REMOVING THE DEAD HAND ON THE FUTURE: RECOGNIZING CITIZEN CHILDREN'S RIGHTS AGAINST PARENTAL DEPORTATION

by
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Current immigration laws do not provide the opportunity for undocumented, noncitizen parents to lawfully remain in the United States even when the noncitizen is the parent of a minor citizen child. This sends a demoralizing message about the value of family and the meaning of citizenship. It also ignores the difficulties and burdens placed on citizen children who may be forced to return to their parents' country of origin, should their parents be deported. To remedy this dilemma, advocates have urged the recognition of substantive due process rights of citizen children whose parents are subject to deportation. However, nearly every circuit has rejected the existence of such rights. Part I of this Comment addresses how the current debate over this issue evolved. Two main theories advocating for the rights of citizen children whose parents face deportation have been used. The first, a cost benefit analysis, effectively limits relief from removal on a case-by-case basis. On the other hand, the second main theory, substantive due process, would greatly reduce Congress's ability to place such a burden on minor citizen children. Part II of the Comment advocates that the right of citizen children to be raised by their noncitizen parents is deserving of substantive due process protection. The Supreme Court has ruled that when rights of children conflict with government objectives, recognition must be given to the substantive rights of children. Part III discusses how the recognition of the rights of citizen children will not undermine current immigration laws.

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"To make an old mistake indelible—to lay a dead hand on the future, is always of doubtful value."—Jane Addams[**]

I. INTRODUCTION

Children have been described as "the living messages we send to a time we will not see."[1] Current immigration law is sending a demoralizing message about the value of family and the meaning of citizenship. Over three million children who are U.S. citizens by birth[2] live in families in which one or both parents are undocumented noncitizens.[3] These citizen children make up ten percent of all births in the United States and are

[**] MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 82 (2004) (quoting Ms. Addams' reaction to a 1929 law that permanently barred deported persons from readmission into the United States).

[1] JOHN W. WHITEHEAD, THE STEALING OF AMERICA 116–17 (1983).

[2] The Fourteenth Amendment of the U.S. Constitution provides that "[a]ll persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States." U.S. CONST. amend XIV, § 1. The Supreme Court has interpreted this provision to mean that a child born in the United States to parents of foreign descent, but who are not employed in any diplomatic capacity and are not members of foreign forces in hostile occupation of the United States, becomes a U.S. citizen at the time of birth. United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898). Some scholars have argued that the Fourteenth Amendment does not provide birthright citizenship to children born in the United States to undocumented noncitizens because such children are not subject to the jurisdiction of the United States. *See generally* PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985).

[3] JEFFREY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. 8 (2006), *available at* http://pewhispanic.org/files/reports/61.pdf.

the fastest growing segment of the population.[4] Over the past five years, the federal government has intensely pursued its goal of removing all undocumented immigrants by 2012.[5] As a result, between 2004 and 2007, over 80,000 parents of citizens were removed.[6]

Current immigration laws do not provide the opportunity for parents to remain in the United States based solely on the existence of a minor citizen child. Undocumented noncitizens that have a citizen child are eligible for cancellation of removal only upon very narrow grounds, including continuous physical presence in the United States for a period of ten years and a showing of hardship to certain relatives who are U.S. citizens or lawful permanent residents.[7] It is estimated that 40% of undocumented noncitizens arrived after the year 2000; thus, only about 60% of such persons may be able to satisfy the ten year presence requirement.[8]

If the ten year presence requirement is met, then the noncitizen must show exceptional and extremely unusual hardship to their citizen child.[9] Hardship is a hypothetical consideration which asks what difficulties the child would face if he remained in the United States apart from his parent, and what problems the child might face if he

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[4] Susan Donaldson James, *Health Care Eludes Families in the Shadows*, N.Y. TIMES, May 7, 2006, at 14NJ.

[5] *See* BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., ENDGAME: OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN 2003–2012 (2003) [hereinafter U.S. DEP'T OF HOMELAND SEC., ENDGAME] (outlining the federal government's immigration enforcement goal of removing all removable aliens within the United States by 2012). Since Operation Endgame has been in effect, removals of aliens have increased by 66%, from 211,098 in FY2003 to 319,382 in FY2007. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2007 YEARBOOK OF IMMIGR. STATISTICS 95, tbl.36 (2007), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2007/ois_2007_yearbook.pdf. Hundreds of thousands of aliens also chose to voluntarily depart the United States during this same period.

[6] *See* OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., REMOVALS INVOLVING ILLEGAL ALIEN PARENTS OF U.S. CITIZEN CHILDREN 6 fig.2 (2009) [hereinafter ILLEGAL ALIEN PARENTS], *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_09-15_Jan09.pdf (listing total number of parental removals from 2004 to 2007 without specifying whether citizen child was a minor and not including voluntary departures).

[7] 8 U.S.C. § 1229b(b) provides for cancellation of removal for nonpermanent residents with certain citizen relatives. To be eligible the noncitizen must: 1) have been physically present in the United States for a continuous period of not less than ten years, 2) have been a person of good moral character, 3) have not been convicted of certain crimes that would make him inadmissible or removable, 4) not be subject to any of the security grounds of inadmissibility or removability, and 5) make a showing that his removal would result in exceptional and extremely unusual hardship to his citizen or lawful permanent resident spouse, parent, or child. 8 U.S.C. § 1229b(b)(1) (2006).

[8] *See* PASSEL, *supra* note 3, at 2.

[9] 8 U.S.C. § 1229b(b)(1)(D).

accompanies his noncitizen parent to his country of origin.[10] Factors to consider in construing hardship to citizen children include the parent's financial difficulties, health conditions of parent or child, special needs in school, and adverse country conditions in the country of return.[11] Such hardship must be "substantially beyond that which ordinarily would be expected to result from the alien's deportation."[12] For example, exceptional and extremely unusual hardship was found when six citizen children were being reared by a financially struggling single mother who had family in the United States but no family in her native country to assist her.[13] In contrast, the requisite hardship was not found when two citizen children were being reared by a single mother who had no family lawfully present in the United States and who had accumulated significant assets in the United States.[14] Because the ten year presence requirement is accompanied by a narrow hardship standard, this form of relief is generally unavailable for most parents of citizen children.

When their parents are removed, citizen children are thus left with two "choices": to depart from the United States with their parents or to remain in the United States under the care of persons who are not their parents to enjoy the full benefits of citizenship.[15]

For children who remain in the United States upon the removal of their parents, the separation from their parents can be devastating. Many of these children are placed in an already burdened foster care system.[16] Reports of children who remain behind detail severe mental health issues, negative changes in school performance, behavioral problems, and feelings of abandonment and resentment.[17] There are concerns that the emotional, financial, and psychological impact of being separated

[10] *See* David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165 (2006) (listing the two ways parents can theoretically argue hardship to children and noting how "virtually no one" argues that the requisite hardship would be shown by separation of parent from child).

[11] *In re* Monreal, 23 I. & N. Dec. 56, 59 (B.I.A. 2001).

[12] *Id.*, H.R. REP. No. 104-828, at 213 (1996) (Conf. Rep.).

[13] *In re* Recinas, 23 I. & N. Dec. 467 (B.I.A. 2002).

[14] *In re* Andazola-Rivas, 23 I. & N. Dec. 319, 324 (B.I.A. 2002).

[15] *See generally* Thronson, *supra* note 10.

[16] *See* Julianne Ong Hing & Seth Wessler, *When an Immigrant Mom Gets Arrested*, COLORLINES, July-Aug., 2008, at 22 (explaining that child welfare departments do not collect information on the numbers of children in foster care due to the removal of a parent, but that there is growing evidence that the numbers of children entering the foster care system for this reason are on the rise).

[17] *See* RANDY CAPPS ET AL., NAT'L COUNCIL OF LA RAZA, PAYING THE PRICE: THE IMPACT OF IMMIGR. RAIDS ON AMERICA'S CHILDREN 12, 42–53 (2007) [hereinafter PAYING THE PRICE], *available at* http://www.urban.org/UploadedPDF/411566_immigration_raids.pdf (speculating on the variety of long-term effects on children separated from their deported parents). *See also* Nina Bernstein, *A Mother Deported, and a Child Left Behind*, N.Y. TIMES, Nov. 24, 2004, at A1 (describing the accounts of several children who remained in the United States after one or both of their parents were deported).

from their removed parents will result in long-term damage to these children.[18]

Citizen children who return with their parents to their parent's country of origin similarly struggle. A thirteen-year-old citizen who moved to Mexico when her mother was removed described her difficulty in adjusting to life in a foreign land by stating, "I felt like there were no dreams for me."[19] In contrast to their life in the United States, citizen children living in their parents' home country may experience inadequate living conditions and insurmountable barriers to success; including cultural and language barriers, poor educational opportunities, lack of adequate health care, and even violence.[20] Such children will likely be disadvantaged if they later return to the United States as adults and possibly even burden the welfare system because they may lack the educational, language, and cultural skills necessary for success.[21]

To remedy this dilemma, advocates have urged courts to recognize the constitutional rights of citizen children whose parents are subject to deportation. Advocates have articulated the substantive due process rights at issue as identical to those already recognized for adults. Specifically, advocates have often expressed the substantive due process right at issue as the right to family integrity and the right to choose one's residence.[22] Nearly every circuit has rejected the existence of such rights for citizen children whose parents face deportation.[23] The circuits have given three primary reasons for doing so: the incapacity of children to exercise such rights, the plenary power of Congress over immigration, and the fear that acknowledgement of citizen children's rights would

[18] *See* Jacqueline Hagan et al., *U.S. Deportation Policy, Family Separation, and Circular Migration*, 42 INT'L MIGRATION REV. 64 (2008) (providing an overview of the difficulties of families separated by removal).

[19] Thelma Gutierrez & Wayne Drash, *U.S. Teen: "I Felt Like There Were No Dreams for Me,"* CNN, Sept. 10, 2008, http://www.cnn.com/2008/LIVING/wayoflife/09/10/citizenchildren/index.html.

[20] *See* Eunice Moscoso, *Who's Watching Deportees' Kids?*, ATLANTA J. CONST., Aug. 18, 2006, at C1 (detailing the consequences to citizen children who return to their parent's country of origin).

[21] *See* Noreen M. Sugrue, *American-Born Children Shouldn't be Deported*, CHRISTIAN SCI. MONITOR, July 17, 2006, at 9 (explaining how exiled children will likely return to the United States as adults with fewer skills needed for economic success and will turn to social assistance programs for help); Edith Z. Friedler, *From Extreme Hardship to Extreme Deference: United States Deportation of Its Own Children*, 22 HASTINGS CONST. L.Q. 491, 535 (1995) (describing how citizen children who return to the United States. after exile may not have an ability to understand English or to participate in American society and as a result may be an economic burden on the government).

[22] *See infra* notes 44–52 and accompanying text (discussing various articulations of rights in terms of family and citizenship).

[23] *See infra* note 53 and accompanying text (detailing circuits' rejections of argument for substantive due process rights of citizen children whose parents face deportation).

unravel the immigration scheme set out by Congress.[24]

This Comment focuses on the duty of the courts to recognize the constitutional rights of citizen children whose noncitizen parents are facing removal, especially in light of the rapidly growing number of citizen children with undocumented noncitizen parents. U.S. citizen children have a substantive due process right to be reared by their parents in the United States, and this right can be utilized without usurping Congressional power to control admissions under immigration law. Part I of this Comment discusses how this constitutional argument has evolved over the years and why nearly all of the circuit courts rejected the argument by the mid-1980s. Part II focuses on redefining the constitutional rights at issue. This section departs from prior case law defining the substantive due process right for citizen children as an affirmative right already recognized for adults. Instead, this author examines existing substantive due process rights and then articulates the right at issue as a negative right which extends from existing substantive due process rights yet uniquely belongs to citizen children: namely, the right to be reared by their parents in the United States without undue interference from the government. This section also describes how the removal of parents violates citizen children's rights. Finally, Part III explains how judicial recognition of the rights of citizen children will not undermine the current immigration scheme. A proposal is offered for how to amend immigration laws to account for the constitutional rights of citizen children. This section specifically addresses the fear that to recognize the rights of citizen children in this area would create an incentive for noncitizens to bear children in the United States to gain lawful immigration status, otherwise known as the "anchor baby" problem.

