

Maclain Conlin: Good afternoon, and welcome to Originalist Angles. My name is Maclain Conlin. Today, we are joined by a very special guest, Mr. Christopher Landau. Mr. Landau holds degrees from Harvard College and Harvard Law School, where he earned the highest GPA in his graduating class. After law school, he clerked for Justices Antonin Scalia and Clarence Thomas, and embarked on a highly successful career in appellate law, arguing nine cases before the U.S. Supreme Court. In 2019, he was appointed by President Trump to be the U.S. Ambassador to Mexico, and in 2020, he was included on the President's Supreme Court shortlist. Since leaving office in 2021, Ambassador Landau has emerged as a leading commentator on a variety of issues, including the topic we will be discussing today, "Potential Reforms to the American Immigration System." Ambassador Landau, thank you for joining us.

Christopher Landau: It's my pleasure. Thank you for the invitation!

MC: Of course. First of all, I would like to start by reading a brief quote from an op-ed you published in The New York Times last year. You wrote the following of the federal immigration system: "This is a domestic matter that fell outside my jurisdiction as ambassador. But it was certainly awkward for me to ask my Mexican counterparts to crack down on unauthorized migrant flows when our own government had not meaningfully addressed the major engine of such flows." What is the major engine of unauthorized migrant flows, and how has the United States failed to address it, sir?

CL: Sure thing. It's my view, and I expressed it in that piece, that the major engine is the ability of people to come to the United States illegally and secure jobs here. We don't have an effective system to deter companies from using the labor of unauthorized illegal migrants and the federal government isn't really doing anything to enforce the laws that we have to prevent their abuse. There's about 7 billion people in this world. We're very fortunate to occupy this little piece of the globe with our 330 million people in the United States. But if we're not serious about protecting our borders, an unlimited number of people will want to come here. The truth is, if they can come here and get jobs, then there's no reason for them not to try to come here.

Let me make one point clear, Maclain. I am the son of immigrants. I am a first-generation American. Both of my parents were born in Europe. Most people in this country are immigrants. This is in no way a case against immigrants. This is a question of illegal immigration v. legal immigration. We have a government of laws. We should decide as a Nation-and we have decided it-what our immigration policy will be, and once that has been done, that policy must be enforced. People can argue that we should change the law.

That's fair. That's the way democracy works. But I don't see any basis for encouraging illegal immigration. I don't think that's good for anybody. It's not good for our country, and it frankly isn't good for those undocumented immigrants that come here and are forced to spend their lives in the shadows. If you're not here legally, you can't just live a normal life because you are always living under the shadow of deportation. People are very wary about complaining if they are mistreated in the workplace, worried about going to the hospital or having doctors, etc. Many of the things that we take for granted in life, someone who's here illegally can't have.

We cannot lose sight of the fact that this is happening because companies are hiring these people. They are incentivised to come by the promise of much higher wages than they could get in their own countries.

If you can make more here in a day than you could in a month back in your own country, of course you will want to try and come here. I don't blame these folks for wanting to try and come here for a better life for themselves and their families. But we can't have a system that lures them here unfairly, and then forces them to live a life in the shadows.

I know this is a long answer to your question, but my main point is that our policies have focused largely on catching these migrants after the fact, almost as if we are chasing them like rabbits when there is a huge box of carrots open on our side of the border. It seems to me that we should focus our energy on closing that box as opposed to running around trying to catch individual people. I think the system itself has to be reformed. We are putting all our energy and efforts into the wrong places. If you didn't have a system where people could come here illegally and nonetheless find work, then it seems to me that illegal migration would dry up dramatically.

MC: That's interesting. You argued in your piece that unauthorized migration often harms undocumented immigrants themselves because of what they must face on their journey to this country. When you were U.S. Ambassador to Mexico, did you see any of those problems first-hand at the southern border?

