deportation.[112] This has by no means resolved Kairi Shepherd's plight.[113] Denying any grant of citizenship or lawful status, the United States has left Shepherd in a position where she can be deported at any moment.[114] Shepherd currently does not have access to government medical assistance to subsidize her medical expenses and "cannot travel by plane, train or bus within the United States because she lacks legal identification. Under today's law, there is no relief available."[115]

This Note has established that for some international adoptees convicted of committing crimes, deportation is too severe of a consequence. This is especially true for those deportees who already served time in the United States for their crimes. Moreover, the fact that deportation may be seen as a penalty in and of itself can sometimes far outweigh the severity of the crime committed. In the words of Justice Brewer in his dissenting opinion in *Fong Yue Ting v. United States*:

> [I]t needs no citation of authorities to support the proposition that deportation is punishment. Every one knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel.[116]

As an example of this imbalance, consider the tragedy following the deportation of a U.S. international adoptee Joao Herbert.[117] Herbert was murdered in Brazil following his deportation after being convicted of distribution of seven and a half ounces of marijuana—Herbert's first and only criminal offense, carrying a "sentence of probation and community treatment."[118] Following Herbert's murder, then-Representative Delahunt said to Congress, "[n]o one condones criminal acts . . . but the terrible price these young people and their families have paid is out of proportion to their

110. Gossett, *supra* note 1, at 69; Futia, *supra* note 109; Pak et al., *supra* note 108.
111. Futia, *supra* note 109.
112. *Id.*
113. *Id.*
114. *Id.*; Gossett, *supra* note 1, at 69.
115. Futia, *supra* note 109.
116. Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting).
117. Gossett, *supra* note 1, at 61–62.
118. *Id.* at 61.

misdeeds. Whatever they did, they should be treated like any other American kid. They are our children, and we are responsible for them."[119]

B. STALLED LEGISLATIVE ATTEMPTS TO CLOSE THE COVERAGE GAP

Legislators have attempted to provide coverage for those international adoptees over the age of 18 at the time of the Child Citizenship Act's passage by proposing a number of bills and amendments, but none so far have succeeded. The first of these attempts was the Citizenship for Lawful Adoptees Amendment, which was approved by the Senate only to die in the House of Representatives.[120] The amendment's sponsor was an adoptive parent who agreed, as did the majority of the Senate who approved the amendment, that deportation is an unacceptable punishment for those adoptees guilty of certain crimes.[121]

Following the highly-publicized deportation saga of Adam Crapser, Senator Klobuchar introduced the Adoptee Citizenship Act of 2015 to address the lack in coverage left following the 2000 Child Citizenship Act.[122] The Act intended "to 'create a clear pathway for adoptees who have been deported for minor crimes and have served their sentences to come back to the [United States.]'"[123] Representative Smith introduced a companion bill in the House of Representatives in June of 2016.[124] As of 2017, leaders of adoptee rights and welfare organizations expressed skepticism that the legislation would pass given the current U.S. political environment.[125] Some advocates believe after the terrorist attacks on September 11, 2001 legislators are more apt to find legislation relating to immigration "untenable."[126] Advocates attempted to educate both legislators and the public on the importance of this bill.[127]

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119. *Id.* at 62 (quoting 146 CONG. REC. 18,492 (2000) (statement of Rep. Delahunt)).

120. Gossett, *supra* note 1, at 66–67 & n.276 (citing Amendment to the Border Security, Economic Opportunity, and Immigration Modernization Act, S. Amendment 1222 to S. 744, 113th Cong. (2013)).

121. *Id.* at 66–67.

122. *Id.* at 70–71; *see also* Adoptee Citizenship Act of 2015, S. 2275, 114th Cong. (2015) ("[P]rovid[ing] for automatic acquisition of United States citizenship for certain internationally adopted individuals, and for other purposes.").

123. Gossett, *supra* note 1, at 71 (quoting Frances Kai-Hwa Wang, *Bill Would Provide Retroactive Citizenship for All International Adoptees*, NBC NEWS (Nov. 13, 2015, 3:36 PM), https://www.nbcnews.com/news/asian-america/bill-would-provide-retroactive-citizenship-all-international-adoptees-n462151).