II. DEFINING THE RIGHT, REJECTION BY THE COURTS, AND THE RENEWED CALL FOR RECOGNITION OF CITIZEN CHILDREN'S RIGHTS AGAINST PARENTAL REMOVAL

Over the past eighty years, the legal community has presented compelling arguments for recognition of the rights of citizen children whose noncitizen parents faced removal. The main theories for recognition of children's rights in this area can be delineated into two categories: economic cost-benefit analysis and substantive due process rights of citizen children.

Cost-benefit analysis balances the seriousness of the immigration violation against the economic costs of deporting persons with dependent family members who are legal permanent residents or U.S.

[24] *See infra* notes 53–68 and accompanying text (outlining reasons why circuits have rejected the argument for recognition of the substantive due process rights of citizen children whose parents face deportation).

citizens.[25] Over the years, economic cost-benefit analysis has provided for important forms of discretionary relief from removal. For example, in the 1930s, the U.S. Immigration and Naturalization Service (INS) instituted discretionary relief from deportation in "meritorious" cases, typically cases where deportation would result in extreme hardship to the noncitizen's family.[26] The purpose of such relief was to prevent the noncitizen's dependent family members from becoming public charges.[27] A similar form of relief was instituted under the 1952 Immigration and Nationality Act which provided relief from deportation for noncitizens who had immediate family in the United States who would suffer extreme hardship if the noncitizen were deported.[28] More recently, in the context of noncitizen parents with citizen children, courts have considered the economic costs of separation in assessing whether or not a parent qualifies for discretionary relief from removal,[29] including the costs for placement of the children in foster care.[30] Thus, the practical effect of the economic cost-benefit theory is to limit relief from removal on a case-by-case basis to a handful of noncitizen parents whose deportation would cause their citizen children to suffer an unusually serious economic detriment, typically one which would create great expense for the U.S. public welfare system.[31]

In contrast to the cost-benefit analysis, the substantive due process rights of citizen children have not been an impetus for providing any parental relief from removal.[32] In general, courts have been hesitant to

[25] MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 80 (2004) (discussing the origins of the cost-benefit analysis approach used by immigration reformers beginning in the 1920s).

[26] *Id.* at 84 (discussing how immigration reformers in the 1930s utilized a cost-benefit analysis leading to the INS creating discretionary relief from deportation).

[27] *Id.* (noting that the goal of such relief was to ensure persons would not become public charges).

[28] *See id.* at 88 n.122 (citing Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 244(a), 66 Stat. 163, 214–15 (1952) as providing relief from deportation for noncitizens who had long-term residence and immediate family in the United States).

[29] *See* In re C-V-T, 22 I. & N. Dec. 7, 11 (B.I.A. 1998) (listing several relevant economic factors to be considered for discretionary relief from removal, including hardship to the noncitizen's family if deportation occurs, the noncitizen's history of employment, and the existence of the noncitizen's property or business ties).

[30] *See* De La Luz v. INS, 713 F.2d 545, 546 (9th Cir. 1983) (requiring the BIA in construing extreme hardship to consider the impact of separation of citizen children from their mother and "costs for the care and placement of the children at public expense.").

[31] *See supra* notes 9–14 and accompanying text (discussing the requirement of exceptional and extremely unusual hardship for cancellation of removal and factual situations which have satisfied this requirement).

[32] *See* Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 622 (2006) (describing how U.S. constitutional law has not utilized substantive due process family unity rights of citizens to constrain deportation, even in the cases of citizen children who will lose the chance to live in the United States when their noncitizen parents are deported).

recognize the substantive due process rights of children. This hesitancy is based on two factors. First, the expansion of the concept of substantive due process is generally disfavored by the courts.[33] The courts see such an expansion as a limitation on the powers of Congress to assess public opinion and develop the laws accordingly.[34] Recognition of a substantive due process right by the courts restrains these powers of Congress by requiring new and existing laws impacting such a right to meet strict scrutiny.[35] In the context of immigration law, unlike relief offered under the cost-benefit theory, recognition of the constitutional rights of citizen children could provide broad relief from parental removal. This is because a substantive due process right in this area would belong to all citizen children, and any immigration law which impacted such a right would have to satisfy strict scrutiny to withstand challenge.[36] Second, the rights of children are often outweighed by the *parens patriae* duty of the state to protect children or by the rights of their parents.[37] Because of their immaturity and lack of judgment, children are typically deemed incapable of independently exercising due process rights.[38] Immigration

[33] *See* Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) (detailing Supreme Court's reluctance to expand the concept of substantive due process because of a lack of guideposts for responsible decision-making).

[34] *See* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (explaining that judicial recognition of a substantive due process right places the issue outside the arena of public debate and legislative action and, thus, the Court must "'exercise the utmost care whenever we are asked to break new ground in this field,' lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court . . . .") (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)); Galvan v. Press, 347 U.S. 522, 530–31 (1954) (describing expansion of the concept of substantive due process "as a limitation upon all powers of Congress").

[35] *See* Reno v. Flores, 507 U.S. 292, 302 (1993) (stating that the substantive due process rights under the Fourteenth Amendment cannot be impacted by the government "*at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling [government] interest.").

[36] *Id.* at 317–18 (O'Connor, J., concurring).

[37] *See* Bellotti v. Baird, 443 U.S. 622, 633–34 (1979) (explaining that children are not outside of the scope of the Constitution but that they do not have the same constitutional rights as adults because of their "peculiar vulnerability . . . and the importance of the parental role in child rearing."). *See also* Cecelia M. Espenoza, *Good Kids, Bad Kids: A Revelation About the Due Process Rights of Children*, 23 HASTINGS CONST. L.Q. 407, 409–10 (1996) (discussing how the Supreme Court acknowledges the legitimacy of children's needs for due process protection yet denies them rights because of superseding rights of the state under its *parens patriae* power or because of the superlative rights of parents).

[38] *See* Parham v. J.R., 442 U.S. 584, 601–02 (1979) (conceding that children have a liberty interest in not being held unnecessarily for medical treatment but that children lack "maturity, experience, and capacity for judgment required for making life's difficult decisions."); Bellotti, 443 U.S. at 633–35 (finding that a mature minor has sufficient capacity to decide to have an abortion yet explaining that "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.").

law incorporates these principles by denying children the power to extend status to their parents.[39] This leaves decisions about immigration in the hands of parents.[40] Additionally, this arguably allows the government to protect children from adults who might conceive them solely for use as a conduit to lawful status.[41] Despite these hurdles, the substantive due process rights of children have been and continue to be posited as a reason for parental relief from removal.[42]

A. Definitions of the Right

The substantive due process rights of citizen children whose parents face removal have been defined by advocates for reform in a variety of ways. These definitions fall under two broad categories: a right to family unity or the general rights of citizenship. None of the circuits has recognized these rights as reasons for relief from removal of parents.[43]

The right to family unity has been more specifically asserted as the right of children to the continuation of the family unit,[44] the right to family life without interference from the state,[45] and the right of the child to continued love and affection from his parents in the United States.[46] The general rights of citizenship have been articulated as the right of the child to choose his residence,[47] the right to be reared in the United

[39] *See* Thronson, *supra* note 10, at 1184 (discussing how children's inability to extend status to parents under immigration law is consistent with family law cases which vests decision-making power with parents).

[40] *Id.*

[41] *Id.* at 1185 (observing that by denying minor citizen children the power to extend status to their parents, immigration law "works as a barrier to the legal immigration of undocumented parents" and eliminates incentive to deportable aliens to bear children merely to gain status).

[42] *See infra* note 53 and accompanying text (detailing decades of cases in nearly all the circuits arguing for recognition of the substantive due process rights of children whose parents face deportation); *infra* notes 74–81 and accompanying text (describing how the argument for recognition of the substantive due process rights of citizen children has recently resurfaced in light of increased government enforcement efforts and failed Congressional attempts to provide comprehensive immigration reform).

[43] *See infra* note 53 and accompanying text (describing how every circuit except the First, Eleventh, and D.C. Circuits have rejected the argument that citizen children have constitutional rights which are violated by the deportation of their parents).

[44] Robles v. INS, 485 F.2d 100, 102 (10th Cir. 1973).

[45] *See* NGAI, *supra* note 25, at 80 (noting how Max Kohler, a former assistant attorney general who represented immigrants, formulated a substantive due process rights argument in the 1920s based on the Supreme Court's 1923 ruling in *Meyer v. Nebraska* to oppose family separation by immigration laws (citing Meyer v. Nebraska, 262 U.S. 390 (1923))).

[46] Cervantes v. INS, 510 F.2d 89, 91 (10th Cir. 1975).

[47] The Third and Sixth Circuits have acknowledged a constitutional right for citizens to reside where they wish, but have found that children lack the capacity to exercise the right. *See* Newton v. INS, 736 F.2d 336, 338 (6th Cir. 1984); Ayala-Flores v. INS, 662 F.2d 444, 446 (6th Cir. 1981); Acosta v. Gaffney, 558 F.2d 1153, 1157 (3rd

States,[48] and the right of the citizen child to not be constructively deported from the United States.[49] The basic articulation of the right against constructive deportation is that: 1) a child born in the United States is a U.S. citizen by virtue of the Fourteenth Amendment, 2) U.S. citizens cannot be deported, 3) deportation of both noncitizen parents in effect deports the child, and 4) the deportation of the parents is an unconstitutional deportation of a U.S. citizen child.[50] This definition of the right may be the most compelling as it was recognized by the district court in *Acosta v. Gaffney*, even though it was ultimately overturned on appeal to the Third Circuit.[51]

It should also be noted that the right of family unity and the general rights of citizenship can be seen as different facets of the same argument. In a notable dissent, Justice Douglas viewed the general rights of citizenship as dependent on the right of family unity:

> The citizen is a five-year-old boy who was born here and who, therefore, is entitled to all the rights, privileges, and immunities which the Fourteenth Amendment bestows on every citizen. A five-year-old boy cannot enjoy the educational, spiritual, and economic benefits which our society affords unless he is with his parents.[52]

Thus, the right of family unity may be seen as essential to the general rights of citizenship.

B. Rejection by the Circuit Courts of Appeals

Other than the brief acknowledgement of the citizen child's right in the district court decision of *Acosta*, nearly every circuit has refused to recognize the violation of the substantive due process rights of citizen children when their parents are facing removal.[53] In 1976, the U.S.

Cir. 1977).

[48] Enciso-Cardozo v. INS, 504 F.2d 1252, 1253 (2d Cir. 1974).

[49] Hernandez-Rivera v. INS, 630 F.2d 1352, 1356 (9th Cir. 1980); *Acosta*, 558 F.2d at 1157.

[50] *See* Lopez v. Franklin, 427 F. Supp. 345, 347 (E.D. Mich. 1977) (detailing the elements of the *de facto* deportation argument of a citizen child).

[51] 413 F. Supp. at 831–32 (D. N.J. 1976), *rev'd*, 558 F.2d 1153 (3d Cir. 1977) (explaining that children born in the United States are citizens who cannot be deported and that deporting both noncitizen parents of a citizen child results in the unconstitutional deportation of the citizen child). *See also infra* notes 53–60 and accompanying text (discussing the *Acosta* decision and subsequent reversal).

[52] Hintopoulos v. Shaughnessy, 353 U.S. 72, 79 (1957) (Douglas, J., dissenting).

[53] All Courts of Appeals except the First, Eleventh, and D.C. Circuits have refused to recognize the violation of the rights of citizen children in the context of their parents' deportation. *See* Gallanosa v. United States, 785 F.2d 116, 117 (4th Cir. 1986); Marquez-Medina v. INS, 765 F.2d 673, 674 (7th Cir. 1985); Newton v. INS, 736 F.2d 336, 337–38 (6th Cir. 1984); Ayala-Flores v. INS, 662 F.2d 444, 446 (6th Cir. 1981); Urbano de Malaluan v. INS, 577 F.2d 589, 594 (9th Cir. 1978); Mamanee v. INS, 566 F.2d 1103, 1106 (9th Cir. 1977); *Acosta*, 558 F.2d at 1154; Cervantes v. INS, 510 F.2d 89, 92 (10th Cir. 1975); *Enciso-Cardozo*, 504 F.2d at 1252, 1254; Robles v. INS, 485 F.2d 100, 102 (10th Cir. 1973); Perdido v. INS, 420 F.2d 1179, 1181 (5th Cir.

district court in *Acosta v. Gaffney* determined that the simultaneous deportation of both noncitizen parents would violate the five-month-old citizen child's Fourteenth Amendment right against constructive deportation.[54] This holding was subsequently reversed by the Third Circuit, which broadly redefined the fundamental right as the "right of an American citizen to reside wherever he wishes, whether in the United States or abroad."[55] The court held that the child was not barred from exercising her right to choose her residence but was merely delayed in doing so until she developed the capacity to make a conscious choice of residence.[56] The court pointed out that the child's parents could exercise the right on her behalf and elect for her to remain in the United States.[57] By broadly redefining the right as a right to remain instead of the specific right against *de facto* deportation, the Third Circuit avoided acknowledging any meaningful rights of citizen children in the context of immigration law.

