

BIRTHRIGHT CITIZENSHIP IN THE UNITED STATES: REALITIES OF DE FACTO DEPORTATION AND INTERNATIONAL COMPARISONS TOWARD PROPOSING A SOLUTION

[W]e are a nation of immigrants who, through citizenship, seek to fully embrace all that America is and hopes to be. Today, as in decades past for many immigrants, citizenship represents the ultimate in attaining the American dream. Citizenship acknowledges the exceptional value of the immigrants and bestows fuller acceptance into American society. Through naturalization the immigrant is transformed from an “alien” into an American; no longer the stranger, but now an esteemed family member free to assert all the rights and bear all the responsibilities of American citizenship.¹

INTRODUCTION

Saul Arellano is an American citizen.² His mother, Elvira Arellano, arrived in the United States illegally in 1997 from Mexico and gave birth to Saul shortly thereafter.³ In 2006, despite two previous deportation deferrals, Elvira was ordered deported.⁴ She immediately took refuge in a Chicago church to avoid being separated from her son,⁵ and she quickly became an activist “for illegal immigrant parents as she defied her deportation order and spoke out from her sanctuary.”⁶

On August 19, 2007, Elvira had just spoken at an immigration rally when she was arrested and deported to Mexico.⁷ She left her son in the care of Reverend Walter Coleman from the Chicago church.⁸ Immigration and Customs Enforcement has defended its actions, saying that Elvira, who had previously been convicted of using a false identity and using someone else’s

1. John S. Cummins, *Naturalization and Birthright Citizenship Should Be Encouraged*, in IMMIGRATION: OPPOSING VIEWPOINTS 188, 189 (Mary E. Williams ed., 2004).

2. *Coleman v. United States*, 454 F. Supp. 2d 757, 760 (N.D. Ill. 2006); see also Gretchen Ruethling, *Chicago Woman’s Stand Stirs Immigration Debate*, N.Y. TIMES, Aug. 19, 2006, at A10.

3. *Coleman*, 454 F. Supp. 2d at 760.

4. *Id.* at 762.

5. Elliot Spagat, *U.S. Departs Sanctuary Movement’s Symbol*, USA TODAY, Aug. 20, 2007, http://www.usatoday.com/news/topstories/2007-08-19-2962407204_x.htm.

6. *Id.*

7. Sara Olkon & Bob Sector, *Deporting Mother Inflames Emotions*, CHI. TRIB., Aug. 21, 2007, at 1.

8. Spagat, *supra* note 5.

social security number, was a criminal fugitive living in the United States illegally.⁹

In response to her deportation order, Elvira's priest filed suit on behalf of Saul alleging that the removal order was a constructive removal action against Saul that violated his Fourteenth Amendment constitutional rights.¹⁰ The court acknowledged that Saul "possesses the constitutional right . . . to reside in the United States," and "[i]nherent within this right of citizenship is the 'independent right to not be deported.'"¹¹ However, the court specified that "this particular right of citizenship is personal and cannot be imputed to non-citizens,"¹² essentially declaring that Saul's citizenship status alone cannot save his mother from deportation.

Although the court recognized that "any separation of a child from its mother is a hardship," it reasoned that this hardship should not allow "an otherwise unqualified mother to append the children's right to remain in the United States."¹³ The law does not grant citizen family members of illegal aliens a legal right to prevent deportation.¹⁴ Each court that has addressed the issue of whether a removal order issued against an alien parent violates the constitutional rights of a citizen-child has held that removal is not unconstitutional, "even if that removal constitutes the 'constructive' or 'de facto' deportation" of a citizen-child.¹⁵ The removal of the illegal alien parent does not violate the child's constitutional rights since the "citizen child remains free to exercise his right to live in the United States."¹⁶ The court subsequently concluded that because Elvira's removal order would "not have any legal effect on Saul's right to remain in the United States," the removal order should be executed as ordered.¹⁷

Coleman v. United States represents the typical case in which a citizen-child is trying to prevent the deportation of his illegal alien parent. The problem with deporting illegal residents with American-born children is that the children have a constitutional right to U.S. citizenship, acquired simply by virtue of having been born within U.S. borders.¹⁸ As a consequence, the children are legal citizens and cannot be forced to leave. However, the

9. *Coleman*, 454 F. Supp. 2d at 760.

10. *Id.*

11. *Id.* at 766 (citing *Acosta v. Gaffney*, 558 F.2d 1153, 1157 (3d Cir. 1977) and *Oforji v. Ashcroft*, 354 F.3d 609, 616 (7th Cir. 2003)).

12. *Id.*

13. *Id.* at 767 (quoting *Oforji*, 354 F.3d at 617-18).

14. *Coleman*, 454 F. Supp. 2d at 767 (quoting *Oforji*, 354 F.3d at 617-18).

15. *Id.*

16. *Id.* at 767-68.

17. *Id.* at 768.

18. See U.S. CONST. amend. XIV, § 1; see also *infra* Part I (discussing birthright citizenship in the United States).

deportation of the parent often results in de facto deportation of the citizen-children, a practice which many argue contradicts the constitutional guarantee of birthright citizenship and the inherent rights associated with American citizenship.

This Comment takes the position that the current U.S. immigration policy of deporting illegal immigrants with little regard to the citizenship status of their children directly contradicts the ideals of birthright citizenship, particularly with regard to children of illegal immigrant parents. The inherent rights of these citizen-children simply cannot be respected and upheld under a system that forces them to choose between either exercising their right to remain in the United States or staying with their parent and being deported. Birthright citizenship for children of illegal immigrant parents must be abandoned in favor of a system that does not require such a difficult and contradictory choice.

Undoubtedly, these problems are not uniquely American. To better resolve these supposed contradictions between law and policy, an international perspective is imperative and practical. Thus, this Comment discusses birthright citizenship from an international perspective, providing a comparative analysis between the United States' approach toward birthright citizenship and the approach taken by other western democratic nations. Part I discusses the origins of birthright citizenship in general and the problem of illegal immigrant births in the United States, including information on illegal immigrant birthrates, a summary of the conflicting schools of thought on the subject of birthright citizenship, and pending congressional responses. Part II discusses de facto deportation and the relative case law and legislation. Part III encompasses the comparative analysis and includes an examination of the philosophical and practical approaches to birthright citizenship taken in Canada, Australia, Ireland, and France. Finally, Part IV attempts to propose a solution to resolve the contradiction between U.S. law, which grants birthright citizenship to the children of illegal immigrants, and U.S. policy, which encourages the deportation of illegal immigrant parents and the inevitable de facto deportation of the citizen-child.

I. BIRTHRIGHT CITIZENSHIP IN THE UNITED STATES

The United States confers both *jus sanguinis*¹⁹ citizenship and *jus soli*²⁰ citizenship. *Jus sanguinis* confers citizenship to any child whose parent is a citizen,²¹ and *jus soli* confers citizenship to anyone born within a state's

19. Immigration and Nationality Act ("INA"), § 301(c)-(e), (g)-(h), 8 U.S.C. § 1401(c)-(e), (g)-(h) (2006).

20. U.S. CONST. amend. XIV, § 1; 8 U.S.C. § 1401(a)-(b).

21. BLACK'S LAW DICTIONARY 880 (8th ed. 2004).

territory.²² The *jus soli* doctrine as used in the United States originates from English common law, which conferred citizenship upon any person born within its boundaries.²³ *Jus soli*, or birthright citizenship, was incorporated into U.S. law with the Civil Rights Act of 1866²⁴ and ultimately the Fourteenth Amendment to the U.S. Constitution.²⁵ Thus, “every person born within the dominions and allegiance of the United States, whatever the situation of his parents, was a natural-born citizen.”²⁶

A. *The Statistics of Illegal Immigration and Birthright Citizenship*

The practice of birthright citizenship in the United States has resulted in a staggering number of U.S. citizens born to illegal immigrant parents. According to the Center for Immigration Studies, approximately “383,000 children are born each year to illegal alien mothers, accounting for nearly 10 percent of all births in the United States.”²⁷ The Federation for American Immigration Reform claims that, of these, almost half are born to illegal immigrants who come to the United States “to give birth so their children will be American citizens.”²⁸ Some estimates indicate that “about 3.1 million American children have at least one parent who is an illegal immigrant.”²⁹ In 2007, “[a]bout two-thirds of the children of the illegal immigrants detained in immigration raids” were born in the United States, and “at least 13,000 American children have seen one or both parents deported in the past two years” after immigration raids in factories and neighborhoods.³⁰

22. *Id.*

23. *United States v. Wong Kim Ark*, 169 U.S. 649, 655–66 (1898); *see also* Jonathan C. Drimmer, *The Nephews of Uncle Sam: The History, Evolution, and Application of Birthright Citizenship in the United States*, 9 GEO. IMMIGR. L.J. 667, 671–73 (1995) (discussing birthright citizenship under English law). For other introductory overviews of birthright citizenship in English common law, *see* ALEXANDER PORTER MORSE, *A TREATISE ON CITIZENSHIP, BY BIRTH AND BY NATURALIZATION* (Boston, Little, Brown, & Co. 1881), and Charles Wood, *Losing Control of America's Future—The Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J.L. & PUB. POL'Y 465, 504–06 (1999).

24. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (1866) (current version at 42 U.S.C. § 1981–1982 (2000)).

25. U.S. CONST. amend. XIV, § 1.

26. FREDERICK VAN DYNE, *CITIZENSHIP OF THE UNITED STATES* 5 (1904) (citing *Lynch v. Clarke*, 1 Sand. Ch. 583 (N.Y. Ch. 1844)).

27. *Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary*, 109th Cong. 2 (2005) (statement of Rep. John Hostettler, Chairman, Subcomm. on Immigration, Border Security, and Claims).

28. *Oforji v. Ashcroft*, 354 F.3d 609, 621 (7th Cir. 2003).

29. Julia Preston, *Case of Mother Torn from Baby Reflects Immigration Quandary*, N.Y. TIMES, Nov. 17, 2007, at A1.

30. *Id.*

With such high numbers of American-born children with illegal immigrant parents, policymakers have struggled to decide how to deal with illegal immigrants while also respecting the citizenship status and familial needs of their citizen-children. Incidents similar to the case of Elvira Arellano represent the difficulties that lawmakers face in forming a workable approach toward illegal immigration. More recently, in October 2007, an illegal immigrant mother was detained while nursing her nine-month-old baby, who was born in the United States.³¹ Immigration and Customs Enforcement responded to subsequent outcries over her detention by issuing new written guidelines establishing how agents should treat single parents, pregnant or nursing women, and other immigrants with special child or family care responsibilities who are arrested in raids.³²

B. *Birthright Citizenship: The Debate*

1. Maintain Birthright Citizenship for Children of Illegal Immigrants and Eliminate De Facto Deportation

Proponents of birthright citizenship contend that denying or restricting birthright citizenship for children of illegal immigrants would create grave social problems, resulting in a “new and artificial barrier between the ‘accepted’ citizens and the ‘unaccepted’ citizens of our nation” that would “create an unhealthy and destructive divide within America and add to the number of those who feel excluded from the greater society.”³³ Ending birthright citizenship for these children “would create a new series of practical problems for citizens and government alike.”³⁴ As one commentator notes:

Native-born Americans would have to prove their parents’ citizenship in order to enjoy the rights and privileges of their own citizenship. This in turn would introduce new possibilities for racial and ethnic discrimination. A stateless class would be created—the first native-born non-citizens to grow up in America since the children of slaves before the Civil War.³⁵

Without a system of birthright citizenship, the United States, a country with high immigration rates, would become “a hereditary caste of permanent aliens.”³⁶

31. *Id.*

32. *Id.*

33. Cummins, *supra* note 1, at 190.

34. *Id.* at 191.

35. *Id.*

36. T. Alexander Aleinikoff, *Between Principles and Politics: U.S. Citizenship Policy*, in FROM MIGRANTS TO CITIZENS: MEMBERSHIP IN A CHANGING WORLD 119, 128 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2000) (quoting *Societal and Legal Issues Surrounding Children Born in the United States to Illegal Alien Parents: Joint Hearing Before the Subcomm.*

Proponents of birthright citizenship also offer practical arguments in favor of continuing the current law. They argue that immigrants “access social welfare services at much lower rates than U.S.-born citizens,” and intergenerational welfare dependency between immigrant parents and children is unsubstantiated, negating arguments that focus on taxpayer burdens.³⁷ Additionally, illegal immigrants “tend to have above-average levels of education and occupational skills in comparison with their homeland populations,” since “[t]he very poor and the unemployed seldom migrate.”³⁸ Illegal immigrants are “positively self-selected in terms of ambition and willingness to work.”³⁹

Activists for illegal immigrants also argue that strict policies calling for the deportation of illegal immigrant mothers violate the constitutional rights of their citizen-children, destroy the family, and result in negative consequences for their children. In fact, courts deciding issues of de facto deportation have acknowledged that “the longer [that] children [of illegal immigrant parents] have lived in the United States, the greater the hardship to them of being sent back to their parent’s native country.”⁴⁰ Thus, many argue that not only should the practice of birthright citizenship be maintained, but deportation of the illegal immigrant parents of citizen-children should end.⁴¹

2. Abolition of Birthright Citizenship for Children of Illegal Immigrants

Opponents of birthright citizenship for children of illegal immigrants generally utilize three arguments in favor of abolishing the practice.⁴² First, it bestows citizenship on some whose “only tie to the society is the geographic accident of their place of birth.”⁴³ Second, *jus soli* citizenship encourages people from developing nations to enter illegally and give birth to their children,⁴⁴ giving rise to so-called “anchor babies.”⁴⁵ Anti-immigrant groups,

on Immigration and Claims and the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 104th Cong. 109 (1995) (statement of Gerald L. Neuman, Professor, Columbia University Law School)).

37. Priscilla Huang, *Which Babies are Real Americans?*, TOMPAINE.COM, Feb. 20, 2007, http://www.tompaine.com/articles/2007/02/20/which_babies_are_real_americans.php.

38. ALEJANDRO PORTES & RUBÉN G. RUMBAUT, *IMMIGRANT AMERICA: A PORTRAIT* 10 (2d ed. 1996).

39. *Id.*

40. *Oforji v. Ashcroft*, 354 F.3d 609, 620 (7th Cir. 2003) (Posner, J., concurring).

41. For a more extensive criticism of de facto deportation, see discussion *infra* Part II.B.

42. T. ALEXANDER ALEINIKOFF & DOUGLAS KLUSMEYER, *CITIZENSHIP POLICIES FOR AN AGE OF MIGRATION* 11 (2000).

43. *Id.*

44. *Id.* The authors note, however, that there is “scant evidence” to support the claim that illegal immigrants enter the country solely to give birth. *Id.* They immigrate to “obtain work, join family, or flee persecution or civil strife.” *Id.*

45. Judith Bernstein-Baker, *Citizenship in a Restrictionist Era: The Mixed Messages of*

such as the Federation of American Immigration Reform (FAIR), argue that these children born to illegal immigrant parents “create a drain on the country’s social service programs.”⁴⁶ They contend that the large numbers of births by non-U.S. citizens in American hospitals is indisputable, and “its impact is huge.”⁴⁷ Third, automatic birthright citizenship may influence states to “adopt tougher rules on family unification,” namely, by deporting the illegal immigrant parents of citizen-children.⁴⁸

Opponents of birthright citizenship for children of illegal immigrants argue that “it is simply morally perverse to reward law-breaking by conferring the valued status of citizenship.”⁴⁹ Such a policy “makes a mockery of citizenship”⁵⁰ and allows illegal immigrants and their children to “automatically jump ahead of millions of other foreigners patiently waiting in line abroad for the chance to come to the United States in proper, legal fashion.”⁵¹ One commentator argues that withholding birthright citizenship from “anchor babies” “would no more be ‘blaming’ or ‘punishing’ innocent children than an airline would be blaming or punishing the children of hijackers by not awarding them Frequent Flier mileage for unscheduled flights to Havana.”⁵² Instead of “encouraging foreigners to come to the United States solely to enable them to confer U.S. citizenship on their future children,” the United States should “stop [this] abuse of hospitality . . . by changing the rule on citizenship.”⁵³ American-born children should not be forced to make an “ugly choice” between either staying in the United States without their parents or facing de facto deportation to their parents’ home country.⁵⁴

C. Pending Congressional Responses

Congress has struggled to resolve the debate concerning birthright citizenship and the rights of the American-born children of illegal immigrants. In January 2007, Representative Elton Gallegly from California reintroduced the Citizenship Reform Act, House Bill 133,⁵⁵ and in April 2007,

Federal Policies, 16 TEMP. POL. & CIV. RTS. L. REV. 367, 371 (2007).

46. Huang, *supra* note 37.

47. Bonnie Erbe, *Birthright Citizenship Should Be Repealed*, in IMMIGRATION: OPPOSING VIEWPOINTS, *supra* note 1, at 184, 186.

48. ALEINIKOFF & KLUSMEYER, *supra* note 42, at 11.

49. Aleinikoff, *supra* note 36, at 127.

50. *Oforji v. Ashcroft*, 354 F.3d 609, 621 (7th Cir. 2003) (Posner, J., concurring) (quoting John McCaslin, *Inside the Beltway: Rotund Tourists*, WASH. TIMES, Aug. 27, 2002, at A7).