CL: One hundred percent. It was awful. This is one of the things that I find very frustrating. A lot of people say, "Oh, I feel sorry for these people. They're poor and need help." I get it. That's a legitimate perspective. I understand, as Christians and as human beings, that our hearts go out to people that are suffering and poor. However, does that mean that you should have policies that encourage more people to come? Is that the humane thing to do? In other words, when these people come, they are doing so because they are drawn by a variety of factors. People are not dumb. They don't leave their homes and pay vast sums of money without an expectation of success. Nobody makes the trek through Mexico and into the United States without having to pay tens of thousands of dollars to criminal organizations. It's a fantasy not to recognize that. Illegal immigration is enriching criminal organizations in Mexico. It is putting the migrants in severe peril and forces them to risk their lives. The statistics on the number of women and girls who are raped or otherwise sexually assaulted are heart-wrenching. They're horrendous. These people are often victimized on the way. Hardly a week went by when I was Ambassador to Mexico that they didn't discover some cargo truck that was crammed with people, and oftentimes they were abandoned. The gangs that run these operations are not known for their compassion towards human life, and if things become too dangerous for them, they have no compunction about abandoning a trailer full of people.

Long story short, I think there is a tremendous human toll that this causes. One has to be very careful when you're thinking, "I want to be a compassionate person. I'm trying to be a good Christian (or whatever your faith may be, or just a good person without a faith)." That doesn't always mean that you want to do things which have the effect of encouraging more people to undertake what is a very dangerous journey. I think that the most compassionate thing to do is have a system that does not give people false hope about coming into this country if we are not in fact offering them a real future. Moreover, whatever laws we have, we need to enforce them. If we don't like our laws, we should change our laws. We're a democracy. We have representatives in Congress. One thing that really upsets me, Maclain, is that in this administration in particular, we are seeing an Executive Branch that refuses to execute the laws.

Going back to Articles I and II and the basic principles of our Constitution-I'm sure that your readers are familiar with this, but it's shocking how many people are not these days-Congress makes the laws, and the President is the one that executes the laws. He makes sure that they are faithfully enforced. Obviously, there is some level of prosecutorial discretion within the executive. The executive doesn't have to catch and ticket every person who is speeding. The executive has to make decisions about what resources to devote to the enforcement of laws. They might only get speeders who are going over one hundred miles per hour or eighty miles per hour, not someone who is going one mile per hour over the speed limit.

What we're seeing in some recent administrations, including the current one, is that the Executive Branch says, "We're not going to enforce that law. We don't agree with it." In a sense, that's the President nullifying the law. I think as an American that that's a very concerning thing. Again, if you don't like the law, protest it. You have a First Amendment right to condemn it. That's one thing, but it's something else entirely when the Executive Branch says that because it disagrees with a law on policy grounds, it won't enforce it. I think it's very important for your readers, all young people, and frankly all citizens to keep in mind when we are having these kinds of discussions that there's the world of law and there's the world of policy. A lot of times, many people-especially in the media-don't draw a distinction between the two. You can think that something is a very good policy, but if it has not been enacted by Congress, the written law should still be enforced. The goal should be to change the law, not to ignore it. Going back to basics-and this is the way that I approached these issues as ambassador-is that we have a certain set of laws on the books. To me, there is room for debate on what the appropriate level of migration is good for our country. What are the kinds of migrants that we should seek to attract? Educated or uneducated, etc.? What is the mix? That's a fair conversation, but to me, it seems like a no-brainer that under no set of circumstances should we want a system that encourages people to come here in violation of our immigration laws.

In other words, we have this complex system of laws, and then people who just come in. If you complain about this crisis, you are labeled anti-immigrant. That could not be farther from the truth. I'm pro-law. Again, we can have a debate about whether or not the law should allow more people or fewer people. Those are very fair questions. But it is imperative that our current laws be enforced. I don't think we're doing these people any favors by turning a blind eye. In fact, you can create many awful situations where people come here illegally and then they settle down in a community and have children here. The children become American citizens by birthright and go to school here, but then the parents always have to live in the shadows. From both a policy point of view and a legal point of view, I think that's terrible. And then you have these problems about what you do if you have a million children who were born here when their parents immigrated illegally. Some of them don't even speak their parents' mother tongue. It just creates all of these problems down the road if you don't enforce the law.

I would encourage your readers, in terms of thinking about this, to consider what the laws currently are. We have laws allowing visas, where you can apply and come here to work. My main goal as Ambassador to Mexico was to try to fix the system that allows people to come here and work legally. In other words, we have a system that creates work permits for certain industries that need workers and can't find them. Again, you can always quarrel and say that they should just raise their wages. There are legitimate questions about that. My main point is that we have a work permit system right now, but it doesn't work very well. You need to sign up for your workers well in advance. There's a lot of bureaucratic red tape. If

you need someone to pluck the turkeys before Thanksgiving, you might not know what your demand for turkeys is going to be a year before that Thanksgiving. The system doesn't work well, and that's something that can be fixed. When people come here legally, that's fine! They come here, they work, they get the money they were promised, and if their employer tries to mess with them they can complain.