The broad redefinition of the right was also consistent with the later *Acosta* court's deeper policy reasons for rejecting recognition of the citizen child's right against constructive deportation. Quoting *Perdido v. INS*, the *Acosta* court pointed out:

> [A] minor child who is fortuitously born here due to his parents' decision to reside in this country, has not exercised a deliberate decision to make this country his home, and Congress did not give such a child the ability to confer immigration benefits on his parents. . . . It gave this privilege to those of our citizens who had themselves chosen to make this country their home and did not give the privilege to those minor children whose noncitizen parents make the real choice of family residence.[58]

This suggests the court viewed birthright citizenship for children born to undocumented parents as accidental and providing no meaningful rights until the child gained the capacity to consent to such citizenship.[59] In addition, by eliminating a possible judicial pathway to lawful status for undocumented immigrants, the court furthered the

1969); Mendez v. Major, 340 F.2d 128, 132 (8th Cir. 1965), *overruled on other grounds by* Cheng Fan Kwok v. INS, 392 U.S. 206 (1968). Two of the three circuits which have not rejected substantive due process claims by children have rejected similar citizenship claims made by citizen spouses. *See* Thronson, *supra* note 10, at 1195 n.152 (noting how the First and D.C. Circuits rejected citizenship claims made by citizen spouses to prevent the deportation of their noncitizen spouses (citing Silverman v. Rogers, 437 F.2d 102, 107 (1st Cir. 1970); Swartz v. Rogers, 254 F.2d 338, 339 (D.C. Cir. 1958))).

[54] 413 F. Supp. at 831–32.

[55] *Acosta*, 558 F.2d at 1157.

[56] *Id.* at 1158.

[57] *Id.* at 1158.

[58] *Acosta*, 558 F.2d at 1157 (quoting *Perdido*, 420 F.2d at 1181).

[59] S*ee generally* Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35 (1988) (discussing why courts often deny the citizen children of undocumented parents the full benefits of citizenship).

policy of deterring unlawful immigration. The court noted that to recognize the rights of citizen children "would open a loophole in the immigration laws for the benefit of those deportable aliens who have had a child born while they were here."[60] Although it is not clear, these policy decisions may have been the decisive factor in the Third Circuit's denial of any meaningful constitutional rights for citizen children whose parents face deportation.

A similar mixture of policy concerns and constitutional justifications have been asserted by the other circuits in rejecting the argument that citizen children have substantive due process rights that may be violated by parental removal. Three primary reasons have been given. First, the courts have acknowledged the rights of children but have found no violation, typically because the child was deemed incapable of exercising the right.[61] Courts have asserted that recognizing the independent rights of the child would interfere with the fundamental rights of parents to control the upbringing of their children.[62] Second, courts have refused to recognize the rights of citizen children out of deference to the plenary power of Congress over immigration. The plenary power doctrine limits judicial review of constitutional challenges to the conditions set by Congress under which noncitizens can enter and remain in the United States.[63] Specifically, the circuits have opted to not challenge Congress' lack of accounting for the rights of citizen children under the immigration scheme.[64] Third, courts have posited that to recognize the rights of the citizen child to stay the removal of the parents would

[60] *Acosta*, 558 F.2d at 1158.

[61] Newton v. INS, 736 F.2d 336, 343 (6th Cir. 1984) (finding no violation of child's right to choose residence since child had not reached age necessary to exercise right); Schleiffer v. Meyers, 644 F.2d 656, 662–63 (7th Cir. 1981) (stating *de facto* deportation does not violate child's fundamental rights because it merely postpones the child from exercising such right until he is an adult); *Acosta*, 558 F.2d at 1158 (holding child's right to choose residence was not denied but merely delayed since child incapable of exercising right).

[62] Ayala-Flores v. INS, 662 F.2d 444, 445–46 (6th Cir. 1981) (noting how "parents make the real choice of family residence" when holding no violation of child's rights when parents were deported); *Schleiffer*, 644 F.2d at 660 (finding child unable to make mature choice on where to live while acknowledging primary parental role in controlling the upbringing of their children); *Perdido*, 420 F.2d at 1181 (pointing out that minors do not determine where the family home will be and that such decisions are left to parents).

[63] *See generally* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (1984).

[64] Cervantes v. INS, 510 F.2d 89, 92 (10th Cir. 1975) (acknowledging Congressional power to control conditions for noncitizens to enter and remain in the United States and finding "incidental impact" of immigration laws on citizen children did not cause constitutional problems); Mendez v. Major, 340 F.2d 128, 131–32 (8th Cir. 1965) (explaining how Congress has the power to determine the conditions noncitizens must meet to enter and remain in the United States even if such conditions impose a certain amount of hardship on the noncitizen's citizen children).

circumvent well-established immigration law.[65] This is because to recognize such rights would create a pathway for citizen children to extend status to their undocumented parents, and such a pathway has never been offered under immigration law.[66] Courts fear that to provide status based on the rights of the citizen child would create an incentive for undocumented noncitizens to have children to gain lawful status.[67] The incapacity of children, the plenary power of Congress over immigration, and the fear that acknowledgement of citizen children's rights would unravel the immigration scheme thus form the core barriers to judicial recognition of meaningful substantive due process rights for citizen children whose parents face removal.

C. Renewed Call for Recognition of Citizen Children's Rights Against Parental Removal

In the past few years, the demand for courts to recognize the substantive due process rights of children whose parents face removal has been revitalized. In 2007, 600 citizen children filed a class action lawsuit in the U.S. Supreme Court to stay the removal of their parents.[68] The suit urged the Court to acknowledge that the constitutional rights of children to have their parents with them outweigh the government interest in removing their parents from the United States.[69] From 2006 to 2009,

[65] *Ayala-Flores*, 662 F.2d at 446 (declining to extend "illegal stay" of parents pursuant to citizen child's rights because to do so would create loophole in immigration laws); Urbano de Malaluan v. INS, 577 F.2d 589, 594 (9th Cir. 1978) (finding no violation of rights of citizen child whose parent faced deportation primarily because to do so would "permit a wholesale avoidance of immigration laws . . . ."); *Perdido*, 420 F.2d at 1181 (noting how immigration laws created by Congress did not permit children to extend benefits to parents).

[66] *See* Thronson, *supra* note 10, at 1184–85 (discussing how U.S. immigration law has consciously chosen to deny children the power to extend status to their parents in an effort to deter unlawful immigration and because children are perceived as lacking capacity to make important decisions about where to live).

[67] Marquez-Medina v. INS, 765 F.2d 673, 676 (7th Cir. 1985) (asserting that an undocumented noncitizen "cannot gain a favored status merely by birth of a citizen child."); Mamanee v. INS, 566 F.2d 1103, 1106 (9th Cir. 1977) (stating that undocumented noncitizens cannot rely on citizenship of child to prevent their own deportation); Gonzalez-Cuevas v. INS, 515 F.2d 1222, 1224 (5th Cir. 1975) (acknowledging that deportation of parent would result in *de facto* deportation of child but explaining that to allow noncitizens who illegally remained in the United States for the birth of their citizen children to gain favored status over those noncitizens who comply with immigration laws would usurp immigration law).

[68] *See* Maria Elena Salinas, *Immigration Raids Take Toll on Children*, SEATTLE POST-INTELLIGENCER, Nov. 13, 2007, at B6 (describing immigration activist Nora Sandigo's efforts to prevent the separation of citizen children from their noncitizen parents, which included filing a class-action lawsuit with the Supreme Court calling for a recognition of children's constitutional rights and an end to the detention and deportation of their parents); Karen Branch-Brioso, *Status Causes Family Separation Anxiety*, TAMPA TRIB., Nov. 13, 2007, at 1 (describing same).

[69] Branch-Brioso, *supra* note 95, at 1.

Judge Pregerson in the Ninth Circuit dissented 139 times in cases where noncitizen parents of citizen children were ordered removed.[70] The basic

[70] Judge Pregerson filed such dissents in thirteen cases not selected for publication in the Federal Reporter on February 19, 2009 (Gonzalez v. Holder, 312 F. App'x 863 (9th Cir. 2009); Martinez v. Holder, 312 F. App'x 864 (9th Cir. 2009); Palacios v. Holder, 312 F. App'x 866 (9th Cir., 2009); Santiago v. Holder, 312 F. App'x 867 (9th Cir. 2009); Miranda v. Holder, No. 08-71332, 2009 WL 412996 (9th Cir. Feb. 19, 2009); Garduno-Pizana v. Holder, 311 F. App'x 984 (9th Cir. 2009); Cruz-Cegueda v. Holder, 311 F. App'x 986 (9th Cir. 2009); Popoca v. Holder, 311 F. App'x 988 (9th Cir. 2009); Pena v. Holder, 311 F. App'x 989 (9th Cir. 2009); Flores-Jimenez v. Holder, 311 F. App'x 991 (9th Cir. 2009); Chavarria v. Holder, 311 F. App'x 993 (9th Cir. 2009); Martinez v. Holder, No. 08-71613, 2009 WL 413078 (9th Cir. Feb. 19, 2009); Al Bajah v. Holder, 311 F. App'x 995 (9th Cir. 2009)). He wrote one such dissent in 2008 (Benitez v. Mukasey, 270 F. App'x 523 (9th Cir. 2008). He issued sixty-one such dissents in 2007. One was published (Memije v. Gonzales, 481 F.3d 1163 (9th Cir. 2007)). Sixty of those dissents were made on October 18, 2007, and twenty are available in the Federal Appendix (Miranda v. Keisler, 251 F. App'x 443 (9th Cir. 2007); Rodriguez v. Keisler, 251 F. App'x 440 (9th Cir. 2007); Marcial v. Keisler, 251 F. App'x 439 (9th Cir. 2007); Carranza v. Keisler, 251 F. App'x 438 (9th Cir. 2007); Orduna v. Keisler, 251 F. App'x 436 (9th Cir. 2007); Gonzales v. Keisler, 251 F. App'x 435 (9th Cir. 2007); Pardo v. Keisler, 251 F. App'x 433 (9th Cir. 2007); Hernandez v. Keisler, 251 F. App'x 432 (9th Cir. 2007); Sanchez v. Keisler, 251 F. App'x 430 (9th Cir. 2007); Duran v. Keisler, 251 F. App'x 429 (9th Cir. 2007); Pedroza v. Keisler, 251 F. App'x 423 (9th Cir. 2007); Hernandez v. Keisler, 251 F. App'x 421 (9th Cir. 2007); Renteria v. Keisler, 251 F. App'x 420 (9th Cir. 2007); Ramirez v. Keisler, 251 F. App'x 418 (9th Cir. 2007); Maldonado v. Keisler, 251 F. App'x 416 (9th Cir. 2007); Suarez v. Keisler, 251 F. App'x 415 (9th Cir. 2007); Baroja v. Keisler, 251 F. App'x 414 (9th Cir. 2007); Rivera-Perez v. Keisler, 251 F. App'x 412 (9th Cir. 2007); Villegas v. Keisler, 251 F. App'x 411 (9th Cir. 2007); Lopez v. Keisler, 251 F. App'x 409 (9th Cir. 2007)). On July 3, 2006, Judge Pregerson dissented sixty-four times; sixty-one of the cases are available in the Federal Appendix (Salazar v. Gonzales, 189 F. App'x 606 (9th Cir. 2006); Mata v. Gonzales, 189 F. App'x 604 (9th Cir. 2006); Villada-Cabrera v. Gonzales, 188 F. App'x 627 (9th Cir. 2006); Guzman Balbuena v. Gonzales, 188 F. App'x 602 (9th Cir. 2006); Cuervo-Mateo v. Gonzales, 188 F. App'x 601 (9th Cir. 2006); Torres Bedolla v. Gonzales, 188 F. App'x 600 (9th Cir. 2006); Parra-Rosales v. Gonzales, 188 F. App'x 599 (9th Cir. 2006); Melchor-Cano v. Gonzales, 188 F. App'x 597 (9th Cir. 2006); Rosas v. Gonzales, 188 F. App'x 596 (9th Cir. 2006); Pallares v. Gonzales, 188 F. App'x 595 (9th Cir. 2006); Hernandez-Mendez v. Gonzales, 188 F. App'x 594 (9th Cir. 2006); Guevara v. Gonzales, 188 F. App'x 593 (9th Cir. 2006); Marquez-Avila v. Gonzales, 188 F. App'x 591 (9th Cir. 2006); Galindez Martinez v. Gonzales, 188 F. App'x 590 (9th Cir. 2006); Hurtado v. Gonzales, 188 F. App'x 589 (9th Cir. 2006); Ramirez-Rosas v. Gonzales, 188 F. App'x 587 (9th Cir. 2006); Martinez v. Gonzales, 188 F. App'x 586 (9th Cir. 2006); Gonzalez v. Gonzales, 188 F. App'x 585 (9th Cir. 2006); Vega v. Gonzales, 188 F. App'x 583 (9th Cir. 2006); Vasquez Rubio v. Gonzales, 188 F. App'x 582 (9th Cir. 2006); Espinoza v. Gonzales, 187 F. App'x 796 (9th Cir. 2006); Goicochea Hernandez v. Gonzales, 187 F. App'x 795 (9th Cir. 2006); Hernandez Calderon v. Gonzales, 187 F. App'x 794 (9th Cir. 2006); Lucio-Zamora v. Gonzales, 187 F. App'x 793 (9th Cir. 2006); Gramajo de Leon v. Gonzales, 187 F. App'x 792 (9th Cir. 2006); Aguirre de Nuno v. Gonzales, 187 F. App'x 791 (9th Cir. 2006); Garcia Andrade v. Gonzales, 187 F. App'x 790 (9th Cir. 2006); Pelayo v. Gonzales, 187 F. App'x 789 (9th Cir. 2006); Gutierrez Llanes v. Gonzales, 187 F. App'x 788 (9th Cir. 2006); Vazquez v. Gonzales, 187 F. App'x 787 (9th Cir. 2006); Ramirez v. Gonzales, 187 F. App'x 786 (9th Cir. 2006); Alvarez-Toro v. Gonzales, 187 F. App'x 785 (9th Cir. 2006); Arce-Segura v.