51. Erbe, *supra* note 47, at 186–87.

52. *Id.* at 186.

53. *Oforji*, 354 F.3d at 621 (Posner, J., concurring).

54. *Id.*

55. 153 CONG. REC. H115 (daily ed. Jan. 5, 2007).

Representative Nathan Deal proposed House Bill 1940,⁵⁶ both of which would have amended the Immigration and Nationality Act to deny birthright citizenship to children of parents who are neither citizens nor permanent resident aliens.⁵⁷ In November 2007, Representative Tom Tancredo introduced House Bill 4192,⁵⁸ which contained a provision that also would have amended the Immigration and Nationality Act to provide that a child would not be a U.S. citizen unless at the time of the child's birth at least one of the child's parents is a citizen or lawful permanent resident alien.⁵⁹ In a markedly different approach, in January 2007, Representative Jose Serrano from New York introduced House Bill 213,⁶⁰ which would provide discretionary authority to an immigration judge to determine that an alien parent of a United States citizen-child should not be deported if the deportation would be against the best interests of the child.⁶¹

II. DE FACTO DEPORTATION

A. Case Law

As stated above, each court that has addressed the issue of whether a removal order issued against an alien parent violates the constitutional rights of a citizen-child has held that removal is not unconstitutional, "even if that removal constitutes the 'constructive' or '*de facto* deportation' of a citizen child."⁶² Although courts have acknowledged that "any separation of a child

56. 153 CONG. REC. H3693 (daily ed. Apr. 19, 2007).

57. Citizenship Reform Act of 2007, H.R. 133, 110th Cong. (2007); Birthright Citizenship Act of 2007, H.R. 1940, 110th Cong. (2007).

58. 153 CONG. REC. H14,080 (daily ed. Nov. 15, 2007).

59. OVERDUE Immigration Reform Act of 2007, H.R. 4192, 110th Cong. § 201 (2007).

60. 153 CONG. REC. H118 (daily ed. Jan. 5, 2007).

61. H.R. 213, 110th Cong. (2007). After the original bill never became law, Serrano reintroduced it as H.R. 182 in January 2009.

62. *Coleman v. United States*, 454 F. Supp. 2d 757, 767 (N.D. Ill. 2006) (footnote omitted); *see also Gallanosa v. United States*, 785 F.2d 116, 120 (4th Cir. 1986); *Marquez-Medina v. INS*, 765 F.2d 673, 676 (7th Cir. 1985); *Newton v. INS*, 736 F.2d 336, 342-43 (6th Cir. 1984); *Valadez-Salas v. INS*, 721 F.2d 251, 252 (8th Cir. 1983); *Aguilar v. INS*, 638 F.2d 717, 719 (5th Cir. 1981); *Delgado v. INS*, 637 F.2d 762, 763-64 (10th Cir. 1980); *Urbano de Malaluan v. INS*, 577 F.2d 589, 594 (9th Cir. 1978) (observing that the argument "that the deportation order would amount to a *de facto* deportation of the child and thus violate the constitutional rights of the child . . . has been authoritatively rejected in numerous cases"); *Acosta v. Gaffney*, 558 F.2d 1153, 1158 (3d Cir. 1977); *Enciso-Cardozo v. INS*, 504 F.2d 1252, 1253 (2d Cir. 1974); Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35, 40-41 (1988) (noting that citizen children "have not been successful in pressing the view that the deportation of their undocumented parents is tantamount to the *de facto* deportation of the child").

from its mother is a hardship,”⁶³ they have reasoned that the removal of the illegal alien parent does not violate the child’s constitutional rights, since the “citizen child remains free to exercise his right to live in the United States.”⁶⁴ Once the child “reaches the age of discretion, . . . she will be free to return and make her home in this country,” and her “parents’ deportation will not affect her[] right to do so.”⁶⁵ The Seventh Circuit has held that “the constitutional right . . . to exercise a choice of residence, and to leave or stay in the United States as one chooses . . . is not always absolute in children.”⁶⁶

Courts have also held that an illegal alien parent who has no legal right “to remain in the United States may not establish a derivative claim for asylum” by arguing that de facto deportation would force hardship on her child.⁶⁷ The Ninth Circuit has reasoned that one of the principal reasons for the rejection of de facto deportation of the child as a means to prevent deportation of the illegal parent “is that it would permit a wholesale avoidance of immigration laws if an alien were to be able to enter the country, have a child shortly thereafter, and prevent deportation.”⁶⁸ The court in *Gonzalez-Cuevas v. INS* held that alien parents “who illegally remain[] in the United States for the occasion of the birth of their citizen children” do not derive any “extraordinary rights . . . directly or vicariously through their citizen children, to retain their illegally acquired residency status in this country.”⁶⁹

63. *Oforji v. Ashcroft*, 354 F.3d 609, 617 (7th Cir. 2003).

64. *Coleman*, 454 F. Supp. 2d at 767–68; *see also* *Lopez v. Franklin*, 427 F. Supp. 345, 349 (E.D. Mich. 1977) (rejecting the argument that de facto deportation violated a citizen-child’s constitutional rights in part because the child’s departure from the United States was not “the necessary result of the government’s actions”).

65. *Ayala-Flores v. INS*, 662 F.2d 444, 446 (6th Cir. 1981); *see also* *Acosta*, 558 F.2d at 1158 (reasoning that “[t]he right of an American citizen to fix and change his residence is a continuing one which he enjoys throughout his life,” and deportation of a citizen-child’s illegal immigrant parent “will merely postpone, but not bar” the child’s right to reside in the United States).

66. *Schleiffer v. Meyers*, 644 F.2d 656, 662–63 (7th Cir. 1981); *see also* *Perdido v. INS*, 420 F.2d 1179, 1181 (5th Cir. 1969) (reasoning that “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”).

67. *Oforji*, 354 F.3d at 618.

68. *Urbano de Malaluan v. INS*, 577 F.2d 589, 594 (9th Cir. 1978); *see also* *Mendez v. Major*, 340 F.2d 128, 131–32 (8th Cir. 1965) (holding that “Congress has the power to determine the conditions under which an alien may enter and remain in the United States even though the conditions may impose a certain amount of hardship upon an alien’s wife or children” (citations omitted)).

69. 515 F.2d 1222, 1224 (5th Cir. 1975).

B. *De Facto Deportation: A Practical Perspective*

Despite the consensus among U.S. Circuits that any legal claim of de facto deportation is without merit, de facto deportation undoubtedly has real, anti-American consequences in practice. Undoubtedly, scholars on both sides of the debate have argued that “what is best for the child” should be the guiding principle in determining a workable policy toward citizen-children of illegal immigrant parents.⁷⁰ However, considering that most immigrants today come to America because of “desperate poverty, squalor, and unemployment” in their own countries,⁷¹ sending the child back to the parents’ home country seems counterintuitive as a method to achieve “what is best for the child.”

Additionally, many nations, including westernized and non-westernized, democratic and non-democratic, have recognized at some point the right of a child to the care and parentage of a family.⁷² In fact, all but two United Nations states⁷³ have acknowledged that the family is “the fundamental group of society” and serves as the “natural environment for the growth and well-being of all its members.”⁷⁴ Children “particularly . . . should be afforded the necessary protection and assistance” of the family, and children “should grow up in a family environment” to ensure their “full and harmonious development.”⁷⁵

Article 8 of the Convention on the Rights of the Child obligates party states to “undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.”⁷⁶ Article 9 requires party states to “ensure that a child shall not be separated from his or her parents against their will, except when . . . such separation is necessary for the best interests of the child.”⁷⁷ Surprisingly, the United States is one of the two U.N. states who have yet to ratify the Convention.⁷⁸

70. Marvin P. Dawkins, *Rethinking U.S. Immigration Policy*, BLACK ISSUES IN HIGHER EDUC., Apr. 27, 2000, at 120.

71. PORTES & RUMBAUT, *supra* note 38, at 9.

72. See United Nations Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989); see also *infra* Part III.D.1 (discussing *jus soli* and deportation of illegal immigrant parents in Ireland).

73. The United States has signed, but not ratified, the Convention. See Office of the U.N. High Comm’r for Human Rights, *Status of Ratifications of the Principal Int’l Human Rights Treaties* (June 9, 2004), available at <http://www.unhchr.ch/pdf/report.pdf>; see also Child Rights Information Network, Convention on the Rights of the Child, <http://www.crin.org/resources/treaties/CRC.asp?catName=International+Treatie> (last visited Dec. 15, 2008).

74. G.A. Res. 44/25, *supra* note 72, pmb1.

75. *Id.*

76. *Id.* art. 8.

77. *Id.* art. 9.