These programs are supervised. A lot of these folks don't want to be migrants. They want to earn money, but they don't necessarily want to move their entire family from a village in Mexico to the United States. But if you come here illegally, you can't go back to Mexico for your daughter's birthday, or if one of your parents dies. You're basically stuck here. The current system, in a sense, has forced family separations for people who are here illegally. The only way for them to be reunited with their family is to bring their whole family here. There's so many perverse incentives now. If we fixed the current programs that allow people to come here legally, that would help U.S. companies to address any labor concerns that they have and would allow these folks to make more money. That would be a win-win for everybody. Right now, we're in a lose-lose situation where the people come illegally and live in the shadows and can't see their families. It's bad for everybody.

MC: Thank you for that, sir. I think many of our readers will need to start contemplating those issues, especially as they assume their right to vote in next year's presidential election. You mentioned the current administration. The New York Post reported five days ago that in August 2023, our country experienced the largest number of illegal border crossings by migrant families in American history.¹ Over the past three years, what specific policies of the current administration do you believe led to that?

CL: It's a number of policies. They basically announced that they are not going to be deporting people. They've sent a clear message that they don't take illegal immigration seriously. The administration has basically given a wink-in other words, if you make it here, you will not be removed. I think that's horrible because it encourages people to come. People don't risk their lives and their treasure recklessly. They only do that if they think there is a realistic chance of actually getting into the United States. If you're living in a village in Honduras or Guatemala, you have to decide a lot of questions. What are the odds of getting from my country into Mexico? Can I cross over Mexico safely? If I get into the United States, what are my chances of actually being able to stay there. There's a cost-benefit analysis in everything that we do as human beings. People may not realize it, but no one undertakes these massive risks lightly. If their odds of getting into the United States are quite low, they aren't going to take that risk. One has to send a clear message that the border is closed. You can't simply say that and then use your actions to remove any consequences for doing so.

So far, Maclain, we have just been talking about the immigration laws on their face. A related part of those laws is our asylum rules. Our asylum laws are really different, because our asylum laws were created after World War II after the terrible tragedy that so many people in Europe, particularly Jewish people, were being persecuted and found the United States closed to them. In fact, that's what happened to my parents. My father was born in Austria and went to Colombia in South America to escape persecution. He could not directly get into the United States at that time, and he ultimately came here

¹<https://nypost.com/2023/09/01/illegal-crossings-of-migrant-families-at-us-mexico-border-hits-all-time-high/>

through Colombia. The asylum laws were basically established as a humanitarian measure for people who faced a fear of persecution on the basis of their religion or politics-specific and clearly enumerated categories. It wasn't meant to be just a general end-run around immigration laws. The statute has been completely corrupted. Now, people-especially from South America-are trained to say that they are fleeing generalized poverty and are allowed in under asylum claims. That blurs the distinction between asylum and immigration. Asylum is supposed to be a very narrow category. Now, so many people come and claim asylum at the same time that we don't have enough judges to adjudicate each claim in a timely manner. What's happening now is that somebody from El Salvador comes here, repeats a few phrases about a well-founded fear that he'll be harmed because, perhaps, his brother got into a fight with a gang member, and he'll be able work and live in the United States until a court date three years later. What do you think are the odds that this person is actually going to show up for their court date?

I am concerned that the entire asylum system has become rife with abuse. That's one of the reasons why, under the Trump administration, we created the "Remain in Mexico" policy. That basically says, "If you want to claim asylum, that's fine, but you can't just make that claim and come to live in the United States as if your request has already been granted. Until your claim has been adjudicated, you must wait in Mexico." That immediately dried up all those frivolous asylum claims. The truth is, I think the cleaner way to do it would be to say, "Wait a second. You can't cross a safe third country like Mexico and then come to our courts and try to claim asylum here." Again, the asylum laws are meant to give you refuge from a well-founded fear of persecution or physical violence. It's intended to give you shelter in the storm. The idea that you can cross one or more other countries really makes a mockery of the whole asylum process. It's clear that these are people who simply want to make an end-run around our immigration laws.