premise of his dissents was that citizen children faced two choices, both which violated their constitutional rights.[71] The purported unconstitutional choices available to citizen children were to accept *de facto* expulsion from the United States or to give up their constitutional right to remain with their parents.[72] Pregerson posited that to remove the parents would deny the children "the opportunity to develop their full potential in the country of their birth."[73]

The resurfacing of the argument for recognition of the substantive due process rights of citizen children is most likely due to several factors. Over the past few years, Congress has made unsuccessful efforts to reform an admittedly failing immigration system.[74] Judge Pregerson has noted this failure in his dissents, calling for Congress to "ameliorate the plight of families . . . and give us humane laws that will not cause the disintegration of such families."[75] In addition, the number of unlawfully present noncitizens is at an all-time high of approximately twelve

Gonzales, 187 F. App'x 784 (9th Cir. 2006); Gonzalez Vallejo v. Gonzales, 187 F. App'x 783 (9th Cir. 2006); Serna v. Gonzales, 187 F. App'x 782 (9th Cir. 2006); Garcia v. Gonzales, 187 F. App'x 781 (9th Cir. 2006); Serrano-Hernandez v. Gonzales, 187 F. App'x 780 (9th Cir. 2006); Ortiz Pioquinto v. Gonzales, 187 F. App'x 778 (9th Cir. 2006); Llamas v. Gonzales, 187 F. App'x 777 (9th Cir. 2006); Barriga-Partida v. Gonzales, 187 F. App'x 776 (9th Cir. 2006); Memije v. Gonzales, 187 F. App'x 775 (9th Cir. 2006); Gurrola v. Gonzales, 187 F. App'x 774 (9th Cir. 2006); Fuentes-Oceguera v. Gonzales, 187 F. App'x 773 (9th Cir. 2006); Monroy-Arredondo v. Gonzales, 187 F. App'x 772 (9th Cir. 2006); Flores Trujillo v. Gonzales, 187 F. App'x 771 (9th Cir. 2006); Corona-Guerrero v. Gonzales, 187 F. App'x 770 (9th Cir. 2006); Solis Duran v. Gonzales, 187 F. App'x 769 (9th Cir. 2006); Rojas-Santos v. Gonzales, 187 F. App'x 768 (9th Cir. 2006); Catalan Calderon v. Gonzales, 187 F. App'x 767 (9th Cir. 2006); Chowdhury v. Gonzales, 187 F. App'x 766 (9th Cir. 2006); Rodriguez Deloya v. Gonzales, 187 F. App'x 765 (9th Cir. 2006); Arce-Hidalgo v. Gonzales, 187 F. App'x 764 (9th Cir. 2006); Rodriguez Resendis v. Gonzales, 187 F. App'x 763 (9th Cir. 2006); Riego de Dios v. Gonzales, 176 F. App'x 911 (9th Cir. 2006); Arias v. Gonzales, 176 F. App'x 910 (9th Cir. 2006); Ramos Cepeda v. Gonzales, 176 F. App'x 909 (9th Cir. 2006); Magana-Rosiles v. Gonzales, 176 F. App'x 908 (9th Cir. 2006); Munoz-Chavez v. Gonzales, 176 F. App'x 907 (9th Cir. 2006); Navarrete-Garcia v. Gonzales, 176 F. App'x 906 (9th Cir. 2006); Orozco-Rosas v. Gonzales, 176 F. App'x 905 (9th Cir. 2006); Chavez Guzman v. Gonzales, 176 F. App'x 904 (9th Cir. 2006)).

[71] Memije v. Gonzales, 481 F.3d 1163, 1164 (9th Cir. 2007) (Pregerson J., dissenting).

[72] *Id.*

[73] *Id.* at 1165.

[74] *See* Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1561 n.17 (2008) (listing several immigration reform acts presented in Congress since 2005 but never approved); Christa Marshall, *Dream Vote in Senate: Loss Likely Ends '07 Efforts for Reforming Immigration,* DENVER POST, Oct. 25, 2007, at B12 (quoting Senator Ken Salazar as stating, "I will continue to support . . . comprehensive immigration reform as a way to fix our broken immigration system."); *Sen. Johnson Comments on Immigration Vote,* U.S. FED. NEWS, June 28, 2007 (statement from Senator Johnson from South Dakota expressing regret in Senate's failure to pass immigration reform and noting that the United States "still faces a broken immigration system.").

[75] *Memije*, 481 F.3d at 1165–66.

million.[76] An estimated 3.1 million citizen children have at least one undocumented noncitizen parent.[77] Moreover, the government has intensified efforts to identify and remove unlawfully present noncitizens, with the goal of removing all removable noncitizens by 2012.[78] The workplace immigration raids used by the government to accomplish this goal have caused thousands of children to suffer severe emotional trauma, economic hardship, and social isolation.[79] As a result, between 2004 and 2007, over 80,000 parents of citizens were removed.[80] Millions of other citizen children continue to face losing one or both parents to removal.[81] It is within this context that the demand for judicial recognition of the substantive due process rights of citizen children has been revived.

III. REDEFINING THE RIGHT AND HOW REMOVAL OF PARENTS VIOLATES THE RIGHTS OF CITIZEN CHILDREN

A. Similar Independent Constitutional Rights of Children

The Supreme Court has acknowledged that children are within the protection of the constitution and thus entitled to certain constitutional rights.[82] Minors have been expressly recognized as "persons" under the

[76] PASSEL, *supra* note 3, at 2–3 (estimating the number of unauthorized noncitizens living in the United States to be 11.5 to 12 million as of March 2006, a new high since 1980 when the numbers of such individuals began to be approximated).

[77] *Id.* at 8.

[78] *See* U.S. DEP'T OF HOMELAND SEC., ENDGAME *supra* note 5 (describing the U.S. Department of Homeland Security's goal of removing all removable aliens within the United States by 2012).

[79] *See ICE Workplace Raids: Their Impact on U.S. Children, Families, and Communities: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Education & Labor,* 110th Cong. 2–3, 5 (2008) (statement of Rep. Lynn Woolsey, Chairwoman, Subcomm. on Workforce Protections) (describing how thousands of children live in constant fear of separation from family members and suffer severe emotional trauma as a result of workplace raids targeting their communities); Randy Capps & Rosa Maria Castañeda, *The Impact of Immigration Raids*, COMMUNITIES & BANKING, Summer 2008, at 11–12 (discussing how the raids have impacted the mental and physical health of children by causing family separation, economic hardship, fear, isolation, and social stigma); David B. Thronson, *Creating Crisis: Immigration Raids and the Destabilization of Immigrant Families*, 43 WAKE FOREST L. REV. 391, 392, 417 (2008) (explaining how the federal government uses raids to create fear in immigrant families in the hopes that such immigrants will voluntarily leave the United States and how thousands of children have been separated from their parents in the aftermath of such raids); *see generally* PAYING THE PRICE, *supra* note 17, at 41–50 (explaining the consequences of the raids on children's psychological, educational, social, and economic well-being).

[80] *See* ILLEGAL ALIEN PARENTS , *supra* note 6, at 6 fig.2.

[81] *See* PASSEL, *supra* note 3, at 8.

[82] *See infra* notes 86–94 and accompanying text (discussing scope of constitutional rights of children).

Constitution.[83] The Court has repeatedly stated that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[84] Moreover, the Court has asserted that children are not merely protected by the Constitution but also can exercise Constitutional rights prior to attaining the age of majority.[85]

Nevertheless, the Court has asserted that "the constitutional rights of children cannot be equated with those of adults."[86] This is because children are perceived as vulnerable and incapable of making critical decisions in an informed, mature manner.[87] As such, the rights of children may be outweighed by the *parens patriae* duty of the government to protect children[88] or the fundamental rights of parents to control the upbringing of their children.[89] Moreover, instead of gaining independent recognition, children's rights are often incorporated into their parents' right to control their upbringing.[90] These considerations limit but do not

[83] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) (finding students in school and out of school to be "persons" under the Constitution and thus possessing fundamental rights); *In re* Gault, 387 U.S. 1, 13 (1967) (acknowledging juvenile delinquents as persons under the Constitution).

[84] Bellotti v. Baird, 443 U.S. 622, 633 (1979) (quoting *In re Gault*, 387 U.S. at 13); Carey v. Population Serv. Int'l, 431 U.S. 678, 692 (1977) (quoting *In re Gault*, 387 U.S. at 13); McKeiver v. Pennsylvania, 403 U.S. 528, 532 (1971) (quoting *In re Gault*, 387 U.S. at 13).

[85] *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.").

[86] *Bellotti*, 443 U.S. at 634.

[87] *Id.* (explaining that the constitutional rights of children cannot be equal to those adults possess because of the unique vulnerability of children and the inability of children to make informed critical decisions); Parham v. J.R., 442 U.S. 584, 602 (1979) (upholding law limiting due process for commitment of children into mental institutions by their parents since children lack "maturity, experience, and capacity for judgment required for making life's difficult decisions.").

[88] *See* Schall v. Martin, 467 U.S. 253, 265 (1984) (holding juvenile delinquent had liberty interest in freedom from pretrial detention but that such interest was subordinate to the government's *parens patriae* interest in promoting the welfare of the child when the juvenile posed risk of committing another serious crime); Prince v. Massachusetts, 321 U.S. 158, 165–66 (1944) (explaining the rights of children to exercise their freedom of religion could be restricted by the government if in the best interest of the child).