78. See *supra* note 73.

Not only is there international recognition of a child's right to familial support and care, but traditional American legal and moral principles of the sanctity of the family and parental involvement in the care and rearing of children seem to contradict courts' unsympathetic view of de facto deportation.⁷⁹ Courts have acknowledged that "[t]o protect the unit in [its] constitutionally guaranteed right to form and preserve the family is one of the basic principles for which organized government is established."⁸⁰ One commentator argues that "although the word 'family' is not found in the U.S. Constitution, the Supreme Court has consistently recognized that the protection of private choices about family integrity is a matter of constitutional dimension."⁸¹ The relationship between a parent and child "has always been recognized as an inherent, natural right, for the protection of which, just as much as for the protection of the rights of the individual to life, liberty, and pursuit of happiness, our government is formed."⁸²

Although the United States has yet to adopt the U.N. Convention and is therefore under no U.N. obligation to recognize a child's right to a consistent familial structure, basic principles of fairness and integrity require such an approach. The child may be free to stay in the United States with a relative or family friend, but the child's inevitable need for a family structure will most often force him to leave with his deportee parent. A citizen-child of an illegal, deportee parent has two choices, both undesirable. One such choice "denies citizen children their right to remain in the United States, and the other

79. See David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1174-75 (2006) (discussing the Supreme Court's tendency to protect "family integrity" and prevent outside influence on the parent-child relationship, and arguing that "the Court's primary approach has been to stress parents' role in raising their children").

80. *Lacher v. Venus*, 188 N.W. 613, 617 (Wis. 1922); see also *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (arguing that Supreme Court jurisprudence "establish[es] that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition"). The Court argues that the *Wisconsin v. Yoder* Court "rested its holding in part on the constitutional right of parents to assume the primary role in decisions concerning the rearing of their children." *Moore*, 431 U.S. at 503 n.12 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). Such a constitutional right "is recognized because it reflects a 'strong tradition' founded on 'the history and culture of Western civilization,' and because the parental role 'is now established beyond debate as an enduring American tradition.'" *Id.* (quoting *Yoder*, 406 U.S. at 232).

81. 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, 58-59 (2006). Thronson argues that "[t]he Supreme Court has long acknowledged that among the liberties protected by the due process clause of the constitution is the right to 'establish a home and bring up children, . . . [a right] essential to the orderly pursuit of happiness by free men.'" *Id.* at 59 n.4 (alteration in original) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)); see also *Moore*, 431 U.S. at 503 n.12 (quoting *Yoder*, 406 U.S. at 232).

82. *Lacher*, 188 N.W. at 617.

destroys their right to live in an intact family.”⁸³ De facto deportation is real, and passively forcing a child to leave the country to retain familial support contradicts American notions of the importance of family. Such a practice also undoubtedly affects the citizen-child’s ability to develop crucial, nationhood bonds with the United States.⁸⁴ The “fundamental rights [of] the parent-child relationship” should not be “weakened by parents’ lack of immigration status or even their imminent deportation.”⁸⁵

C. *De Facto Deportation: Legislation*

Under current law, the U.S. Attorney General may cancel the deportation of an illegal alien parent upon a showing of exceptional hardship and a minimum of ten years continuous physical presence in the United States.⁸⁶ Simply asserting that deportation would have “a negative impact on the citizen child does not itself establish the extreme hardship necessary to cease the deportation.”⁸⁷ The U.S. Attorney General and the Board of Immigration Appeals has broad discretion, without much scope for judicial substantive review, to define “extreme hardship” and determine situations that qualify as an “extreme hardship” on the child.⁸⁸ This law, however, has been criticized as arbitrary, ineffective, and unnecessarily strict.⁸⁹

Judge Richard Posner, in his concurring opinion in *Oforji v. Ashcroft*, criticized the “ten-year rule” by arguing that it “has only a tenuous relation to the hardship of children whose parent is ordered deported.”⁹⁰ Posner continues

83. Thronson, *supra* note 81, at 80; *see also* *Oforji v. Ashcroft*, 354 F.3d 609, 618 (7th Cir. 2003) (stating that despite the hardship that an illegal alien parent must face in choosing whether to allow her children to remain in the United States with a guardian or to take them back to her home country, “Congress has foreseen such difficult choices, but has opted to leave the choice with the illegal immigrant”).

84. *See* Thronson, *supra* note 81, at 81 (arguing that “removal of citizen children from the United States is certain to limit their development of important bonds with their country of citizenship”).

85. Thronson, *supra* note 79, at 1197.

86. INA § 240A(b)(1), 8 U.S.C. § 1229b(b)(1) (2006); *see also* *Romero-Torres v. Ashcroft*, 327 F.3d 887, 889 (9th Cir. 2003); *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 597 (9th Cir. 2002).

87. Michael Robert W. Houston, Note, *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, 733 (2000).

88. *Hernandez-Cordero v. INS*, 819 F.2d 558, 561 (5th Cir. 1987); *Contreras-Buenfil v. INS*, 712 F.2d 401, 402–03 (9th Cir. 1983).

89. *See* Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law’s Conflicted Answers*, 32 HOFSTRA L. REV. 273, 298 (2003) (arguing that the prerequisite “that the alien be a person of good moral character” is a requirement that is impossible to fulfill for illegal immigrants with a criminal conviction and that subsequent court decisions indicate that the “hardship requirement is very difficult to meet”).

90. 354 F.3d 609, 620 (7th Cir. 2003) (Posner, J., concurring). At the time, the rule Posner

by acknowledging “that the longer the children have lived in the United States, the greater the hardship to them of being sent back to their parent’s native country,” and the hardship is “made more excruciating the longer they remain here and become acclimated to American ways.”⁹¹ The ten-year rule is “irrational,” since “the parent may have been here for nine years but the child [may] have been born eight years ago,” and deportation would still be a great hardship for the child, even though the parent might not satisfy the ten-year requirement.⁹²

III. COMPARATIVE ANALYSIS: BIRTHRIGHT CITIZENSHIP IN OTHER WESTERN DEMOCRATIC NATIONS

In determining a workable policy to deal with the American-born children of illegal immigrant mothers, lawmakers should examine the policies utilized in other western democratic nations facing similar immigration problems. Controlling access to automatic citizenship or nationality in modern liberal-democratic states has generally centered around three approaches: *jus soli*, *jus sanguinis*, and naturalization through formalized legal procedures, such as marriage, adoption, or other specialized circumstances.⁹³ Some argue that in countries where *jus soli* is used to determine citizenship, “the public policy toward migrants is one of assimilation.”⁹⁴ Conversely, in countries where *jus sanguinis* is used to determine citizenship, “the public policy toward migrants is one that resists assimilation,” and xenophobia remains a serious problem in these areas.⁹⁵

Modern states often employ some variation of all three of the primary means to satisfy different purposes.⁹⁶ Whatever the means that nations choose, “questions of citizenship are always inextricably bound to larger issues of sovereignty, national identity, the framework of political order, and individual liberties.”⁹⁷

was criticizing required seven years continual presence in the United States. *Id.* His criticisms, however, are still relevant in the context of the ten-year rule.

91. *Id.*

92. *Id.*

93. Douglas Klusmeyer, *Introduction* to FROM MIGRANTS TO CITIZENS: MEMBERSHIP IN A CHANGING WORLD, *supra* note 36, at 5.

94. John D. Snethen, *The Evolution of Sovereignty and Citizenship in Western Europe: Implications for Migration and Globalization*, 8 IND. J. GLOBAL LEGAL STUD. 223, 244 (2000).

95. *Id.*

96. *See id.* at 242–44.

97. Klusmeyer, *supra* note 93, at 7.

A. *Canada*

1. History of *Jus Soli*

Under current Canadian law,⁹⁸ *jus soli* citizenship is conferred on anyone born in Canada, regardless of the citizenship status of his parents.⁹⁹ For decades before the passing of the Citizenship Act, the Canadian Parliament made little effort to define the status of Canadian citizenship, opting instead to rely on English common law.¹⁰⁰ In the early 1900s, however, Canada began to assert its status as an emerging independent country, rather than as a British colony, partly by enacting statutes aimed at defining Canadian citizenship.¹⁰¹ One of these statutes, the Immigration Act of 1910,¹⁰² “placed significant restrictions on citizenship,” which allowed Canadian Parliament to control the composition of the Canadian population.¹⁰³ The Immigration Act, in general, defines a citizen as a person born in Canada, a British subject living in Canada, or a person naturalized in Canada.¹⁰⁴ Such restrictive legislation, aimed at “achieving a cohesive and loyal population,”¹⁰⁵ enabled Canada to communicate to other nations its status as an autonomous country¹⁰⁶ and assert its newly acquired sovereignty.¹⁰⁷ In fact, Canadian law explicitly states that determinations of citizenship should be “designed and administered in such a manner as to promote the domestic and international interests of Canada.”¹⁰⁸

2. *Jus Soli* Comes Under Fire

During most of the legal history of Canada, birthright citizenship seemed to be an acceptable and virtually undisputed policy that was “never seriously

98. Citizenship Act, R.S.C., ch. C-29 (1985).

99. *Id.* § 3(1). Children born to foreign diplomats are an exception. Donald Galloway, *The Dilemmas of Canadian Citizenship Law*, 13 GEO. IMMIGR. L.J. 201 (1999), reprinted in FROM MIGRANTS TO CITIZENS: MEMBERSHIP IN A CHANGING WORLD, *supra* note 36, at 82, 85 (citing Citizenship Act, R.S.C. ch. C-29, § 3(2)). Galloway acknowledges that identifying the Citizenship Act as the primary source of citizenship law is “controversial” because many credit the 1982 Canadian Charter of Rights and Freedoms as the authority on citizenship. *Id.* at 84. However, Galloway argues that the Charter fails to define citizenship and does not identify qualifications for obtaining citizenship. *Id.*

100. Galloway, *supra* note 99, at 93.

101. *Id.* at 94.