A piece of it, Maclain, is the asylum system. It has been really abused. We also need to crack down generally on countries that won't take their migrants back. If you show up in a different country and are deported, then the international norm is that your home country takes their citizen back. Many nations aren't doing that. The United States needs to say that you can't refuse to take your own citizens back. If you're not going to play ball and follow those international law norms, we will impose sanctions on you and prevent your leaders from coming to the United States. We will impose economic sanctions on you. We need to get serious about this.

Just to cut to the chase, Maclain, I think this is very important for your readers to think about. It's my view that borders are what makes a nation. How do you define a country? For example, where is the United States? The first thing you do is look at a map and say that it's this geographic space and the people within it. What happens when basically anybody can come into that geographic space? In that case, you no longer really have a country. Without borders, you can't define what your country is.

Anybody can come in and out. If your borders are erased, your country is erased. I don't think that that is an anti-immigrant view. Again, we are a country of immigrants. I'm very proud of my immigrant parents. Basically, all Americans are immigrants at some point or another along the way. But that doesn't mean that we can't control our migration and our borders. That is one of the fundamental attributes of sovereignty. It's like with any group. If you start a club, you have a right to determine who will be a part of your club. That's just part of the rules. It's not really a club if basically anybody can come in and

declare that they are a member of the club. In a democracy, if people don't like the rules, they can change them. But I'm just very frustrated because we have been caught in this trap where our system encourages people to come illegally and there aren't really any serious efforts made. I think that's true of administrations of both parties, that we haven't done enough to crack down on industries that are incentivising this. It was a frustration of mine, even in a Republican administration, that we were focused a lot more on targeting individuals instead of going after what I think are the root causes, which include the ability to get a job here and the lack of seriousness regarding that kind of enforcement.

I don't think that the root cause is poverty in other countries. I suppose, if Honduras were Denmark, we would all want to leave, but if you look at it that way, you will never solve the problem, because no amount of money that the United States could pour into countries like El Salvador could turn them into Denmark. I think it's a fantasy from what we've seen in Iraq and Afghanistan that we can wave a magic wand and spend a lot of money and just transform a country. I think that's magical thinking. I'm not against trying to create economic opportunities in these countries, but it would take centuries, frankly, if ever, to get them up to comparable standards of living. The truth is that we have to focus on what is within our control. We can't control what will happen in Honduras, but what we can do is we can control what happens within our borders, including the actions of employers. Who are they hiring? To me, this seems like common sense.

MC: Thank you, sir, and in your op-ed, you mentioned that one way to ensure employers are complying with federal immigration law is to mandate that they use E-Verify. Would you mind just taking a quick moment to explain what that system is, and how you believe it will help solve this problem?

CL: Sure! When I was ambassador, I was concerned about this issue. It seemed to me that my job in Mexico was to get the Mexicans to crack down on the people who are coming through their country and trying to get into our country illegally. That was my job, and it felt like I was trying to put my finger in a dike that's being overrun. The answer isn't to beg Mexico to help us. We don't need to ask another country for permission to enforce our own laws against our own internal companies. I spoke to the Attorney General and asked what we were doing domestically to crack down on companies that are hiring illegal aliens. He said that that's really a problem for the Department of Homeland Security, and not a Department of Justice issue. So I went to the Department of Homeland Security, and he said that that's a problem for the Attorney General! I said that we have a problem, because everyone was just pointing a finger at someone else.

I said that we have to get on the same page in terms of enforcing these priorities. We should work with Mexico in terms of diminishing these flows, but unless we get serious in our own country about how we are going to do this, I don't think this is going to change. That's the problem.

E-Verify, to go back to your question, is a program that seeks to address the difficulties of trying to prosecute a company after the fact. Under the law, you have to prove that a company knowingly hired people, that they knew their immigration status. What was told to me was that these are very complicated prosecutions. To me, the easy answer is that if it is hard to come in and get a company to obey the law on

the back-end by prosecuting them, change the process on the front-end by making it more difficult to hire people in the first place without verifying their immigration status. That's where E-Verify comes in.