[89] *See* Michael H. v. Gerald D., 491 U.S. 110, 130–31 (1989) (noting that child conceived as result of extra-marital affair may have liberty interest in relationship with her biological father, but that such interest would be outweighed by married parents' interest in protecting family unit); *Parham*, 442 U.S. at 604 (finding child's liberty interest in not being unnecessarily committed to mental institution superseded by parents' substantial right to make such medical decisions for their child, subject to a doctor's independent medical judgment).

[90] *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (holding that state could not force children to accept education only from public schools because the responsibility in making religious and educational choices was a fundamental right entrusted to parents); Meyer v. Nebraska, 262 U.S. 390, 400–01 (1923) (finding rights

negate the possibility of recognition of additional substantive due process rights of children.

When the rights of children share tensions with parental autonomy, such as in the area of medical decision-making, the Court typically defers to the parents' right to control the child's upbringing.[91] This deference to parental autonomy arises from the presumption that parents will act in their child's best interest.[92] The Court has departed from this general approach only in the area of abortion, where the Court has held that minors are entitled to obtain an abortion without parental consent.[93] Outside of this limited exception, deference to parental autonomy is frequently used by the legal system to limit the opposing rights of children.[94]

In contrast, when the rights of children primarily conflict with government objectives, the Supreme Court has been more willing to recognize the independent substantive rights of children, particularly when important societal interests were at stake. During the Vietnam War era, the Court recognized that minors had a limited First Amendment right to express their anti-war views at school.[95] When the "unbridled discretion" of the juvenile justice system led to a teenager being committed to a juvenile facility for six years for making an obscene phone call, the Court determined that juveniles facing detention were guaranteed the same constitutional rights as adult criminal defendants.[96] These rights belonged exclusively to the child and were not outweighed by government interests.

Perhaps the Court did not find a superseding government or parental interest for the above-listed independent constitutional rights of children because such rights were in areas foundational to our free society; specifically the areas of speech, personal liberty, and individual

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of children to receive teaching in languages other than English encompassed by fundamental right of parents to control the upbringing of their children).

[91] *Meyer*, 262 U.S. at 400–01. *See also* Barbara Bennett Woodhouse, *Speaking Truth to Power: Challenging "The Power of Parents to Control the Education of Their Own*," 11 CORNELL J.L. & PUB. POL'Y 481, 487 (2002) (evaluating Supreme Court jurisprudence to find parental interests are often the determinative factor in deciding whose rights control when parental, government, and children's interests collide); Espenoza, *supra* note 37, at 409–10 (the Supreme Court's denial or limitation of a child's due process right is supported by the superior right of the parents in their child's best-interest).

[92] *See* Troxel v. Granville, 530 U.S. 57, 68 (2000) (plurality opinion) (asserting there is presumption that fit parents will act in the best interests of their children).

[93] Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976).

[94] S*ee* Robin Paul Malloy, *Market Philosophy in the Legal Tension Between Children's Autonomy and Parental Authority*, 21 IND. L. REV. 889, 892 (1988) (positing that the law empowers parents and disempowers children by giving parents control over the everyday choices of their children).

[95] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) (limiting the right to activities which would not substantially interfere with schoolwork or discipline).

[96] *In re* Gault, 387 U.S. 1, 18–22 (1967).

autonomy.[97] The right to family and the right to remain in one's native land to experience the full benefits of citizenship are similarly at the core of the history and tradition of American life. The Court has declared that "the institution of the family is deeply rooted in this Nation's history and tradition."[98] Choices about family life have been recognized as having "basic importance in our society."[99] Similarly, the Court has described a citizen's right to move about the country as "part of our heritage" and as "basic in our scheme of values."[100] The Court has also described citizenship as integral to our national identity: "[c]itizenship in this Nation is a part of a cooperative affair. Its citizenry is the country and the country is its citizenry."[101] Thus, to recognize specific fundamental rights of children in the areas of family life and citizenship would be consistent with the previous independent fundamental rights granted to them in areas central to American identity such as speech and individual autonomy.

Finally, recognizing additional substantive due process rights for children based on similar developments in international law would be consistent with the Court's recent jurisprudence. In the past several years, the Court has expanded its general substantive due process analysis by looking not only at whether the right is rooted in the nation's history and tradition,[102] but by considering whether the right sought has been "accepted as an integral part of human freedom in many other countries."[103] Since several European countries have recognized the independent rights of children,[104] including the right to be reared by

[97] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (describing the right to make autonomous choices as essential to "the attributes of personhood" and which thus could not be compelled by the government); Stone v. Powell, 428 U.S. 465, 491 n.31 (1976) (recognizing essential need in free society for safeguarding innocent persons from suffering an unconstitutional loss of liberty); Shelton v. Tucker, 364 U.S. 479, 486 (1960) (acknowledging freedom of speech "lies at the foundation of a free society.").

[98] Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977).

[99] M.L.B. v. S.L.J., 519 U.S. 102, 103 (1996) (quoting Boddie v. Connecticut, 401 U.S. 371, 376 (1971)).

[100] Kent v. Dulles, 357 U.S. 116, 126 (1958).

[101] Afroyim v. Rusk, 387 U.S. 253, 268 (1967).

[102] *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (noting that the Court's method of analysis for substantive due process includes protecting fundamental rights "deeply rooted in this Nation's history and tradition . . . ." (quoting *Moore*, 431 U.S. at 503)).

[103] Lawrence v. Texas, 539 U.S. 558, 577 (2003) (finding homosexual adults have constitutional liberty interest to engage in intimate consensual conduct, in part due to other countries affirming same right).

[104] *See* Charter on Fundamental Rights of the European Union, art. 14, 24, 2000 O.J. (C 364) 11, 13, *available at* http://www.europarl.europa.eu/charter/pdf/text_en.pdf (listing fundamental rights of children to be recognized by European Union Member States as right to education, a right to respect for family life, and a right to be seen as an equal person under the law). *See also* Elizabeth T. Gershoff & Susan H. Bitensky, *The Case Against Corporal Punishment of Children*, 13 PSYCHOL. PUB. POL'Y & L.

their parent in their country of citizenship,[105] the groundwork is present for the Court to recognize the rights of citizen children whose parents face removal. Working together, these factors provide a framework for broader recognition of the independent substantive constitutional rights of children, including the right to be reared by their parents in the United States.

B. Redefining the Right at Issue

U.S. citizen children have a substantive due process right to be reared by their parents in the United States so that they may enjoy the full benefits of citizenship. Although the Supreme Court has recently expressed disfavor with the expansion of substantive due process rights, the right articulated here is within the core of substantive due process protection.[106] The modern concept of substantive due process serves to prevent Congress from wielding its power to oppress persons who have no voice in the political process. Footnote four of *United States v. Carolene Products Co.* ushered in the modern view of substantive due process and stands for the proposition that courts should defer to the legislature except for cases involving fundamental rights and those involving discrete and insular minorities.[107] The right at issue here involves three million children who have no voice in the political process. This voice is lacking because the children are not old enough to vote and their parents, who lack immigration status as well as citizenship status, are ineligible to vote in U.S. elections. In addition, the right at issue is the synthesis of two longstanding fundamental constitutional rights: the right to family and the rights of citizenship. Since the right falls comfortably within existing substantive due process doctrine, courts should not hesitate to recognize citizen children's substantive due process right to be reared by their parents in the United States.

Although there is no mention of "children" or "parents" in the

231, 249 (2007) (noting that in the past fifteen years several countries have recognized the absolute right of children against corporal punishment including Denmark, Bulgaria, Germany, Greece, Croatia, Romania, the Netherlands, Spain, and Portugal).

[105] *See* Fajujonu v. Minister for Justice, [1990] I.R. 151 (Ir.) (holding Irish citizen children of illegal aliens who have resided for appreciable time in Ireland have right to company, care, and parentage of their parents within Ireland), *superseded by constitutional amendment,* Twenty-Seventh Amendment of the Constitution Act, 2004 (Bill No. 15/2004) (Ir.), *available at* http://www.oireachtas.ie/documents/bills28/acts/2004/a27th04.pdf.

[106] *See supra* notes 33–38 (discussing Supreme Court cases expressing reluctance of Court to expand substantive due process rights).

[107] 304 U.S. 144, 152 n.4 (1938). *See also* Gregory C. Cook, *Footnote 6: Justice Scalia's Attempt to Impose a Rule of Law on Substantive Due Process,* 14 HARV. J.L. & PUB. POL'Y 853, 855 (1991) (noting that most commentators agree that the modern era of substantive due process began with the Supreme Court's famous footnote in *Carolene Products Co.* which restricted the use of substantive due process to civil liberties cases (citing *Carolene Prod. Co.*, 304 U.S. 144)).

Constitution, there are a plethora of Supreme Court cases recognizing the fundamental right to family.[108] This right can be broadly defined as a right to family unity[109] and a right to family relationships.[110] It is based on the importance of family in history and tradition as the primary means by which Americans "pass down many of our most cherished values, moral and cultural."[111] The Supreme Court has expressly recognized this right as belonging to adults but has acknowledged that children have a "vital interest" in preserving a parent relationship without interference from the state.[112]

In interpreting the scope of the general right to family, lower courts have determined that there is no justification for recognizing a parental substantive right to companionship of the child yet denying the child a reciprocal right to the same companionship.[113] The child's right to companionship may be even weightier than that of his parents' since his parents can have more than one biological child but the child cannot replace a biological parent. Based on this logic, several circuits have recognized that children have a substantive due process right to a relationship with their parents.[114] This right has been acknowledged as the child's right to be nurtured by his parents,[115] to be in the care and custody of his parents,[116] and to the companionship of his parent.[117] In keeping with these cases, it is then reasonable to define the right of the child as the right to the companionship of his parent without government interference so that he may be nurtured and cared for until

[108] *See generally* Rachel King, *No Due Process: How the Death Penalty Violates the Constitutional Rights of the Family Members of Death Row Prisoners*, 16 B.U. PUB. INT. L.J. 195, 201–07 (2007) (outlining the Supreme Court jurisprudence establishing a fundamental right to family based on the recognition of the substantive due process rights to marry, to use contraceptives, to have children, and to make decisions on how to manage one's household).

[109] Moore v. City of E. Cleveland, 431 U.S. 494, 503–04 (1977) (invalidating city ordinance which limited dwelling unit occupancy to members of nuclear family since fundamental right of family included tradition of extended family living together).

[110] Stanley v. Illinois, 405 U.S. 645, 651–55 (1972) (holding unwed biological father who reared children from birth had due process right to have relationship with his children).

[111] *Moore*, 431 U.S. at 503–04.

[112] Santosky v. Kramer, 455 U.S. 745, 760 (1982) (holding parent and child share vital interest in preserving relationship absent state showing of parental unfitness).

[113] *See* Wooley v. City of Baton Rouge, 211 F.3d 913, 923 (5th Cir. 2000); Smith v. City of Fontana, 818 F.2d 1411, 1419–20 (9th Cir. 1987), *overruled on other grounds by* Hodgers-Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999); Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977).

[114] *Duchesne*, 566 F.2d at 825. *See also* Suboh v. Dist. Attorney's Office of Suffolk Dist., 298 F.3d 81, 91 (1st Cir. 2002); Brokaw v. Mercer County, 235 F.3d 1000, 1018–19 (7th Cir. 2000); J.B. v. Wash. County, 127 F.3d 919, 927 (10th Cir. 1997); Franz v. United States, 707 F.2d 582, 594–95 (D.C. Cir. 1983).

[115] *Brokaw*, 235 F.3d at 1018–19.

[116] *J.B.*, 127 F.3d at 927.

[117] *Smith*, 818 F.2d at 1419; *Franz*, 707 F.2d at 594–95.

he reaches the age of majority.