102. Immigration Act, 1910, 9 & 10 Edw. 7, c. 27 (Eng.).

103. Galloway, *supra* note 99, at 94.

104. *Id.* at 95 (citing Immigration Act, 1910, 9 & 10 Edw. 7, c. 27 § 2).

105. *Id.* at 97.

106. *Id.* at 95.

107. *Id.* at 96.

108. Ayelet Shachar, *Children of a Lesser State: Sustaining Global Inequality Through Citizenship Laws*, in CHILD, FAMILY, AND STATE 345, 351 (Stephen Macedo & Iris Marion Young eds., 2003) (citing Immigration Act, R.S.C., ch. I-2, § 3 (1985)).

questioned.”¹⁰⁹ Apparently, birthright citizenship did not come under serious debate or consideration until 1994, when the issue was raised for discussion before the Canadian Standing Committee on Citizenship and Immigration.¹¹⁰ The Standing Committee reported the potential for abuse of birthright citizenship, stating that “some women may be coming to Canada as visitors solely for the purpose of having their babies on Canadian soil, thereby ensuring Canadian citizenship for their children.”¹¹¹ The Committee subsequently recommended that *jus soli* citizenship be abandoned in favor of a policy that grants citizenship only to children of at least one Canadian-citizen parent.¹¹² Although such recommendations did not develop into any tangible legislation, the concerns over abuses of birthright citizenship and proposals for reform remained.¹¹³

Jus soli citizenship has continued to receive staunch criticism in recent years from politicians, legal experts, and members of the Canadian public.¹¹⁴ Their concerns, in large part, mirror the concerns of Americans who oppose granting birthright citizenship, including the fear “that illegal immigrants in Canada are abusing the birthright citizenship law by having children on Canadian soil, and then ‘using’ these children to increase their chances of staying in the country.”¹¹⁵

In the Canadian Supreme Court case of *Baker v. Canada*, the court dealt with a situation very similar to that of Elvira Arellano.¹¹⁶ A woman with Canadian-born children was ordered deported, but she petitioned for an exemption “based upon humanitarian and compassionate considerations,” specifically the effect that her deportation would have on her children.¹¹⁷ The court noted that although immigration officers should be impartial and free from bias, their decision should include “sensitivity and understanding”¹¹⁸ and should consider the various hardships that a deportee might face if forced to

109. Sarah Buhler, *Babies as Bargaining Chips? In Defence of Birthright Citizenship in Canada*, 17 J.L. & Soc. Pol’y 87, 95 (2002).

110. *Id.* at 96 (citing Margaret Young, *Canadian Citizenship Act and Current Issues* (Ottawa: Parliamentary Research Branch, 1998), available at <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/bp445-e.htm>).

111. *Id.* (quoting Standing Committee on Citizenship and Immigration, *Canadian Citizenship: A Sense of Belonging* 17 (Ottawa: Pub. Works and Gov’t Servs. Can., 1994)); Margaret Young, *Canadian Citizenship Act and Current Issues* (Ottawa: Parliamentary Research Branch, 1998), available at <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/bp445-e.htm>.

112. Buhler, *supra* note 109, at 96.

113. *See id.* at 96–97.

114. *Id.* at 88.

115. *Id.* at 88–89 (footnote omitted).

116. [1999] 2 S.C.R. 817 (Can.), available at <http://scc.lexum.umontreal.ca/en/1999/1999rcs2-817/1999rcs2-817.pdf>.

117. *Id.* at 825–26.

118. *Id.* at 849–50.

return to her home country.¹¹⁹ Officers should also consider the “interests and needs of children” because “[c]hildren’s rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society.”¹²⁰

The court in *Baker* demonstrated “an increased respect” for Canadian-born children of illegal immigrants.¹²¹ Although several cases following the *Baker* decision have indicated that the effect of an illegal parent’s deportation on her citizen-children is irrelevant in making the decision to deport,¹²² those opposing birthright citizenship fear the *Baker* decision reflects an ever-increasing problem in Canadian immigration law that makes it easier for illegal immigrants to abuse the system.¹²³

Some suggest that this shift in Canadian sentiment toward restriction of birthright citizenship reflects a worldwide trend of nations moving “toward more nationalistic and ethnically-defined identities”¹²⁴ out of the pressure stemming from ever-increasing global migration.¹²⁵ As immigrants continue to flock to more affluent nations, these countries respond by enacting policies and laws that make it more difficult for immigrants to obtain citizenship.¹²⁶ Canadian proponents of birthright citizenship, however, contend that abolishing the policy would unfairly punish innocent children as a way to “teach’ their immigrant parents to follow Canada’s immigration rules.”¹²⁷ Proponents insist that any fair immigration policy must look beyond the simplified statistics and criminality of illegal immigration and consider the economic and political context in which the illegal immigration most often occurs.¹²⁸ “[M]orally blameless children” should not be used as legislative pawns to punish parents “whose only ‘crime’ . . . is to have contravened Canada’s immigration laws in a socio-economic context that leaves them feeling that there is no other option.”¹²⁹

The parallel between the Canadian situation and the recent controversy over birthright citizenship in the United States is clear. It is interesting to note that when faced with increasing numbers of births to illegal immigrant mothers, many Canadians responded with a call to abolish unconditional *jus soli* citizenship. Undoubtedly, proponents of this view recognize that abuse of

119. *Id.* at 862.

120. *Id.* at 860.

121. Buhler, *supra* note 109, at 93.

122. *See id.*

123. *Id.* at 94.

124. *Id.* at 100 (citing Canadian Council for Refugees, *Statelessness—Addressing the Issues*, Nov. 1996, <http://www.web.net/~ccr/statelss.htm>).

125. *Id.*

126. Buhler, *supra* note 109, at 100.

127. *Id.* at 101.

128. *See id.*

129. *Id.*

birthright citizenship can only be sufficiently remedied by a change in the law itself and not through an unfair policy that punishes citizen-children by forcing them to be deported with their illegal immigrant parents.

B. Australia

1. Current Law

The Australian Citizenship Act of 1948 is the preeminent legislation governing citizenship in Australia.¹³⁰ The Act confers citizenship based on *jus soli*, *jus sanguinis*, adoption, and by grant.¹³¹ Unconditional *jus soli* was the position in Australia concerning birthright citizenship until a reform in 1986 declared that in order for a child born in Australia to be granted citizenship at birth, the parent must be an Australian citizen or permanent resident, or have been a resident for ten years at the time of the birth.¹³²

2. Elimination of Unconditional *Jus Soli* Citizenship

a. Large-Scale Migration Program

Apparently, *jus soli* was “abandoned for a specific reason.”¹³³ The Australian government began to make deep, structural changes to raise the country’s naturalization rates.¹³⁴ After World War II, Australia began a large-scale effort to recruit immigrants and create “one of the most culturally diverse countries in the world.”¹³⁵ The government began to view the acquisition of

130. Australian Citizenship Act, 1948; see Gianna Zappalà & Stephen Castles, *Citizenship and Immigration in Australia*, in FROM MIGRANTS TO CITIZENS: MEMBERSHIP IN A CHANGING WORLD, *supra* note 36, at 32, 42–43. Although the Australian Citizenship Act of 1948 was recently replaced by the Australian Citizenship Act of 2007, the following discussion concerning Australian citizenship is still relatively current, as the relevant provisions remain largely unchanged, particularly the abandonment of unconditional *jus soli*. See Australian Citizenship Act, 2007, § 12(1)(a)-(b).