124. Adoptee Citizenship Act of 2016, H.R. 5454, 114th Cong. (2016); Gossett, *supra* note 1, at 71–72.

125. Rachel Yang, *Korean Adoptees: Left Behind, Now Fighting for Citizenship*, IMMIGRANT CONNECT CHI., http://immigrantconnect.medill.northwestern.edu/blog/2016/06/20/korean-adoptees-left-behind-now-fighting-for-citizenship (last visited Apr. 9, 2019).

126. *Id.*

127. *Id.*

One advocate for adoptee rights expressed tempered expectations regarding passage of the 2016 Act, stating that between 80%–90% of bills fail to become law and given that the bill failed to pass prior to the election, it is now up to advocates to maintain Congressional interest in this important piece of legislation.[128] While the 2016 Act stalled in Congress, advocates successfully garnered support for adoptees at the local level. In 2017, Philadelphia and Seattle became the first cities to publicly support the Adoptee Citizenship Act.[129]

Federal and local action increased in 2018. In March, Republican Senator Roy Blunt introduced the Adoptee Citizenship Act of 2018, co-sponsored by Senators Klobuchar, Hirono, and Collins.[130] A companion bill under the same name was introduced on the same date in the House by Democratic Representative Adam Smith, co-sponsored by Representatives Chu, Lofgren, Chris Smith, Walters and MacArthur.[131] At the local level, in January, the city of Houston announced its support for legislation to amend the Child Citizenship Act to close the coverage gap.[132] In July, Los Angeles became the fourth city to pass a resolution for adoptee citizenship.[133] The city's resolution specifically supported the Adoptee Citizenship Act of 2018.[134]

While adoptee-protective laws have evolved along with international adoption practices in the United States, a significant number of international adoptees still do not have citizenship, and, as several of the more publicized deportation cases illustrate, these adoptees have no time to waste while the bill that could save them sits in Congress. Given these circumstances, international adoptees must be able to seek alternatives to remedy this problematic, time-sensitive issue.

IV. ADOPTEES AND ADVOCATES SHOULD LOOK TO JUDGE-MADE LAW AND U.S. OBLIGATIONS UNDER RELEVANT INTERNATIONAL TREATIES FOR REMEDIES IN LIEU OF PENDING LEGISLATIVE PROTECTION

While Congress considers remedying legislation, international U.S. adoptees and advocates must find alternative methods to protect against the

128. Yang, *supra* note 125.

129. *See* Seattle, Wash., Resolution 31,781 (Nov. 20, 2017); Nina Ahmad, *The Adoptee Citizenship Act: What You Should Know and What You Can Do*, ADOPTEE RTS. CAMPAIGN (July 20, 2017), http://adopteerightscampaign.org/philadelphia-city-council-resolution.

130. Adoptee Citizenship Act of 2018, S. 2522, 115th Cong. (2018).

131. Adoptee Citizenship Act of 2018, H.R. 5233, 115th Cong. (2018).

132. Al Ortiz, *Houston City Council Supports Campaign to Help Adoptees Who Lack U.S. Citizenship*, ADOPTEE RTS. CAMPAIGN (Jan. 23, 2018, 4:00 PM), http://adopteerightscampaign.org/houston-city-council-proclamation.

133. Mark Pampanin, *Press Release: City Council Approves Ryu Resolution for Adoptee Citizenship*, ADOPTEE RTS. CAMPAIGN (July 3, 2018), http://adopteerightscampaign.org/los-angeles-city-council-resolution.

134. *Id.*

potential deportation of an entire class of persons. In this Part, this Note proposes alternative arguments and sources of law adoptees and advocates should consider to raise as defenses in deportation proceedings and toward broader legislative lobbying efforts. In particular, this Note contends that adoptees and their advocates have grounds to argue the Child Citizenship Act, as it stands, cannot withstand a court's scrutiny based on an equal protection claim—and that courts should recognize the adult adoptees affected by the Act as a protected minority class. Included in this argument, this Part contends that the Act as written is against the spirit of the United States' own commitments to the UNCRC.