Children who have birthright citizenship under the Fourteenth Amendment also have a constitutionally protected right to live in the United States so that they may enjoy the rights and privileges of citizenship. A relationship with the national territory itself is inherent with *jus soli* citizenship, or citizenship by right of the soil, granted under the Fourteenth Amendment.[118] *Jus soli* citizenship assumes that those born within the borders of the territory are part of a national community.[119] Under the Fourteenth Amendment, citizens have a fundamental right to abide in any state in the Union, which allows the citizen to voluntarily maintain a relationship with his or her national community.[120] Similarly, citizens have a right against deportation from the United States by government action.[121] In *Ng Fung Ho v. White*, two foreign-born sons of native-born citizens were admitted into the United States as citizens.[122] Over one year later, both were arrested and charged with being Chinese laborers in the United States without a certificate of residence in violation of the Chinese Exclusion Act.[123] Despite providing evidence of citizenship, the two men were ordered deported without a judicial hearing.[124] The Supreme Court held that the two men were entitled to a judicial hearing because citizens have a right to be free from deportation.[125] The Court explained that "To deport one who so claims to be a citizen, obviously deprives him of liberty . . . . It may result also in loss of both property and life; or of all that makes life worth living."[126] Thus, the right to live in the United States is the paramount right of citizenship. To deny children this right essentially invalidates their status as citizens and deprives them of all the privileges associated with

[118] GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 165 (1996), (explaining concept of *jus soli* citizenship under the Citizenship Clause of the Fourteenth Amendment).

[119] Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411, 1435–36 (1997) (explaining "extreme geographical rootedness" of *jus soli* citizenship which provides that any child born within the state's territorial jurisdiction becomes a member of the national community therein).

[120] *See* Jones v. Helms, 452 U.S. 412, 417–18 (1981) (affirming the right to take up residence in any state is fundamental right and "privilege of national citizenship").

[121] It is important to note that this discussion limits the child's right against deportation to government action within the immigration context. Parents can still exercise their custodial rights, even through court enforcement, without violating the child's right against constructive deportation. *See, e.g.,* Schleiffer v. Meyers, 644 F.2d 656, 663 (7th Cir. 1981) (finding Swedish court order granting custody of child to mother in Sweden did not violate constitutional rights of U.S. citizen child to reside in United States).

[122] 259 U.S. 276, 281–82 (1922). *See also* Friedler, *supra* note 21, at 546 (discussing same).

[123] *Ng Fung Ho,* 259 U.S. at 281–82 (citing Chinese Exclusion Act, § 6, 27 Stat. 25 (1892) (repealed 1943)).

[124] *Id.* at 281.

[125] *Id.* at 284.

[126] *Id.*

membership in a national community.

When the substantive due process right to parental companionship and the constitutional right against deportation are synthesized, the result is that minor citizen children have a constitutional right to remain in the United States in the care of their parents without undue interference from the government. This articulation of the right differs from past attempts rejected by the circuits in that the right is defined as a negative right, not an affirmative one. This eliminates the issue of the incapacity of children to exercise certain affirmative rights. It also is consistent with the plethora of individual constitutional rights which preserve liberty through limiting the power of government to intrude upon the private lives of its citizens.[127] It should also be noted that the context of the argument for children's rights against parental removal has changed since most of the circuits rejected the argument in the 1970s and 1980s.[128] Specifically, the number of children facing parental removal is at an all-time high and efforts at immigration reform have failed.[129] Within this new context, the courts should reconsider the child's right as a negative one, namely, the right to remain in the United States in the care of their parents, free from undue government interference.

C. Plenary Power Doctrine Does Not Bar Courts from Recognizing Rights of Citizen Children

Congress' plenary power over immigration does not create judicial immunity to constitutional challenges to immigration law. The plenary power doctrine has been used by courts since the late 1800s to limit the scope of judicial review of immigration laws.[130] It is comprised of three elements. First, Congress has the power to admit and exclude aliens under the inherent powers of sovereignty.[131] Second, because Congress's

[127] *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (outlining specific guarantees in the Bill of Rights which create zones of privacy which protect against government intrusion including: the First Amendment right of association, the Fourth Amendment right against unreasonable searches and seizures, and the Fifth Amendment right against self-incrimination).

[128] *See supra* notes 53–67 and accompanying text (discussing circuits' rejection of argument for substantive due process rights for children to prevent parental deportation).

[129] *See supra* notes 74–81 and accompanying text (explaining that millions of citizen children face removal of noncitizen parents while Congress has failed to enact reforms to immigration laws).

[130] *See* Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CAL. L. REV. 373, 378 (2004) (observing that courts have used the plenary power doctrine for over a hundred years to insulate immigration law from constitutional challenge); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550–54 (1990) (discussing the formal beginning of the plenary power doctrine in a series of cases before the Supreme Court in the late 1800s and how the doctrine was used to prevent challenges to immigration laws).

[131] *See* Kleindienst v. Mandel, 408 U.S. 753, 769–70 (1972) (noting that "plenary

power is derived from an extra-constitutional source, there is limited constitutional constraint.[132] Third, because there is limited constitutional constraint, the power of federal courts to review Congress's exercise of its plenary power over immigration is limited.[133] These three factors typically result in courts reviewing constitutional challenges to immigration laws under a highly deferential standard.[134] In the context of citizen children's challenges to parental removal, the plenary power doctrine has been used by the circuits to defer to Congress's choice to deny minor children the power to extend lawful status to their parents regarding the rights of citizen children under the immigration scheme.[135]

Despite the previous use of the plenary power doctrine, there are three reasons why it should not prevent successful constitutional challenges by citizen children to immigration laws. First, the plenary power doctrine effectively shields judicial review in the exclusion context but has limited value in the removal context.[136] The courts have used the doctrine with little restraint in the exclusion context, but have applied constitutional limitations on congressional power in the removal

congressional power to make policies and rules for exclusion of aliens has long been firmly established."); Galvan v. Press, 347 U.S. 522, 531 (1954) (reiterating that Congress has exclusive power to formulate policies regarding the entry of aliens and their right to remain in the U.S.); Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) (explaining that Congress' "power of exclusion of foreigners [is] an incident of sovereignty . . . ."). *See also* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002) (providing a broad overview of the plenary power doctrine and its roots in the concept of inherent sovereignty).

[132] *See* Cleveland, *supra* note 131, at 4 (detailing Supreme Court's position in *United States v. Curtiss-Wright Export Corp.* that the foreign affairs powers were based in international law concepts of sovereignty and as such were unconstrained by other provisions of the Constitution (citing *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936))).

[133] *See id.* at 5 (articulating limited judicial review as element of plenary power doctrine); U.S. CONST., art. III, § 2, cl. 1 (confining federal judicial jurisdiction to "all Cases . . . arising under this Constitution . . . .").

[134] *See* Fiallo v. Bell, 430 U.S. 787, 793 (1977) (mentioning "need for special judicial deference to congressional policy choices in the immigration context . . . ."); Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952) (asserting that immigration policies are "exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry . . . ."); Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) (stating that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."); *Chae Chan Ping*, 130 U.S. at 606 (holding that Congress' exclusion of Chinese nationals under the Chinese Exclusion Act of 1888 was "conclusive upon the judiciary.").

[135] *See supra* notes 63–64 and accompanying text (discussing circuits' use of plenary power doctrine to reject children's rights argument against parental deportation).

[136] *See* Brian G. Slocum, *Canons, the Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. U. L. REV. 363, 385, n.116 (2007) (discussing how courts have used the plenary power doctrine to defer to Congress' substantive criteria for admission and expulsion but have applied constitutional principles for procedural matters in the removal context (citing Landon v. Plasencia, 459 U.S. 21, 32 (1982))).

context.[137] Second, plenary power has been used to primarily prevent noncitizens from effectively challenging the constitutionality of immigration laws.[138] It does not always have a similar effect on constitutional claims made by citizens.[139] For example, in *Nguyen v. INS*, the Supreme Court allowed a citizen father to assert an equal protection challenge to birthright citizenship laws.[140] Like immigration law, the Court has categorized naturalization law as being within the plenary power of Congress.[141] In *Nguyen*, the Court applied the same equal protection standard that it would have applied in the gender-based classification context, offering little deference to the plenary power of Congress.[142] Third, in recent years, courts have demonstrated an increasing willingness to hear constitutional challenges against immigration laws, regardless of whether the claim has been brought by a citizen or noncitizen.[143] Most recently, in *Zadvydas v. Davis*, the Court rejected the government's assertion of plenary power in a case involving indefinite detention of criminal aliens who had been ordered deported but whose deportation could not be carried out.[144] The Court acknowledged Congress's power to remove aliens yet focused on the constitutional limitations of that plenary power.[145] Specifically, the court found that Congress's power over immigration must be exercised through constitutionally permissible means.[146]

This erosion of the plenary power doctrine combined with the fact that citizens are challenging removal—not exclusionary—laws are the reasons why courts should not defer to the plenary power of Congress when considering how immigration law impacts the constitutional rights

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[137] *Id.*

[138] *See* Cox, *supra* note 130, at 387 n.57 (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 271–75 (1990); *Landon*, 459 U.S. at 32; Johnson v. Eisentrager, 339 U.S. 763, 777–78 (1950)).

[139] *See* Nguyen v. INS, 533 U.S. 53, 72–73 (2001) (failing to apply standard of review deferential to congressional exercise of immigration power when citizen challenged immigration laws as violative of equal protection); *but see Fiallo*, 430 U.S. at 796 (applying deferential standard of review to congressional immigration power when citizen and lawful permanent residents challenged laws).

[140] 533 U.S. at 58.

[141] *See* Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 342 (2002) (noting that prior to *Nguyen* the Court consistently invoked the plenary power doctrine when considering constitutional challenges to naturalization laws).

[142] *Nguyen*, 533 U.S. at 71.

[143] For a general discussion on the erosion of the plenary power doctrine and the courts increasing willingness to hear constitutional challenges against immigration law see Motomura, *supra* note 130; Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984).

[144] 533 U.S. 678, 695–96 (2001).

[145] *Id.* at 695.

[146] *Id.*

of citizen children. The doctrine will not preclude citizen children from making successful constitutional challenges to immigration laws.

D. Assessing the Impact of Parental Removal on Children's Rights

When a parent faces removal, a child is confronted with either giving up his right to be reared by his parent or to not be compelled by the government to leave the United States. Some may argue that the child's right against constructive deportation is not affected when a parent is removed. However, at least two circuits have ruled that removal of a parent results in the *de facto* deportation of the child.[147] These courts have refused to find a violation of the child's rights because it was seen as unfairly conveying immigration benefits on the parents.[148] In this sense, courts have erroneously viewed the right as an affirmative exercise of citizenship, namely, children asserting status to provide relief to their parents. When viewed as a negative right against government compulsion to depart the United States, it is clear that the child's citizenship right has been impacted.

These rights cannot be refused to citizen children solely because of their parents' violation of immigration laws. In *Plyler v. Doe*, the Supreme Court held that undocumented children could not be denied access to an elementary school education in U.S. public schools.[149] Under a robust rational basis standard, the Court recognized that, although the parents of the undocumented children had entered the United States in violation of immigration laws, "legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."[150] This approach is consistent with the family law principle that certain rights vested with a child, such as the right to child support, cannot be forfeited by the actions of one parent.[151] For example, if a woman purposely deceives a man regarding her use of contraception and conceives a child, her wrongful actions do not impact the child's right to support.[152] Lower courts have taken a similar approach to

[147] Hernandez-Rivera v. INS, 630 F.2d 1352, 1356 (9th Cir. 1980) (holding deportation of alien parents would result in *de facto* deportation of citizen children, yet finding deportation lawful because to hold otherwise would allow parents to gain favored status merely based on birth of citizen child); Gonzalez-Cuevas v. INS, 515 F.2d 1222, 1224 (5th Cir. 1975) (declaring same).

[148] *Hernandez-Rivera,* 630 F.2d at 1356.

[149] 457 U.S. 202 (1982) (invalidating Texas statute denying undocumented children enrollment in public schools as a violation of Equal Protection Clause of Fourteenth Amendment).

[150] *Id.* at 220.

[151] *See* HARRY D. KRAUSE ET AL., FAMILY LAW: CASES, COMMENTS, AND QUESTIONS 869 (6th ed. 2007) (noting that the general rule is that because the parental support obligation is owed to the child, an agreement between the parents to waive the rights of the child to support is not enforceable).