Whenever you get hired for a job, you have to produce certain documents and answer certain questions. We should make it clear that one of the things you need to check, as a matter of course in the hiring process, is their legal status. Then you don't have to sue companies or bring prosecutions. Just make it a part of the process. If somebody cheats in the process, you can go after them for that, but that's a much easier case to make. Right now, E-Verify is used for companies that participate in government contracts, but it's not a general federal requirement. To me, it seems like a no-brainer. Why are we spending all this money building a wall and assembling border patrol teams when there is a very simple procedure that would greatly reduce the problem? With modern technology, this is not rocket science. It seems ridiculous to say that we shouldn't do it because E-Verify is "complicated." I don't buy that.

MC: I appreciate that clarification, sir, and that broader policy answer. In addition, because it is somewhat rare to find someone who is familiar with both immigration law and constitutional law, I'd like to ask a separate legal question. I've heard many legal scholars debate the issue of birthright citizenship, which you mentioned a moment ago, about whether or not every child born in the United States is an American citizen regardless of the legal status of their parents. Out of curiosity, do you have an opinion on this topic?

CL: I'm familiar with the issue, but to be honest with you, I have not researched the history myself. This arose in the context of the Fourteenth Amendment after the Civil War to ensure that newly freed slaves were considered citizens. I think it's also important here to emphasize the difference between law and policy. I'm not sure what the analysis of that clause is, and if that means that every person born in the United States is automatically a citizen solely by virtue of their birth, I think that certainly raises some very serious policy issues. That may be something that, as a country, we should reconsider. There's no reason that we can't reconsider something that's in the Constitution when it was put there for a very different purpose. I'm not a believer in tinkering with the Constitution lightly. I don't know whether or not the Fourteenth Amendment requires this, but I know that it is a serious problem in a world where you can get from almost any foreign country to the United States on an airplane in the course of a day. I recognize that anchor babies are a serious problem, and in some cases, people have actually given birth in airports. I know that this is a serious problem in Mexico. Couples will sometimes have their babies in the United States. It's almost like an insurance policy for them. If things in Mexico go south, their child is an American citizen, and they figure that that can probably get them into the United States. One of the curious things when I was ambassador was that I couldn't get a straight answer on how many Americans lived in Mexico. I thought that seemed a little odd. That's basic information that an ambassador should have, namely how many of his own people live in the country to which he's an ambassador. It's actually a complicated question because so many Mexicans will come to the United States, have a baby, and then return to Mexico, raising that child as if it were Mexican, perhaps he or she won't even learn English, even though that child is an American citizen by virtue of having been born in the United States. We may have hundreds of thousands or even a million American citizens in Mexico who are otherwise indistinguishable from anybody else in Mexico solely by virtue of having been born in the United States. I do think that raises some policy questions. I don't want to go out on a limb about the constitutional analysis because I haven't looked at that closely enough, but it's certainly an issue. I don't know if it's

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Interview Conducted and Transcribed by Maclain Conlin (All errors are mine alone.)

something that can be fixed by Congress, or if the Constitution answers the question. Obviously, if it's in the Constitution, it can't be undone by legislation because the Constitution is the Supreme Law of the Land and a statute can't override it.

MC: Thank you for that, sir, and before we sign off, I would like to ask if there are any sources that you would recommend to our readers if they want to learn more about federal immigration law.

CL: There's a couple of groups that follow this issue very closely. There's a reporter called Todd Bensman, and he writes a lot on these issues in a very thoughtful way. There's also a think tank called the Center for Immigration Studies that puts out a website on migration. Those are the ones that come to mind immediately. There's also a group called NumbersUSA that publishes data on this issue, along with many other groups. Again, I think this is something that has jumped to the top of the national consciousness over the past few years. We're a democracy, and there's room for a legitimate debate on migration and whether we have enough people. In my mind, the question is what the appropriate level of legal migration is. Then, once we have answered the question, we need to enforce whatever decision is made. That's the answer. I think any amount of illegal immigration, by definition, is undesirable. That's something that our laws don't provide for. If people think we need more migration, then the answer is to change the laws, not to just create a system that encourages people to violate the laws. It seems kind've obvious to me as a lawyer and as someone who believes in the rule of law. One of the things that you recognize when you leave the country and travel abroad is how valuable it is as Americans to have the rule of law in our country. If someone wrongs you, you can have faith in the judicial system. It doesn't always work perfectly, but in many other countries, that isn't even an option. This whole world of illegality and living in the shadows harms that American vision.

MC: Thank you very much for that, sir. We really appreciate your time!

CL: Thanks for having me!