A. *Application of Equal Protection Claims of Selected Immigration Cases*

Although the Supreme Court has not granted certiorari to any matter involving the deportation of U.S. international adoptees, those arguing before ICE and the Board of Immigration Appeals ("BIA") may find guidance from the equal protection arguments in relevant immigration cases. In its evaluation of equal protection claims, a court determines whether the legislation at issue classifies individuals in an impermissible way and accordingly adjusts its scrutiny of the legislation.[135] In the first case of this subsection, the Court invalidated a law based on racial classification, applying strict scrutiny. In the second, the Supreme Court considered the effect of gender classification in an immigration context, applying intermediate scrutiny. As discussed later in this Note, all classifications considered less than semi-suspect receive a rational basis review.[136]

1. *Yick Wo v. Hopkins*

Yick Wo v. Hopkins provides strong support for the notion that "[t]he fourteenth amendment to the constitution is not confined to the protection of citizens. . . . These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of . . . nationality . . . ."[137] Under *Yick Wo*, international adoptees may argue they should not be denied equal protection of the law based upon their international origins.[138] However, as discussed later in this Part, courts will not

135. Certain "suspect" classifications, namely race and ethnicity, receive strict scrutiny, under which the classification must be narrowly tailored to achieving a compelling governmental interest; "semi-suspect" classifications, those based on gender and legitimacy, receive intermediate scrutiny, under which the classification must be substantially related to an important governmental interest. *See generally* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1996) (applying heightened scrutiny for gender-based classification); Trimble v. Gordon, 430 U.S. 762 (1977) (applying intermediate scrutiny applied for statutes discriminating based on illegitimacy); Loving v. Virginia, 388 U.S. 1 (1967) (applying strict scrutiny to classification based on race).

136. *See infra* Section IV.B.

137. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

138. *See id.*

automatically analyze the Child Citizenship Act under strict scrutiny. These arguments will best serve to support a stricter-than-rational-basis scrutiny argument, given the uniquely challenging situation faced by those adversely affected by the Act.

2. *Sessions v. Morales-Santana*

The Immigration and Nationality Act, the same legislation amended at § 1431 by the Child Citizenship Act, has another troubling provision relating to nationality and naturalization: § 1409.[139] In *Sessions v. Morales-Santana*, decided in June of 2017, the Supreme Court declared the difference between §§ 1401 and 1409 violates the equal protection notions of the Fifth Amendment.[140] According to § 1401, when a child is born abroad to one U.S. citizen parent and one non-citizen, the U.S. citizen parent must have been present in the United States for five years prior to the birth of the child in order for that child to gain U.S. citizenship.[141] This applies to married couples and to unmarried parents where the father is the U.S. citizen.[142] The statute creates an exception, however, for unmarried U.S.-citizen mothers, who are only required to reside in the United States for one year prior to the birth of a child abroad.[143]

The situation of the defendant in that case, Luis Morales-Santana, is not far removed from that of the individuals described above. Morales-Santana was born in the Dominican Republic to a Dominican citizen mother and a

139. 8 U.S.C. § 1409 (2012). This Note points out the stark differences between this piece of legislation and the Child Citizenship Act. *See id.* § 1431(a). This provision of the Immigration and Nationality Act distinguishes between U.S.-citizen mothers and fathers for foreign-born children born out of wedlock, bestowing differing citizenship outcomes accordingly. *Id.* § 1409(a), (c). In contrast, the Child Citizenship Act grants citizenship to foreign-born children adopted by *any* U.S.-citizen parent, mother or father, with the same outcome in either case. *Id.* § 1431(b). Thus, the Immigration and Nationality Act seemingly treats foreign-born children born to unmarried parents in the U.S. more unfairly than either an unmarried adopting couple or even an adopting single-parent. *Id.* §§ 1409, 1431(a). The reason for this is explained in part by the court in *Morales-Santana*: § 1409 was composed in the 1960s, at a time when the U.S. held a strong view of women as the "center of the home," thus, granting women a more lenient citizenship policy was likely seen to be in the best interest of the child at the time of this legislation. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1689 (2017) (quoting Goesaert v. Cleary, 335 U.S. 464, 466 (1948)). This Note reasons that there was also, and may still be, greater public sympathy in the United States for adoptive families than those involving single parents conceiving children out of wedlock. The *Morales-Santana* case is noticeably silent on this, presumably because the point at issue is the gender-specific citizenship requirements. 8 U.S.C. § 1409; *Morales-Santana*, 137 S. Ct. at 1688–89.

140. *Morales-Santana*, 137 S. Ct. at 1700–01. Though the Fifth Amendment has no explicit equal protection clause, it forbids discriminatory practices that lead to violations of due process. Schneider v. Rusk, 377 U.S. 163, 168 (1964).

141. 8 U.S.C. § 1401(g).

142. *See id.* §§ 1401(g), 1409(a).

143. *Id.* § 1409(c).