131. Zappalà & Castles, *supra* note 130, at 43–44.

132. Bernard Ryan, *The Celtic Cubs: The Controversy over Birthright Citizenship in Ireland*, 6 EUR. J. MIGRATION & L. 173, 176 (2004) (citing Australian Citizenship Act, 1948, § 10(2) (as amended)); see also Australian Dep’t of Immigration and Citizenship, Fact Sheet 17 - New Zealanders in Australia, <http://www.immi.gov.au/media/fact-sheets/17nz.htm> (last visited Dec. 15, 2008).

133. Kim Rubenstein, *Citizenship and the Centenary: Inclusion and Exclusion in 20th Century Australia*, 24 MELB. U. L. REV. 576, 588 (2000).

134. Klusmeyer, *supra* note 93, at 15–16. Authors Gianni Zappalà and Stephen Castles argue that naturalization rates increased because the structural changes made by the government properly addressed a bias in Australian laws toward British citizens. See *id.* at 16; Zappalà & Castles, *supra* note 130, at 38–40.

135. Zappalà & Castles, *supra* note 130, at 33; see also Klusmeyer, *supra* note 93, at 15.

citizenship as essential to immigrants' integration into Australian society.¹³⁶ After naturalization rates remained low and stagnant in the 1950s and 1960s, the "government gradually introduced measures to reduce administrative complexity, lower fees, and simplify procedures."¹³⁷ Although these efforts were accurately aimed at many problems surrounding low naturalization rates in Australia at the time, these efforts proved insufficient to significantly boost naturalization rates.¹³⁸

"By the end of the 1960s, the government finally began to realize that discrimination against immigrants and the failure to take their needs into account was a major deterrent that discouraged migrants from seeking to become Australian citizens."¹³⁹ The government began focusing on policies that would "make newcomers feel welcome" and "accommodate the immigrants' own distinct interests and heritages," including eliminating special privileges and exemptions for British immigrants that had, whether actually or symbolically, reflected Australia's "self-understanding as ethnically British."¹⁴⁰ One commentator attributes the rise in naturalization rates in the 1970s to these deeper structural changes that allowed Australia to move from an exclusivist mentality to active promotion of multicultural diversity.¹⁴¹ By 1991, "70 percent of eligible overseas-born residents were Australian citizens."¹⁴²

b. The End of *Jus Soli*

As a result of "one of the world's largest migration programs," residents' resentment toward illegal immigrants began to rise and "[i]mposing a notion of 'belonging' . . . became increasingly tenuous."¹⁴³ In the case of *Kioa v. West*,¹⁴⁴ it was argued that a child who was born in Australia to parents who were temporary entrants to Australia and subject to a deportation order was an Australian citizen "entitled to natural justice."¹⁴⁵ The court rejected this view, and the Australian government responded with a change in citizenship legislation to prevent such an "abuse of citizenship to obtain an immigration

136. Klusmeyer, *supra* note 93, at 15; *see also* Zappalà & Castles, *supra* note 130, at 35.

137. Klusmeyer, *supra* note 93, at 15.

138. *Id.* at 15–16.

139. *Id.* at 16.

140. *Id.*

141. *See id.*

142. Zappalà & Castles, *supra* note 130, at 48.

143. *Id.* at 39.

144. (1985) 159 C.L.R. 550.

145. Rubenstein, *supra* note 133, at 588; *see also* MARY CROCK, IMMIGRATION & REFUGEE LAW IN AUSTRALIA 26–27 (1998) (discussing the *Kioa* case and the arguments raised about the court's failure to "consider adequately the interests of the Australian-born children").

advantage.”¹⁴⁶ The Australian Citizenship Council, which supported removal of *jus soli* citizenship, argued that “[i]n an international environment where population movements are increasing exponentially,” countries like Australia are “seen by many as a desirable destination.”¹⁴⁷ Granting Australian citizenship to children born in Australia to temporary or illegal entrants would circumvent immigration laws, would “compromise Australia’s migration program,” and would be “inequitable to the many thousands of people who apply to migrate to Australia every year through proper channels.”¹⁴⁸

As a resolution, the Australian government amended the Australian Citizenship Act of 1948 to prevent future challenges from illegal immigrants who had given birth while in Australia.¹⁴⁹ As a result, children born in Australia to illegal immigrant parents are not entitled to Australian citizenship at birth.¹⁵⁰ Instead, children born in Australia on or after August 20, 1986 to illegal immigrant parents may become Australian citizens upon their tenth birthday if they have resided in Australia for the ten years since their birth.¹⁵¹ However, illegal non-citizen parents still have no right to citizenship or to remain in the country simply by virtue of the citizenship status of their children.¹⁵²

Similar to the situation in Canada, Australia experienced an exponential influx of immigrants, although the increase was caused in large part by efforts of the Australian government. Also similar to the Canadian experience, many Australians began to resent immigrants who were viewed as abusing citizenship rights. Australian officials, however, went a step further than officials in Canada by actually eliminating unconditional birthright citizenship from their laws.

146. Rubenstein, *supra* note 133, at 588–89.

147. *Id.* at 589 (quoting AUSTRALIAN CITIZENSHIP COUNCIL, AUSTRALIAN CITIZENSHIP FOR A NEW CENTURY (2000)).

148. *Id.* (quoting AUSTRALIAN CITIZENSHIP COUNCIL, AUSTRALIAN CITIZENSHIP FOR A NEW CENTURY (2000)).

149. Zappalà & Castles, *supra* note 130, at 43.

150. *Id.*; CROCK, *supra* note 145, at 52 (citing Australian Citizenship Act, 1948, §§ 10–15). This provision remains the same in the 2007 Act. See Australian Citizenship Act, 2007, § 12(1)(a).

151. Zappalà & Castles, *supra* note 130, at 43 (citing Australian Citizenship Act, 1948, § 10(2)(b)). This provision remains the same in the 2007 Act. See Australian Citizenship Act, 2007, § 12(1)(b).

152. Zappalà & Castles, *supra* note 130, at 43.

C. Ireland

1. *Jus Soli* as a Means for Illegal Immigrant Parents to Resist Deportation

The Irish Nationality and Citizenship Act of 1935 provided that anyone born in Ireland on or after December 6, 1922 was considered a “natural-born citizen[.]” and granted unconditional *jus soli*.¹⁵³ Unconditional *jus soli* “had implications for Irish immigration law” by creating the possibility for parents of Irish citizen-children to make a legal claim to remain in Ireland simply because of their “connection to an Irish citizen.”¹⁵⁴ Article 41 of the Irish Constitution further strengthens this possibility, recognizing the family as “the natural primary and fundamental unit group of Society and as a moral institution possessing inalienable . . . rights . . . superior to all positive law.”¹⁵⁵ In fact, parents of Irish citizens began to invoke Article 41 in the mid-1980s as a means to resist deportation.¹⁵⁶

In the 1987 case of *Fajujonu v. Minister for Justice*,¹⁵⁷ the court held that Irish citizen-children “had a right to family life which was exercisable in Ireland.”¹⁵⁸ The court reasoned that where an immigrant has “resided for an appreciable time in the State” and has created a family with children who are citizens, those children, as Irish citizens, have “a constitutional right to the company, care and parentage of their parents within a family unit.”¹⁵⁹ According to the court, citizen-children “are entitled to the care, protection and

153. Irish Nationality and Citizenship Act, 1935 (Act No. 13/1935) (Ir.), available at <http://www.acts.ie/zza13y1935.1.html> (last visited Dec. 15, 2008); see also Ir. CONST., 1937, art. 2, available at http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Constitution%20of%20IrelandNov2004.pdf (last visited Dec. 15, 2008); Ryan, *supra* note 132, at 174. The Irish Nationality and Citizenship Act was amended in 1956 to extend birthright citizenship to those born in Northern Ireland. *Id.* at 174–75. However, this extension of birthright citizenship to Northern Ireland was of little significance, since, for purposes of defining citizenship, the Irish Constitution already recognized the “area of jurisdiction” of the Irish Free State as including the entire island of Ireland. *Id.* at 175. “Irish law therefore treated the vast majority of persons domiciled in Northern Ireland” as Irish citizens. *Id.* The Belfast Agreement of 1998 amended the constitution to provide for citizenship as an “entitlement and birthright” of anyone born on the island of Ireland. *Id.* at 177 (citing Ir. CONST., 1937, art. 2 (as amended)); see also Siobhán Mullally, *Citizenship and Family Life in Ireland: Asking the Question ‘Who Belongs’?*, 25 LEGAL STUD. 578, 580 (2005).

154. Ryan, *supra* note 132, at 179.

155. *Id.* (citing Ir. CONST., 1937, art. 41).

156. *Id.*

157. [1989] 2 I.R. 151 (Ir.).

158. Ryan, *supra* note 132, at 180; see also Mullally, *supra* note 153, at 582–83 (describing the court’s emphasis on the importance of family life for Irish citizen-children).