[152] *Id.* at 869–70 (outlining cases where fathers have failed to avoid child support obligations because of mother's contraceptive fraud).

preserving children's rights when adults violate criminal laws. In *White v. Rochford*, the Seventh Circuit found that police officers had unjustly deprived children of their constitutional right to adult care when they abandoned children in a car on the side of a highway after arresting their uncle for drag racing.[153] The majority rejected the dissent's position that the illegal activities of the uncle caused the children to be stranded.[154] Thus, even some criminal acts by an adult caring for a child cannot terminate the existence of a child's right, although certain intrusions on the right may be justified.[155]

The rights of the citizen child are not absolute. Laws impacting the fundamental rights of children should be subjected to the highest level of scrutiny. Substantive due process forbids the government from infringing on fundamental liberty interests unless the infringement is narrowly tailored to serve a compelling government interest.[156] It is difficult to dispute that the government has a compelling interest in maintaining the integrity of immigration laws and removing persons who violate such laws. However, removing the parents of citizen children is not a narrowly tailored means of achieving this goal. This is because it necessarily infringes on one of two constitutional rights of the citizen child. The child can either forfeit his right to be reared in the care of his parent or forfeit his right against constructive deportation.

In addition, a non-infringing alternative exists for achieving the compelling government interest. The government could maintain the integrity of immigration laws while preserving the citizen child's rights by staying the removal of the parents of the minor child until he reaches majority.[157] Once the child becomes an adult, his right to be reared by his parent becomes moot. His parent could then be removed from the United States without the child having to sacrifice one constitutional right over the other. This alternative would require the government to refrain from fulfilling its compelling interest in removal for up to eighteen years. Conversely, the government could achieve its goal of maintaining the integrity of immigration laws with no such delay by focusing on border security efforts.

This situation must also be contrasted with the case of a parent who has committed a crime and is sent to prison.[158] Under a strict scrutiny

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[153] 592 F.2d 381, 384 (7th Cir. 1979) (finding police action violated due process rights of children).

[154] *Id.* at 386.

[155] *Id.* at 383 (specifying that due process right of children at stake was the right to be free from "*unjustified* intrusions on personal security." (emphasis added)).

[156] Reno v. Flores, 507 U.S. 292, 301–02 (1993).

[157] *See* Jessie M. Mahr, Comment, *Protecting Our Vulnerable Citizens: Birthright Citizenship and the Call for Recognition of Constructive Deportation,* 32 S. ILL. U. L.J. 723, 744 (2008) (suggesting this approach as a solution to preserving the rights of citizen children whose parents face removal).

[158] *See* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1954 (2000) (contrasting

analysis, the child's right to family unity has not been violated. First, the child's right to be reared by his parent may be only temporarily impacted for a few months while his parent is incarcerated. Even if the sentence is of longer duration, the child and parent remain in the same country and visitation could easily be facilitated. Second, there is no noninfringing alternative means to incarceration to protect the public from criminal activity. In other words, the parent's risk to public safety may necessitate incarceration.

Although many immigration violations are criminal in nature, it is unlikely that allowing most noncitizens to remain in the United States to raise their children would pose a similar risk to society justifying their permanent absence in their minor children's lives.[159] According to the Department of Homeland Security, in 2007, the overwhelming majority of noncitizens who were removed were not criminals.[160] Nearly two-thirds of all removals were based on noncriminal immigration violations.[161] For the remaining one-third of noncitizens removed on criminal grounds, about twenty percent were for criminal immigration offenses.[162] These removal numbers are consistent with studies showing that noncitizens commit crimes at a lower rate than native-born citizens.[163] Moreover, studies have shown that crime rates decreased as the undocumented population increased.[164] In contrast, children reared in foster care have alarmingly high incarceration rates as adults,[165] as well as high rates of

the issue of family unity in the immigration and criminal justice context and explaining that the criminal system often accounts for the impact incarceration has on families whereas the immigration enforcement system does not).

[159] *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 381 (2006) (discussing how criminal and immigration law substantively overlap, and how immigration and criminal sanctions are often imposed for the same offense); Thronson, *supra* note 10, at 1188 (noting that most removals are based on lack of valid immigration documents, not crime).

[160] OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2007 4, tbl.3, *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_07.pdf (reporting that 99,924 of the total 319,382 noncitizens removed in 2007 were criminals).

[161] *Id.*

[162] *See id.* at 4 tbl.4 (showing that 21,538 of the 99,924 noncitizens removed in 2007 were removed for crimes categorized as immigration crimes).

[163] *See* RUBÉN G. RUMBAUT & WALTER A. EWING, IMMIGRATION POLICY CTR., AM. IMMIGRATION LAW FOUNDATION, THE MYTH OF IMMIGRANT CRIMINALITY AND THE PARADOX OF ASSIMILATION: INCARCERATION RATES AMONG NATIVE AND FOREIGN-BORN MEN 1 (2007), *available at* http://www.immigrationpolicy.org/images/File/special report/Imm%20Criminality%20(IPC).pdf (reporting that criminal incarceration rates are lowest for foreign-born persons).

[164] *See id.* (explaining that since 1994 the documented population has doubled in the United States while the violent crime rate has decreased by 34.2%, and the property crime rate has decreased by 26.4%).

[165] *See* U.S. GEN. ACCT. OFFICE, FOSTER CARE: EFFECTIVENESS OF INDEPENDENT LIVING SERVICES UNKNOWN 4 (1999), *available at* http://www.gao.gov/new.items/he 00013.pdf (citing studies finding that 27% of male and 10% of female former foster care youths had been incarcerated at least once).

homelessness, unemployment, early pregnancy, and reliance on public assistance.[166] For these reasons, in most cases it is likely that the benefit noncitizen parents provide by rearing their children in the United States is not outweighed by any criminal risk to society.

Furthermore, it is well-established under criminal law that when two constitutional rights conflict, a defendant cannot be forced to abandon one to enjoy the other.[167] The constitutional rights of citizen children at stake here are no less fundamental than those of criminal defendants. The right to family has been described by the Supreme Court as "one of the basic civil rights of man."[168] Citizenship, which is so closely tied to a relationship with one's national community, has similarly been valued as "a right no less precious than life or liberty."[169] The parent-child relationship plays an integral role in cultivating the values of American society and citizenship.[170] If a citizen child possesses the constitutional right to parental companionship free from government interference and the right against compulsion by the government to leave his native land, the government cannot limit the child from enjoying both rights. In other words, the child cannot be forced to abandon his right to parental companionship in order to remain in the United States, and vice-versa. The child is entitled to enjoy both rights concurrently.

Finally, in looking at *Plyler*, even if the right is not deemed to be a fundamental right, it is possible that the impact of immigration laws on the right could fail to pass rational basis review. The Court in *Plyler* did not find education to be a fundamental right.[171] Yet the Court did consider the importance of education when invalidating the law at issue under a robust rational basis standard of review.[172] The Court described the Texas law preventing undocumented children from obtaining an elementary school education as:

> [Imposing] a lifetime hardship on a discrete class of children not accountable for their disabling status. . . . By denying these children a basic education, we deny them the ability to live within the

[166] *See id.* at 3–4 (detailing studies finding that among former foster care youths 25% experienced homelessness, 51% were unemployed, 42% had given birth to or fathered a child, and 40% relied on some form of public assistance).

[167] *See* Lefkowitz v. Cunningham, 431 U.S. 801, 807–08 (1977) (holding defendant cannot be forced to choose between Fifth and First Amendment rights); Simmons v. United States, 390 U.S. 377, 394 (1968) (finding state may not require defendant to choose between Fourth and Fifth Amendment rights).

[168] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (declaring right to have offspring as fundamental right).

[169] Klapprott v. United States, 335 U.S. 601, 616–17 (1949) (Rutledge, J., concurring in result).

[170] *See* M.L.B. v. S.L.J., 519 U.S. 102, 116–17 (1996) (declaring relationship between parent-child to be of basic importance in American society); Bellotti v. Baird, 443 U.S. 622, 638 (1979) (explaining how children require parental guidance and care to mature into "socially responsible citizens").

[171] Plyler v. Doe, 457 U.S. 202, 223 (1982).

[172] *Id.* at 223–24.

> structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. . . . [W]e may appropriately take into account its costs to the Nation and to the innocent children who are its victims.[173]

The denial of a citizen child's right to be reared in the United States by his parent raises the same concerns. The nurturing care of a parent within the presence of one's national community is no less essential than the need for an elementary school education. Denying children the right to be reared by their parent in the United States will come at a great cost to the well-being of children and, in turn, a great cost to the future of America.[174] Under the *Plyler* approach, the failure of immigration law to adequately account for the rights of citizen children may not withstand even rational basis review.

Whether strict scrutiny or a robust rational basis is applied, the impact of current immigration laws on the rights of citizen children is constitutionally impermissible.

IV. RECOGNITION OF RIGHTS OF CITIZEN CHILDREN WILL NOT UNDERMINE CURRENT IMMIGRATION LAWS

A. Proposed Amendment to Immigration Laws

Once the substantive due process rights of citizen children are recognized, the immigration laws will need to be amended to ensure those rights are not unduly burdened. This means that the law must be narrowly tailored to achieve the compelling government interests of deterring unlawful immigration and maintaining the integrity of the immigration scheme. Also, in viewing the approaches of other countries who have dealt with this issue, there are three competing considerations which must be dealt with: 1) avoiding the creation of a subclass of persons with no recognized right to remain, 2) preserving the integrity of the legal immigration system, and 3) applying the law to a large number of people in an efficient manner.[175]

This author suggests that Congress amend the Immigration and Naturalization Act to grant temporary status to citizen children's undocumented parents while denying such parents a permanent right to remain in the United States. Under this approach, undocumented parents of citizen children would be able to obtain temporary status if they met similar criteria for § 1255(i) status adjustment, including having

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[173] *Id.*

[174] *See also supra* notes 16–21 and accompanying text (discussing impact of children leaving the United States or remaining in the United States without parents).

[175] *See infra* notes 178–84 and accompanying text (discussing various international approaches for providing noncitizen parents a right to remain with their citizen children in the child's country of citizenship).

no convictions for crimes under § 1182(a)(2).[176] This would allow citizen children to be cared for by their parents in the United States during their formative years without fear of government raids or parental separation. The temporary status would permit the parent to work in the United States so that the citizen child would be adequately supported. Upon the child turning twenty-one, the temporary status would expire and the parent would be required to voluntarily depart absent a showing of extreme hardship. The parent would then be subject to the existing three-year or ten-year bars to re-entry due to any accrued unlawful presence.[177] The parent would never be eligible for permanent status in the United States but could seek readmission for brief visits under a special nonimmigrant visitor's visa. Such visa would only be available if the parent voluntarily departed prior to the expiration of their temporary status.

This approach ensures the government is able to achieve its compelling interests without unduly burdening the citizen child's right to be reared by his or her parent in the United States. Specifically, the government can continue to deter unlawful immigration and maintain the integrity of the immigration scheme by requiring these parents to depart once the child reaches the age of twenty-one. Moreover, the government would retain full control over border security and could prevent noncitizens from entering in the first place. While the government goals are met, young citizens are cared for by their parents in the United States and there is flexibility for family visitation after the child reaches majority.

This approach also balances the three competing considerations evident from how other countries have addressed the rights of citizen children with undocumented noncitizen parents, specifically: 1) avoiding the creation of a subclass of persons with no recognized right to remain, 2) preserving the integrity of the legal immigration system, and 3) applying the law to a large number of people in an efficient manner.

This author suggests that to prevent creation of a subclass of persons while maintaining control over immigration, Congress should provide temporary lawful status for undocumented noncitizen parents while eliminating a pathway to permanent residency. For example, France allows noncitizen parents of citizen children to remain indefinitely without any formal status.[178] This system provides for family unity but it

[176] 8 U.S.C. § 1255(i) (2006) (allowing noncitizens who entered illegally but who have a familial or employment relationship in the United States to apply for adjustment of status while remaining in the United States after payment of a $1,000 fine); 8 U.S.C. § 1182(a)(2) (2006) (listing criminal grounds of inadmissibility, including convictions for crimes involving moral turpitude, controlled substance trafficking, and prostitution).

[177] 8 U.S.C. § 1182(a)(9)(B) (2006).

[178] *See* Jacqueline Bhabha, "*More Than Their Share of Sorrows": International Migration Law and the Rights of Children*, 22 ST. LOUIS U. PUB. L. REV. 253, 262 (2003) (noting how the French permit undocumented parents of citizen children to stay but

creates a permanent subclass of noncitizens with limited rights and uncertain futures. In contrast, Ireland provided a formal path to permanent residency for parents lacking immigration status who had citizen children.[179] Citizens viewed this grant of rights to noncitizen parents as unfairly circumventing immigration laws, and eventually led to Ireland amending its constitution to eliminate pure *jus soli* citizenship.[180] This author's approach avoids the extremes of both of these outcomes by providing the noncitizen parent with temporary lawful status and eliminating a pathway to permanent residency.