Puerto Rican citizen father.[144] The Government and the BIA determined that Luis was a non-citizen, despite having lived in the United States—or U.S. territory—since age 13, because his U.S.-citizen father failed the five-year requirement under § 1401.[145] Much like the international adoptees discussed previously in this Note, Luis committed a series of crimes in the United States, and his deportable status was flagged as a result of his criminal convictions.[146] The Supreme Court ruled that discriminating against foreign-born adoptees with U.S. citizen fathers, thereby discriminating based on gender, violates the equal protection ensured by the Constitution, determining that such discriminatory means were not "substantially related" to obtaining the overall aim of the Immigration and Nationality Act.[147] Similar to *Yick-Wo*, however, a court analyzing the Child Citizenship Act under an equal protection claim will not automatically apply intermediate scrutiny as it did for the problematic gender classification in *Morales-Santana*. As such, adoptees and their advocates must encourage courts to recognize those adversely affected by the Child Citizenship Act as a class deserving of protection and, therefore, a court's use of heightened scrutiny as it considers the constitutionality of the Act.

B. COURTS SHOULD FIND THE CHILD CITIZENSHIP ACT DOES NOT SURVIVE RATIONAL BASIS REVIEW

1. Rational Basis Scrutiny and "Rational Basis with Bite"

A court conducts rational basis review of legislation utilizing a less than semi-suspect classification. Under this standard of review, a statute is declared unconstitutional if the government interest it purports to serve is illegitimate or, if the government interest is legitimate, if the statute's classification scheme is not rationally related to achieving that interest.[148] Rational basis places the burden on the plaintiff to show that one of the two issues above occurred, and traditionally the statute at issue passes this level of scrutiny.[149]

Using an unstated legal principal commonly referred to as "rational basis with bite," the Supreme Court has applied a stricter-than-rational-basis

144. *See Morales-Santana*, 137 S. Ct. at 1687–88. Born in 1900, Morales-Santana's father was a U.S. citizen under the Organic Act of Puerto Rico. *Id.*

145. *Id.* at 1687. Luis's father moved away from Puerto Rico at age 18, just shy of the five-year requirement—at this time, the five years needed to take place after the citizen turned 14, so moving outside the U.S. at age 18 disqualified the father from passing citizenship to any children conceived between himself and a non-U.S. citizen. *Id.* at 1686–87.

146. *Id.* at 1688.

147. *Id.* at 1690, 1692–93; *see also* United States v. Virginia, 518 U.S. 515, 533 (1996) ("The State must show 'at least that the [challenged] classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives."'" (alteration in original) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982))).

148. *See* City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

149. *See id.*

standard for less than semi-suspect classifications involving particular individuals.[150] This has particularly occurred in cases involving legislation concerning undocumented immigrants,[151] individuals with disabilities (prior to protective legislation),[152] and the LGBT community[153]—none of which were classes capable of receiving the benefits of strict or intermediate scrutiny. Through "rational basis with bite," courts have created protections for classes that would not ordinarily benefit from heightened scrutiny of the laws affecting them. In order to find that a law fails rational basis scrutiny in these cases, the court must (i) recognize the class of persons as deserving of heightened scrutiny and (ii) decide that the law does not serve a legitimate government interest or impermissibly burdens the class in question.[154]

2. Adult International Adoptees Deserve Protections as a Discrete and Insular Minority

Much like undocumented immigrant children deserve the same education as non-immigrant children,[155] all international adoptees should be treated the same as those adopted within the United States. Following a core message of *United States v. Carolene Products*, a seminal case on equal protection, laws should not evince "prejudice against discrete and insular minorities" nor "curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[156] As shown above, the affected group in this case is clearly distinct under the Act from other adoptees and cannot derive protections from "those political processes ordinarily to be relied upon."[157] In response any counter arguments raised referring to these adoptees' status as non-citizens, plaintiffs may rely on the Court's holding in *Plyler v. Doe*.[158] In holding that a state law could not deny enrollment in public schools to undocumented immigrant children, the Court reasoned that all individuals residing within the United States and subject to its laws should have a right to equal protection, "including aliens unlawfully present."[159]

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150. *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18–19 (1972).

151. *See generally* Plyler v. Doe, 457 U.S. 202 (1982) (striking down a Texas statute denying undocumented immigrant children an education).

152. *See generally* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985), *superseded by statute*, Fair Housing Act, 42 U.S.C. § 3601–3619 (1988) (striking down city laws imposing special zoning requirements on a group home for citizens with cognitive disabilities).