159. Ryan, *supra* note 132, at 180 (quoting *Farujonu*, 2 I.R. at 162).

society of their parents.”¹⁶⁰ The court’s reasoning revealed that a citizen-child’s “right to family life in Ireland had to be given significant weight in decisions taken with respect to their parents.”¹⁶¹ Illegal immigrant parents could be deported only if “‘a grave and substantial reason associated with the common good’ required such a step.”¹⁶² These reasons must be “so predominant and so overwhelming” that breaking up a family to deport the illegal immigrant parent “is not so disproportionate to the aim sought to be achieved as to be unsustainable.”¹⁶³

2. Rejection of the ‘Right to Family’ Approach

For many years, the decision in *Fajujonu* served as the legal basis for acceptance of non-national parents of Irish citizen-children.¹⁶⁴ Applications to remain in Ireland on the basis of parenthood increased during this time.¹⁶⁵ As a result, the Department of Justice changed its policy in 2001 to begin refusing applications from parents of Irish citizen-children if the family had not been in Ireland for an “appreciable time.”¹⁶⁶ Courts began deciding cases based on “the overriding need to preserve respect for and the integrity of the asylum and immigration systems,”¹⁶⁷ rather than the familial needs of citizen-children.¹⁶⁸ Some judges reasoned that Irish citizen-children were “incapable of making a choice as to residence,” and parents’ entitlement to remain should not be based solely on the residence of their children.¹⁶⁹

To reconcile their departure from the decision in *Fajujonu*, judges argued that immigration conditions in Ireland were very different and more overwhelming than the conditions in 1989, when *Fajujonu* was decided.¹⁷⁰ Courts reasoned that the influx of immigration was straining social services, and “integrating people from very different ethnic and cultural backgrounds into the fabric of Irish society” was increasingly difficult.¹⁷¹ Such a departure from the reasoning in *Fajujonu* was necessary “to respect the integrity of the

160. *Id.* (quoting *Fajujonu*, 2 I.R. at 164).

161. *Id.*

162. *Id.* (quoting *Fajujonu*, 2 I.R. at 162).

163. *Id.* (quoting *Fajujonu*, 2 I.R. at 166); *see also* Mullally, *supra* note 153, at 582–83 (discussing the reasoning of the court in the *Fajujonu* case).

164. Ryan, *supra* note 132, at 181.

165. *Id.*; *see also* Mullally, *supra* note 153, at 583–84 (discussing a Supreme Court case that distinguished *Fajujonu* and argued that any claims made by non-citizen parents on behalf of their citizen children “were subject to the exigencies of the common good”).

166. Ryan, *supra* note 132, at 181.

167. *Id.* at 181–82.

168. *See* Mullally, *supra* note 153, at 583 (describing the increase in the number of applications of immigrant parents claiming residency on the basis of their Irish citizen children).

169. Ryan, *supra* note 132, at 182.

170. *Id.* at 184.

171. *Id.*

systems of immigration control.”¹⁷² Courts aimed to prevent a legal regime that would allow immigrants to use the birth of their children “to circumvent the immigration and asylum systems.”¹⁷³

3. Abolition of Unconditional *Jus Soli*

Although the Irish government supported this shift in policy and responded by refusing to accept new applications for residence based solely on parental status, there were subsequently “very few deportations of the parents of Irish citizen children,”¹⁷⁴ and parents continued to immigrate to Ireland and give birth within the Irish borders.¹⁷⁵ The government began using these applications, however, as grounds to initiate a constitutional amendment to remove unconditional *jus soli* completely from the constitution¹⁷⁶ “to preserve the ‘integrity’ of Irish citizenship.”¹⁷⁷ The referendum passed in 2004 by an overwhelming majority,¹⁷⁸ and provided that those born in Ireland to non-citizen parents were not entitled to Irish citizenship or nationality.¹⁷⁹ One commentator argues that Ireland’s abandonment of unconditional *jus soli* “is not unusual when viewed in comparative terms,” since many states experiencing significant immigration “often respond by introducing restrictions.”¹⁸⁰

Like Canada and Australia, the response in Ireland to an immigration influx included an attack on unconditional *jus soli* citizenship. However, Ireland was arguably responding to a somewhat different problem, paralleled in many ways to the immigration debate in the United States. Irish courts began to recognize the importance of the family and the right of the citizen-child to the care of a parent. This notion, along with the advantage of *jus soli* citizenship for native-born children, led illegal immigrant parents to apply in large numbers to obtain Irish citizenship. Many apparently perceived such “citizenship by proxy” as an abuse of the immigration and citizenship system, and *jus soli* was eliminated as a result.

172. *Id.*

173. *Id.* at 185.

174. Ryan, *supra* note 132, at 185.

175. Mullally, *supra* note 153, at 585.

176. Ryan, *supra* note 132, at 187.

177. *Id.* at 189.

178. *Id.* at 190.

179. *Id.* at 187 (citing Ir. CONST., 1937, art. 9, available at http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Constitution%20of%20IrelandNov2004.pdf (last visited Dec. 15, 2008)).

180. *Id.* at 192.

D. France

1. Current Law

Although citizenship in France is largely based on *jus sanguinis* principles, the citizenship laws are supplemented with substantial elements of *jus soli* citizenship.¹⁸¹ Under current French law, third-generation immigrants are automatically granted *jus soli* citizenship at birth, while second-generation immigrants are subject to conditional *jus soli*, being awarded citizenship upon reaching the age of eighteen and proving residence in France for the preceding five years, among other conditions.¹⁸²

2. *Jus Soli* Extended to Encourage Assimilation and Civic Duties

Before *jus soli* was incorporated in 1889, French citizenship, defined by Revolutionary and Napoleonic codifications, was already quite expansive, “combining the principles of birthplace, descent, and domicile.”¹⁸³ The Napoleonic Code adopted the principle of *jus sanguinis* citizenship, but Napoleon argued for the inclusion of some elements of *jus soli* citizenship.¹⁸⁴ He was convinced that the interests of the state demanded that military obligations be imposed on citizens.¹⁸⁵ Granting French citizenship to the children of settled foreigners would allow the French government “to subject [them] to conscription and other public obligations.”¹⁸⁶ Moreover, Napoleon emphasized the fact that French-born children of settled immigrant parents “have the French way of thinking, French habits, and the natural attachment that everyone has for the country in which he was born.”¹⁸⁷

Critics of *jus soli* citizenship insisted that France’s citizenship regime “reflect an enduring and substantial, not merely an accidental, connection to France, and that it reflect the will to belong,” addressing concerns over granting citizenship to children born to transient visitors of France, rather than

181. ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY 81 (1992). Brubaker argues that although French citizenship is based largely on *jus sanguinis* principles, the government supplements its citizenship laws with elements of *jus soli* principles to a larger extent than most other Western European countries following *jus sanguinis* principles. *Id.* Brubaker continues by saying that although citizenship laws in France and the United States have apparent differences (the former based largely on *jus sanguinis* and the latter based largely on *jus soli*), “persons born in France [to foreign parents] and residing there at majority have French citizenship.” *Id.* at 82. Thus, despite the differences, the end result in the United States and France, “as far as second-generation immigrants are concerned,” is similar. *Id.*

182. Aleinikoff, *supra* note 36, at 128; *see also* BRUBAKER, *supra* note 181, at 81.

183. BRUBAKER, *supra* note 181, at 86.

184. *Id.* at 87–88.

185. *Id.* at 88.

186. *Id.*

187. *Id.* (internal quotation marks omitted).

permanent immigrants living in the country.¹⁸⁸ Others felt that granting citizenship to residents of “foreign origin” would pose a threat to France.¹⁸⁹ Thus, in the final version of the Civil Code, children born in France of foreign parents could only claim French citizenship by declaring their intention to stay in France or establish their domicile there.¹⁹⁰ Such “conditional *jus soli*” prevailed “because it would be too unjust and too ill suited to national dignity to confer French citizenship on a person who, although born in France, had neither resided in France nor manifested the desire to establish himself there.”¹⁹¹ For second-generation immigrants, “the presumption of attachment to France was so strong and self-evident that this group is not even mentioned in the Civil Code—their citizenship literally went without saying.”¹⁹²

However, few persons born in France to foreign parents claimed French citizenship.¹⁹³ This led to resentment among French citizens, who were obligated to perform military service, and a view that these foreign citizens were gaining the benefits of French society while avoiding any civic responsibilities.¹⁹⁴ This response was not surprising, considering the prevailing view, previously discussed, that military service was necessary to achieve state interests and prove civic commitment.¹⁹⁵ The fact that “long-established foreigners” were allowed to remain in their homes “while Frenchmen spent up to five years in the barracks” was viewed as a “shocking inequality”¹⁹⁶ and a potential “impediment to assimilation.”¹⁹⁷

Another, less debated problem was the development of cultural enclaves, with immigrant groups, especially Italian immigrant groups, forming close-knit, isolated cultural communities within French borders.¹⁹⁸ Many viewed the Italian immigrants’ activities, including forming associations, establishing journals, and encouraging Italian nationalism, as “politics of isolation” that “challenged the unitarist French political formula.”¹⁹⁹ Granting citizenship, and thus requiring military service, to native-born children of immigrants was

188. BRUBAKER, *supra* note 181, at 88.

189. Patrick Weil, *Nationalities and Citizenships: The Lessons of the French Experience for Germany and Europe* (George Lavy & Josh Gibson, trans.), in *CITIZENSHIP, NATIONALITY AND MIGRATION IN EUROPE* 74, 77 (David Cesarani & Mary Fulbrook eds., 1996).