To provide for efficiency, this author suggests that parents of noncitizen children meet certain objective criteria similar to the requirements of § 1255(i) to obtain temporary status to rear their citizen children in the United States.[181] Canada requires immigration authorities to balance government interests with family interests to determine whether or not a parent can be deported.[182] This method is a less menacing version of the cancellation of removal provision offered in the United States.[183] It may provide relief to some families on a case-by-case basis but would be difficult to apply on a large scale. Since millions of citizen children have at least one undocumented noncitizen parent, laws accounting for citizen children's rights on a case-by-case basis would be time-consuming and expensive. An application process with set objective criteria would be more efficient and similar to other applications for immigration benefits routinely handled by the U.S. Citizenship and Immigration Services (USCIS) on a high-volume basis.[184]

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prevent them from obtaining any formal regular status).

[179] *See* Fajujonu v. Minister for Justice, [1990] I.R. 151 (Ir.) (holding Irish citizen children of illegal aliens who have resided for appreciable time in Ireland have right to company, care, and parentage of their parents within Ireland), *superseded by constitutional amendment*, Twenty-Seventh Amendment of the Constitution Act, 2004 (Bill No. 15/2004) (Ir.), *available at* http://www.oireachtas.ie/documents/bills28/acts/2004/a27th04.pdf. *See also* CLAIRE BREEN, AGE DISCRIMINATION AND CHILDREN'S RIGHTS: ENSURING EQUALITY AND ACKNOWLEDGING DIFFERENCE 167 (2006) (discussing evolution of Irish *jus soli* citizenship law).

[180] BREEN, *supra* note 179, at 167. *See* Brian Lavery, *Voters Reject Automatic Citizenship for Babies Born in Ireland*, N.Y. TIMES, June 13, 2004, at N7 (reporting that nearly eighty percent of voters approved a plan to eliminate birthright citizenship from the Irish Constitution).

[181] *See supra* note 176.

[182] *See* Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law's Conflicted Answers*, 32 HOFSTRA L. REV. 273, 302, n.160 (2003) (discussing Canadian approach to family unity in deportation context).

[183] *See supra* note 7 and accompanying text (providing brief overview of cancellation of removal relief under 8 U.S.C. § 1229(b)).

[184] *See* U.S. CITIZENSHIP AND IMMIGRATION SERV., APPLICATIONS FOR IMMIGRATION BENEFITS—MONTHLY STATISTICAL REPORT FOR JANUARY 2009 (2009), *available at* http://www.uscis.gov/files/article/APPLICATIONS%20FOR%20IMMIGRATION%20BENEFITS_January09.pdf (reporting that in the fiscal year 2008, USCIS received 4,319,134 applications and petitions for immigration benefits).

B. Addressing the "Anchor Baby" Dilemma

Many courts fear that recognizing the rights of citizen children against parental removal would create an incentive for noncitizens to bear children in the United States to gain lawful immigration status.[185] This is commonly known as the "anchor baby" problem.[186] Proponents urging for the elimination of the "anchor baby" incentive created by *jus soli* citizenship raise two main arguments. First, the cost of these children and parents is an undue burden on the welfare system.[187] Second, the child's ability to confer lawful status on the parent creates a loophole in the legal immigration system and rewards the parents' wrongdoing.[188]

These legitimate concerns must be considered but should not be determinative when it comes to recognition of the rights of the citizen child. To begin with, it is clear that the "anchor baby" incentive already narrowly exists since children upon reaching the age of twenty-one can petition for lawful status for their undocumented parents.[189] To allow minor citizen children to petition for their parents would depart from the existing age requirement but would be consistent with immigration law's asserted goal of family unity.[190] In addition, the failure of the

[185] *See supra* note 67 (citing circuit cases rejecting argument that rights of citizen children are violated by parental removal since to do so would be to grant immigration status to persons merely on account of the birth of a child).

[186] *See* Federation for American Immigration Reform, *Anchor Babies: Part of the Immigration-Related American Lexicon* (Apr. 2008), http://www.fairus.org/site/News2?page=NewsArticle&id=16535&security=1601&news_iv_ctrl=1007 (defining an anchor baby as "an offspring of an illegal immigrant or other non-citizen, who under current legal interpretation becomes a United States citizen at birth" who may later petition for lawful status for noncitizen family members.).

[187] *See id.* (citing hospital and welfare costs for children of undocumented noncitizens which amount "to a virtual tax on U.S. citizens to subsidize illegal aliens"); Fred Elbel, *Consequences of Misinterpreting the 14th Amendment to the United States Constitution* (Dec. 1, 2008), http://www.14thamendment.us/birthright_citizenship/consequences.html (arguing that the children of undocumented noncitizens cost taxpayers $3–6 billion per year in hospital delivery costs, and California alone spent $553 million in a single year for welfare costs for such children).

[188] Elbel, *supra* note 187. (both noting that Congress's failure to eliminate birthright citizenship "rewards law-breakers and punishes those who have chosen to follow the rules and immigrate legally.").

[189] 8 U.S.C. § 1151(b)(2)(A)(i) (2006); David B. Thronson, *You Can't Get Here from Here: Toward a More Child-Centered Immigration Law*, 14 VA. J. SOC. POL'Y & L. 58, 71 (2006) (discussing how children may never petition for parents until they cease to be children under immigration law upon reaching the age of twenty-one). *But see* Katherine Pettit, Comment, *Addressing the Call for the Elimination of Birthright Citizenship in the United States: Constitutional and Pragmatic Reasons to Keep Birthright Citizenship Intact*, 15 TUL. J. INT'L & COMP. L. 265, 277 (2006) (explaining that even if an adult citizen child files a petition for their undocumented noncitizen parent, the parent will likely not be able to obtain lawful status because of previous immigration violations).

[190] *See* INS v. Errico, 385 U.S. 214, 220 n.9 (1966) ("The legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to

government to enforce our borders should not result in burdening the rights of millions of our citizen children. The Court in *Plyler* recognized this in preserving the rights of undocumented noncitizen children and noted that "visiting . . . condemnation on the head of an infant is illogical and unjust . . . . [and] contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."[191] Citizen children of undocumented noncitizen parents have engaged in no wrongdoing. The Constitution grants them citizenship by virtue of their birth in the United States.[192] For citizenship to be meaningful it must offer such children full inclusion in the national community and give them the same constitutional protections as other citizens. Even though the "anchor baby" incentive will be retained and arguably expanded, the rights of citizen children should be given primary consideration.

Some scholars argue that the solution is to repeal the pure *jus soli* citizenship offered under the Fourteenth Amendment.[193] A handful of countries in recent years have revoked or modified their offerings of *jus soli* citizenship in response to the "anchor baby" problem.[194] There have

provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united." (quoting H.R. REP. No. 85-1199, at 7 (1957)); THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 326 (6th ed. 2008) (noting that family reunification is the "dominant feature of current arrangements for permanent immigration to the United States . . . .").

[191] Plyler v. Doe, 457 U.S. 202, 220 (1982) (recognizing right of undocumented noncitizen children to have access to education at public schools) (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)).

[192] *See supra* note 2 and accompanying text (detailing citizenship clause of Fourteenth Amendment and subsequent Supreme Court jurisprudence interpreting the clause).

[193] Adam C. Abrahms, Note, *Closing the Immigration Loophole: The 14th Amendment's Jurisdiction Requirement*, 12 GEO. IMMIGR. L.J. 469, 469–70 (1998) (urging United States to stop practice of granting *jus soli* citizenship under Fourteenth Amendment to children of illegal aliens either through congressional legislation or executive order designating such children as not subject to the jurisdiction of the United States); Monica Diaz Greene, Note, *Birthright Citizenship: Should the Right Continue?*, 9 J. L. & FAM. STUD. 159, 160–61 (2007) (proposing limits on pure *jus soli* citizenship provision of Fourteenth Amendment); Charles Wood, *Losing Control of America's Future—The Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J.L. & PUB. POL'Y 465, 522 (1999) (calling for a new constitutional amendment to stop practice of granting *jus soli* citizenship under Fourteenth Amendment to children of illegal aliens).

[194] *See* Catherine Dauvergne, *Citizenship with a Vengeance*, 8 THEORETICAL INQ. L. 489, 497 (2007) (discussing how Australia modified its form of *jus soli* citizenship in 1986 to require that at least one parent be a citizen or permanent resident, and how Ireland similarly limited *jus soli* citizenship in 2004 to children of Irish citizens or entitled to be Irish citizens); Michael Robert W. Houston, *Birthright Citizenship in The United Kingdom and the United States: A Comparative Analysis of the Common Law Basis for Granting Citizenship to Children Born of Illegal Immigrants*, 33 VAND. J. TRANSNAT'L L. 693, 698–702 (2000) (describing how United Kingdom in 1981 began limiting citizenship to children born in United Kingdom to those with at least one citizen or permanent resident parent); Mae M. Ngai, *Birthright Citizenship and the Alien Citizen*, 75 FORDHAM

also been a number of unsuccessful bills introduced in Congress calling for constitutional and statutory amendments to deny birthright citizenship to children of undocumented parents.[195] However, as our borders continue to be porous, to deny citizenship to children born here would create an entire subclass of people without status. Such persons would lack any voice in the political process and would be pushed to the margins of society.[196] This subclass could be easily exploited and deprived of any basic rights for fear of stepping out of the shadows to assert such rights.[197] In a sense, to repeal the *jus soli* portion of the Amendment could lead to the very type of racially-based caste system that led to the Amendment's creation.[198]

Finally, in considering the rights of citizen children, Congress must minimize the incentive for undocumented noncitizens to have children to gain status. This can be done by eliminating a pathway to permanent lawful status for these parents. Similarly, any recognition of children's rights by the courts should not result in the conferral of lawful permanent status on the undocumented parents of citizen children. Congress is entitled to make those determinations under its exercise of the immigration power.[199] Any judicial recognition of children's rights in this context would merely stay parental removals until Congress amended the immigration laws to account for the rights of citizen children while minimizing the "anchor baby" incentive.

L. REV. 2521, 2524 (2007) (noting how New Zealand amended its *jus soli* citizenship provision by requiring the child to be born to at least one citizen or permanent resident parent).

[195] *See* H.R.J. Res. 46, 109th Cong. (2005) (requesting amendment to deny citizenship to persons born in United States to parents who were not citizens or who did not owe allegiance to the United States); H.R. 3700, 109th Cong. (1st Sess. 2005) (proposing to limit birthright citizenship by amending provisions of the Immigration and Nationality Act).

[196] *See* Brooke Kirkland, Note, *Limiting the Application of Jus Soli: The Resulting Status of Undocumented Children in the United States*, 12 BUFF. HUM. RTS. L. REV. 197, 213–14 (2006) (describing negative repercussions of Japan's policy of permitting generations of Koreans to permanently remain in Japan while providing no pathway to citizenship and denying voting and certain employment rights).

[197] *See* Pettit, *supra* note 189, at 281–86 (discussing how Germany's pure *jus sanguinis* citizenship led to an entire subclass of Turkish permanent nonresidents and how the United States would face similar problems if *jus soli* citizenship were eliminated).

[198] *See* Nicole Newman, Note, *Birthright Citizenship: The Fourteenth Amendment's Continuing Protection Against an American Caste System*, 28 B.C. THIRD WORLD L.J. 437 (2008) (arguing against repeal of *jus soli* citizenship provision of Fourteenth Amendment since to do so would create an unlawful caste of innocent children of undocumented immigrants).

[199] *See supra* notes 130–46 and accompanying text (describing plenary power of Congress over immigration scheme).

V. CONCLUSION

The time is ripe for courts to recognize the substantive due process rights of citizen children to be reared by their parents in the United States without undue government interference. The failure of our government to secure our borders is not a valid excuse for denying citizen children their constitutional rights. Until our legal immigration system accommodates the needs of families within our borders, millions of citizen children will live in the fear of being separated from their parent or being expelled from their native land. For the sake of America's future, the courts must remove the dead hand which Congress has laid upon our young citizens.