153. *See generally* Romer v. Evans, 517 U.S. 620 (1996) (invalidating a state constitutional amendment prohibiting the formation of state/local ordinances protecting LGBT persons from discrimination).

154. *See, e.g.*, *Plyler*, 457 U.S. at 210, 216, 220.

155. *See id.* at 211–13.

156. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

157. *Id.*

158. *See Plyler*, 457 U.S. at 211–13.

159. *Id.* at 212 (citing Wong Wing v. United States, 163 U.S. 228, 238 (1896)).

Adoptees and their advocates have strong evidence showing they have been uniquely harmed by the Child Citizenship Act. As such, courts should recognize them accordingly and analyze the Act under stricter scrutiny than rational basis review.

3. Serving Certain Government Interests, the Child Citizenship Undermines Others

As shown in this Note, the Child Citizenship Act undoubtedly serves an important government purpose in assisting millions in obtaining U.S. citizenship following adoption abroad. However, the Act simultaneously undermines another important government interest: preventing statelessness.[160] In *Morales-Santana*, the Court rejected one of the U.S. Government's tangential arguments that legislation discriminating based on gender is necessary "to reduce the risk that a foreign-born child of a U.S. citizen would be born *stateless*."[161] A "stateless person" is one "who is not considered as a national by any State under the operation of its law."[162] Although the Court implied that the statelessness argument was an afterthought with respect to this provision of the Immigration and Nationality Act, the Government has attempted to assert this same position in the past with respect to this Act.[163] However, the Government's statelessness argument was not sufficiently persuasive to overcome the legislation's discriminatory impact.[164]

With respect to the Child Citizenship Act and the Adoptee Citizenship Act, adoptees and advocates facing deportation proceedings, appeals, or lobbying efforts should apply the Government's own statelessness argument —that is, utilize the Government's demonstrated concern about the statelessness of foreign-born children of U.S. citizens. Advocates may argue that through the Child Citizenship Act, Congress has protected one class of adoptees from statelessness while directly exposing another class to its horrors. The Government, through its position taken in *Morales-Santana*, as

160. Phrased another way, it promotes an illegitimate government interest—statelessness.

161. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1696 (2017) (emphasis added).

162. Convention Relating to the Status of Stateless Persons art. 1, Sep. 28, 1954, 360 U.N.T.S. 117, 136. Interestingly, although the U.S. Government has relied upon arguments based on statelessness, the U.S. is not a party to this convention. *Id.* at 118.

163. *See Morales-Santana*, 137 S. Ct. at 1696; *see also* Nguyen v. I.N.S., 533 U.S. 53, 79 (2001) (O'Connor, J., dissenting) (arguing that the majority did not give the proper relevance to the argument). The Supreme Court similarly rejects the Government's "statelessness" argument with respect to § 1409 in *Nguyen v. I.N.S.*, for much of the same reason as in *Morales-Santana*. *Id.* at 93. The Court states that (1) the INS has not properly shown how the risk of statelessness "justifies the discriminatory means of" the statute. *Id.* Much as in *Morales-Santana*, the INS fails to analyze statelessness from the perspectives of both the unwed mother and unwed father, and thus cannot succeed on a statelessness argument. *Id.*

164. *See Morales-Santana*, 137 S. Ct. at 1685, 1696–98.

well as through the Child Citizenship Act, has demonstrated an interest in protecting certain children and not others from statelessness.

4. U.S. Treatment of Legitimacy of Birth Lends Support to Protecting Those Adversely Affected by the Child Citizenship Act

The Supreme Court has decided a number of cases relating to discrimination based on legitimacy of birth and, similar to gender, analyzes this discriminating legislation under intermediate scrutiny.[165] Accordingly, the Court has stated that legislation "may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally."[166] While not the same as adoption, legitimacy arguments accepted by the Supreme Court pose important underlying notions of equal treatment for children, regardless of the circumstances of their birth.