190. BRUBAKER, *supra* note 181, at 88–89.

191. *Id.* at 89 (internal quotation marks omitted).

192. *Id.*

193. *Id.* at 91.

194. *See id.*; Weil, *supra* note 189, at 77.

195. BRUBAKER, *supra* note 181, at 88.

196. *Id.* at 105.

197. *Id.* at 108.

198. *See id.* at 105.

199. *Id.* at 105–06; *see also* Weil, *supra* note 189, at 78 (discussing the development of *jus soli* as a means to prevent “individual disloyalty” and “collective separatism” among immigrant groups).

viewed as a means to ensure assimilation and civic commitment among the immigrant communities in France,²⁰⁰ and thus prevent disloyalty.²⁰¹ Thus, *jus soli* was extended to third-generation immigrants in 1851, and conditional *jus soli* was extended to second-generation immigrants in 1889.²⁰²

Such conditional and unconditional distinctions for second- and third-generation immigrants, respectively, are not surprising when viewed in the context of the development of *jus soli* citizenship in France described above. Third-generation immigrants have presumably proven their civic commitment to the nation, by virtue of being removed from their ancestor's homeland by at least an entire generation. These individuals are viewed as "French from the point of view of spirit, inclination, habits, and morals."²⁰³ Second-generation immigrants are entitled to citizenship, but they face additional hurdles to prove their civil commitment since they are not as far removed from their parents' non-French home country.

Interestingly, unlike Canada, Australia, or Ireland, France responded to resentment toward immigrants and their perceived abuses of the French citizenship system by actually expanding citizenship laws. One commentator argues that extending citizenship to children of immigrants was somewhat illogical in that "resentment of the privileged situation of established immigrants [led] to a more inclusive definition of citizenship," rather than a more exclusive approach.²⁰⁴ He argues that, at the time *jus soli* became the policy in France, French society and government's "distinctively state-centered and assimilationist understanding[s] of nationhood, deeply rooted in political and cultural geography," largely determined their notion of what was in the best interest of the state.²⁰⁵ Those shaping policy in France began to view the exclusion of citizenship to native-born children of immigrants "as anomalous and intolerable."²⁰⁶ Instead, the "civic and military incorporation" of the children of immigrants was viewed "as natural and necessary."²⁰⁷ Permitting French-born children of immigrants to claim French citizenship was intended "to expand and strengthen the nation, not to dilute its ethnocultural substance."²⁰⁸

200. BRUBAKER, *supra* note 181, at 108; *see also id.* at 152 (referring to the granting of birthright citizenship to third-generation immigrants and stating that "birth (and presumed residence) in France over two successive generations reliably indicated an enduring attachment to France").

201. Weil, *supra* note 189, at 78.

202. BRUBAKER, *supra* note 181, at 85.

203. Weil, *supra* note 189, at 78.

204. BRUBAKER, *supra* note 181, at 85.

205. *Id.* at 85–86.

206. *Id.* at 86.

207. *Id.*

208. *Id.* at 91.

IV. LESSONS LEARNED FROM CANADA, AUSTRALIA, IRELAND, AND FRANCE:
PROPOSING A SOLUTION

This Comment in no way intends to propose an extremely well-considered solution to the problem of birthright citizenship and de facto deportation of citizen-children born to illegal immigrant parents. The following suggestions for reform of birthright citizenship do not include a well-examined or well-researched assessment of the potential consequences, costs, or implications for such a reform of birthright citizenship. Instead, this Comment merely emphasizes that any approach taken by the U.S. government must not only consider the practical consequences of de facto deportation, but must also consider the experiences and reactions of countries with similar laws and similar immigration issues.

The previous discussion of the treatment of *jus soli* citizenship in Canada, Australia, and Ireland contains a general theme: when faced with an exponential influx of immigrants and subsequent “anchor baby” births, these nations have responded by abolishing unconditional *jus soli* from the nations’ laws. Although Canada has yet to officially reject *jus soli*, the arguments in favor of abolishing it seem to remain. Apparently, the solution in Canada, Australia, and Ireland to an increasing number of “anchor babies” is to disallow children of illegal immigrants to obtain citizenship automatically at birth.

In contrast, France responded to similar immigration problems by expanding citizenship laws. It appears that the goal was to facilitate assimilation and civic attachment, and thereby decrease resentment from native-born Frenchmen. More importantly, the French method of granting citizenship may serve as a model for revising America’s citizenship laws without abolishing birthright citizenship completely. To negate concerns over granting citizenship to children of migrants simply “passing through,” the French Civil Code grants citizenship to second-generation immigrants only upon reaching the age of majority and by establishing their domicile in France. Third-generation immigrants still enjoy unconditional *jus soli* citizenship at birth.

It seems plausible that such a system could be established in the United States. Instead of revoking *jus soli* citizenship completely, legislators could simply place conditions on second-generation immigrants’ birthright citizenship. Without changing current *jus sanguinis* citizenship and naturalization processes, the United States could amend unconditional *jus soli* to require that the parent lawfully reside in the United States for a number of years, or that the child reside in the United States for a number of years and reach the age of majority before citizenship is conferred. Such a system may decrease the number of illegal immigrant births and resolve the problem of de facto deportation, since illegal immigrant parents would no longer have an

automatic claim to U.S. residency simply by virtue of their child's citizenship status. If birth alone does not bestow citizenship, "there is less concern that undocumented migrants may try to 'manufacture' equity by having children."²⁰⁹

T. Alexander Aleinikoff and Douglas Klusmeyer are authors and researchers who, as part of the Comparative Citizenship Project of the Carnegie Endowment's International Migration Policy Program, have extensively investigated and compared citizenship policies in liberal-democratic states that have experienced large-scale immigration.²¹⁰ They have proposed a similar approach to citizenship classification that would utilize generations as the category of analysis.²¹¹ They recommend that third-generation foreign nationals be entitled to citizenship at birth, while second-generation foreign nationals acquire citizenship from a modified *jus soli* rule.²¹² Second-generation immigrants could acquire citizenship if they satisfy two requirements: birth in the territory and either residence of the child for a number of years prior to adulthood or lawful residence of the parent.²¹³ In either case, whether citizenship is granted based on the child's residence in the state for a period of time or based on the parent's lawful residence in the state,²¹⁴ such a birthright citizenship regime will presumably negate any attack on the child's tenuous relation to the state in which he is granted citizenship.

CONCLUSION

De facto deportation of citizen-children is an undeniable result of the deportation of illegal immigrant parents. Despite arguments that the child may be free to return to "reclaim" his citizenship status, such a practice leaves the child with two undesirable choices. It forces the child either to relocate to another country and stay with his parent or to remain in the United States and suffer the consequences of having his parent deported. The United States simply cannot continue the practice of birthright citizenship simultaneously with its current policy of deporting illegal immigrant parents with little regard for the citizenship status of their children. Unlimited *jus soli* citizenship must be abandoned in favor of a system that delays the grant of citizenship rights for children of illegal immigrants until the parent or child satisfy a number of prerequisites. These prerequisites should generally be aimed at encouraging children to establish relationships with the United States beyond simply their birth within U.S. borders.

209. ALEINIKOFF & KLUSMEYER, *supra* note 42, at 12.

210. See Klusmeyer, *supra* note 93, at 2.

211. ALEINIKOFF & KLUSMEYER, *supra* note 42, at 7-8.

212. *Id.* at 8, 12.

213. *Id.* at 12.

214. *Id.*

Since immigration woes are undoubtedly not uniquely American, lawmakers should consider the approaches taken by other western democratic states in establishing a workable and fair immigration and citizenship system. Australia and Ireland reacted to immigrant influxes and “anchor baby” births by abolishing unconditional *jus soli* citizenship in favor of *jus sanguinis* models. Similarly, strong arguments exist in Canada to do the same. France reacted by establishing a conditional *jus soli* citizenship regime, which this Comment references as a potential workable solution for the United States. Whatever the solution, birthright citizenship for children of illegal immigrants simply cannot coexist with the current U.S. policy of deporting illegal immigrant parents.

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