The UNCRC, the Optional Protocols of which the United States has ratified, provides further support to the notion that all children should be given equal protection under the law.[167] Article Two of the convention voices the importance of avoiding "discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, col[o]r, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, *birth* or other status."[168] Further, it is widely believed in the United States that non-marital children should be treated the same as those born of a marriage.[169] Legislation "should be neutral toward a class of persons that is blameless in incurring unfavorable treatment."[170] The Government could raise the counter-argument that state family law does not apply to children adopted internationally.[171] Doing so, however, only strengthens the argument

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165. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). For other examples in which the Supreme Court rejected legislation discriminating based on legitimacy of birth, see Jimenez v. Weinberger, 417 U.S. 628, 637–38 (1974); Gomez v. Perez, 409 U.S. 535, 538 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 165 (1972); Levy v. Louisiana, 391 U.S. 68, 71–72 (1968); and Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73, 76 (1968).

166. *Gomez*, 409 U.S. at 538.

167. Convention on the Rights of the Child, *supra* note 1, at 44–45.

168. *Id.* art. 2 (emphasis added).

169. Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 331 (2006).

170. *Id.*; *see also* JOHN DE WITT GREGORY ET AL., UNDERSTANDING FAMILY LAW 114 (2d ed. 2001).

171. *See* Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL'Y 267, 325 (2009). Estin states,

> [c]hildren born outside the United States to an American citizen mother or father are also entitled to U.S. citizenship. If a child's parents are not married to each other, however, the child of a U.S. citizen father and a non-citizen mother must be legitimated before age eighteen to acquire U.S. citizenship by birth. The Supreme Court upheld this rule in *I.N.S. v. Nguyen*, although in other contexts the Court has concluded that distinctions based on legitimacy of birth are unconstitutional. The citizenship of children adopted abroad by an American parent is governed by the Child Citizenship

that it is for the Child Citizenship Act, and thus Congress, to change the Act to eliminate discrimination at the federal level that would not be constitutionally permissible for states.

C. THEORETICAL PROTECTIONS AVAILABLE UNDER THE SALE OF CHILDREN PROTOCOL

Secondarily, and particularly in support of equal protection claims, adoptees and their advocates may utilize the United States' stated "obligations" under the Sale of Children Protocol.[172] Although the "sale of children" is clearly demarcated in the Protocol,[173] the United States has accepted a broader definition.[174] The United States has adopted an understanding of "sale of children," as per Article 2(a) of the Protocol, "intended to reach transactions in which remuneration or other consideration is given and received under circumstances in which a person who does not have lawful right to custody of the child thereby obtains *de facto* authority to exercise control over the child."[175]

Article Three of the Protocol further dictates that criminal conduct relating to the sale of children includes "improperly inducing consent, as an intermediary for adoption in violation of applicable international legal instruments on adoption."[176] However, any argument that the Child Citizenship Act is in conflict with U.S. obligations under the Protocol is weakened significantly, because (i) the Protocol is not binding and (ii) the sale of children is one of several categories of behavior, none of which appropriately encompass the adoption of children without granting citizenship.[177]

> Act of 2000, and international adoption has been regulated principally through the process of issuing orphan visas for adopted children.

Id. (footnotes omitted).

Estin importantly characterizes international adoptions by U.S.-citizen parents under the Child Citizenship Act of 2000 and the visa-issuing process. *Id.* This distinction is important in that it acknowledges that international adoptions, prior to placement in the home, are governed by international law and the Child Citizenship Act. *Id.*; *see also* Bergquist, *supra* note 1, at 4–5 (distinguishing between state and federal law as pertaining to international adoption, both during and after the placement of the foreign-born child with his or her adoptive parents). In this context, as this Note argues, where the Child Citizenship Act fails to properly instruct the courts and relevant governing bodies, the scope must be broadened to relevant common law and the international agreements.

172. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *supra* note 1.

173. *Id.* art. 2.

174. *Id.* at VIII.

175. *Id.* at VIII–IX.

176. *Id.* art. 3(a)(ii).

177. Article 3(1) of the Sale of Children Protocol covers these contexts in great detail. *Id.* at VIII–X. The prohibited acts constituting criminal sale of children include:

Thus, U.S. international adoptees and their advocates should consider arguments based first on equal protection and secondarily, or in support of equal protection claims, on the United States' own positions taken in the protocols to the UNCRC. The arguments provided in this Note are intended to not only assist adoptees and their advocates in lobbying for passage of the Adoptee Citizenship Act but also to prove viable in deportation proceedings or related litigation.

D. CONSTITUTIONAL QUESTIONS SHOULD FURTHER MOTIVATE CONGRESS TO CORRECT THE COVERAGE GAP

The Supreme Court in *Morales-Santana* noted that, while it disagreed with the exception created by the Immigration and Nationality Act, the Court was unable to change Morales-Santana's predicament and "must therefore leave it to Congress to select [a law] . . . applicable to all children born abroad with one [U.S. parent] . . . . In the interim, the Government must ensure that the laws in question are administered in a [non-discriminatory] manner. . . ."[178] This statement is illustrative in two ways: (1) it is properly Congress's responsibility to address the coverage gap it has created in establishing the Child Citizenship Act and (2) in the interim before Congress fully considers the Adoptee Citizenship Act, the U.S. Government and the BIA are free to form their own decisions contrary to the legislation, should they determine that such legislation violates the equal protections guaranteed by the Constitution. Advocates should utilize the arguments provided in this Part to conclude that the Child Citizenship Act cannot stand in its current form and that deportation decisions must be made with greater consideration given to the individual circumstances of U.S. international adoptees.

Given that it is for Congress to properly amend the Child Citizenship Act, the *Morales-Santana* court provided a framework by which legislation may be amended to ensure that everyone encompassed by it receives equal

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> (i) offering, delivering or accepting . . . a child for the purpose of: (a) Sexual exploitation of the child; (b) Transfer of organs of the child for profit; (c) Engagement of the child in forced labour; [and] (ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption.

Id. art. 3. Article 3 of the Sale of Children Protocol primarily provides criminal or penal law coverage. *Id.* at VIII–X. An argument may yet be made that simply because the unequal adoption practices described in this Note are not explicitly referenced does not mean that such practices bridge an unfamiliar territory between legal adoption and the sale of children. Such argument is potentially further supported by the explicit references in the Sale of Children Protocol to the Hague Convention on Intercountry Adoption and its intentions to support this document. *See id.* at IX. The Sale of Children Protocol states that its explicit references to prohibitions against improperly coercing adoptions comes directly from the Hague Convention, which prevents adoptions between nations in which consent to adoption has been garnered by promise of compensation. *Id.*

178. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1686 (2017).

protection. The Court stated, "[w]hen the 'right invoked is that to equal treatment,' the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class."[179] In clear view of Congress's objectives in enacting the Child Citizenship Act, there is little question as to which path the requisite amendments would take—i.e. that which is blatantly presented through the drafting of the Adoptee Citizenship Acts of 2015, 2016, and 2018. Advocates should press the arguments included in this Part both in court and through lobbying efforts to increase awareness and to argue that the Child Citizenship Act, as written, violates the Constitution's equal protection guarantees.

V. CONCLUSION

International adoption provides a wonderful opportunity for individuals to become parents and has had a rich history in the United States. The Child Citizenship Act of 2000 has granted citizenship to tens of thousands of children at the time of its passage and countless more in subsequent years. However, the Child Citizenship Act does not protect all international adoptees, and this gap in citizenship coverage has placed numerous adult adoptees at risk for deportation. The media has highlighted several deportation cases involving U.S.-raised international adoptees, and some of those cases resulted in the death of the deported adoptees. Even in cases with less devastating results, those international adoptees who lived most of their lives in the United States, many under the assumption of U.S. citizenship, suffered tremendous culture shock, poverty, and mental health consequences as a result of their deportations.

Something must be done to address the coverage gap. Several bills have been proposed in Congress, including, most recently, the Adoptee Citizenship Act of 2018. These bills sit idle as thousands wait in jeopardy of deportation. International adoptees must be able to find some alternative recourse or protections through existing law to save them from unjust deportation outcomes.

In its current form, the Child Citizenship Act fails to meet equal protection standards set forth by the Supreme Court. In particular, advocates could argue the Act discriminates against what courts should recognize as a discrete and insular minority deserving of protection. Furthermore, the Act promotes statelessness, a legitimate concern about which the U.S. Government has voiced its interest. Finally, the Child Citizenship Act is arguably misaligned with the United States' commitments under certain

179. *Id.* at 1698 (quoting Heckler v. Mathews, 465 U.S. 728, 740 (1984)). The Court clarifies that "[a] court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." *Id.* (second alteration in original) (quoting Califano v. Westcott, 443 U. S. 76, 89, 99 (1979)).

protocols of the UNCRC. Without question, Congress should pass the Adoptee Citizenship Act with expediency, considering the arguments voiced herein. In the interim, courts must look to *Morales-Santana*, *Yick Wo*, and other equal protection cases—and consider each deportee's individual circumstances—to rightfully remove the deportable status of these would-be U.S. citizens.