Are We Punishing "Illegal Citizen" Children to Deter Parents? Critiquing Birthright Citizenship through the Citizens-Benefits Question and Citizenship Reductionism

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This article proposes that immigration and citizenship law must address the construction of the immigrant child “situated within the family.” Counter to scholarly literature which has addressed the need for some form of the best interests of the child standard in immigration to account for unaccompanied minors, and more generally, immigrant children, this article proposes that reformation of immigration law toward a child-centered, or more specifically family-centric, policy requires attending to the flawed presumptions that the “anchor baby” myth creates—that only by devising a language for unintended consequences can we draw closer to recognizing the immigrant child as deserving of the strongest constitutional protections. Because of the dual nature of the immigrant child as possessing birthright citizenship and noncitizen parents, such double disenfranchisement, as both child and immigrant, leads to fundamental disjunctions regarding the meaning of citizenship, family, and immigration. This article explores that tripartite intersection and concludes that current discourse must focus on the substantive meaning of citizenship with particular attention to its “attendant benefits,” and the impact thereof on immigrant families. Unlike prevailing literature which has primarily analyzed citizenship through the lens of deportation or nationhood, citizenship discourse must also emphasize the harsh collateral consequences of our immigration system and what this means for noncitizens becoming citizens. Through this analysis, I develop a proper language to care
for immigrant children in the family unit, through the realization of the problem of citizen-benefits and citizenship reductionism. The citizenship-benefits question and citizenship reductionism provide the focal point from which to analyze the continuing vitality of birthright citizenship in the U.S.

INTRODUCTION

A fair amount of undocumented immigrant children cross the U.S. border annually and fall into the care of the Office for Refugee Resettlement. The demographic of these children paints a disturbing image of the economic and political strife in their countries of origin. Their plight is exacerbated by the fact that deportations have doubled over the last ten years. Further, because many U.S.-born children have undocumented parents, many more children will be impacted by their parents’ statuses, rendering their own ability to remain in the U.S. moot. Children are increasingly becoming illegal entrants, which elevates the question of their impact on our immigration system and on our preparedness as a nation to accept them.

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2 See About Unaccompanied Children’s Services, supra note 1. In 2012, 77% of unaccompanied children are male, the majority of entering children are between 14-17 years old, 17% are below the age of 14, and 98% of such children come from Guatemala, El Salvador, Honduras, Mexico, and Ecuador.


5 Rodriguez Navarro, supra note 1.
By now, it is unspectacular to say that children in immigration law lack independent rights and interests apart and distinct from their parents. This adage is certainly true under the federal definition of “child” under immigration law, and it similarly holds true in the evolution of U.S. juvenile law. In juvenile law, children were originally seen as dependents and objects of their parents; in immigration law, they are also derivatives of their parents’ petitions seeking to follow or join. No matter the field, it is clear that children maintain a secondary and inferior status to their supposed caretakers. It is also evident that in both fields, children need institutional support, access to guardianship or some form of legal representation, and the ability to voice their preferences and be genuinely listened to and considered alongside adult counterparts.

To be clear, this article does not argue that the best interest standard should be or can be feasibly incorporated into the immigration regime; this solution, while noteworthy and laudable, has

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6 It is important to note that the federal definitions of “child” are different when considering a child for immigration and for nationality reasons. Compare 8 U.S.C. § 1101(b)(1)(B) (2012), with 8 U.S.C. § 1101(c)(1) (2012). In any event, both definitions demonstrate the theme that the child is not a distinct agent from the parent.

7 For greater exploration of federal immigration concept of “child” and for discussion of lack of child agency in the immigration tradition, see David B. Thronson, Kids Will Be Kids? Reconsidering Conceptions of Children’s Rights Underlying Immigration Law, 63 OHIO ST. L.J. 979, 991-92 (2002) [hereinafter Thronson, Kids Will be Kids?]. Thronson has argued that “[p]arental possession and control are the hallmarks of a parent-child relationship in immigration law.” Id. at 992.

8 See id.; see also Jerry Behnke, Comment, Pawns or People? Protecting the Best Interests of Children in Interstate Custody Disputes, 28 LOY. L.A. L. REV. 699 (1995) (stating that children’s interests are solved through the exchange between parent and state, and that children lack a voice in that dialogue).

9 The issue of legal representation or guardian ad litem models for children in removal proceedings is beyond the scope of this article. But suffice it to say that the movement for a Civil Deportation Gideon is a strong one. I use these concerns to provoke and launch the increasingly important role of the adult undocumented parent relative to their immigrant children.

been given substantial attention by the academy and I do not attempt to summarize the immeasurable discourse here. Rather, I make more nuanced contributions. In Part I, I explain the different ways in which constitutional protections have developed for the citizen child under domestic juvenile law and compare it to constitutional protections of immigrant children\textsuperscript{12} under convoluted alienage law. In doing so, I examine how dependency interpretations\textsuperscript{13} and statutory underpinnings of immigration law undermine any construction of the immigrant minor as a rights-holder. The resulting analysis reveals the potency and impact of this construction for child agency in immigration. In Part II, I demonstrate that immigrant children receive some-


\textsuperscript{12} Throughout this article, I use the term “immigrant children” or “immigrant minor” interchangeably and to denote children of at least one undocumented parent. Thus, the phrase encompasses both undocumented children who cross illegally on their own or with parents, as well as U.S.-born children with resulting citizenship. These terms also encompass the popular phrase “unaccompanied minor.”

thing less than a best interest of the child standard in immigration law, undoubtedly as a result of the infusion of plenary immigration power into state family law. I then proceed in Part III, to contextualize the family and immigration law disjunction by examining the ASFA’s impact on parental and children’s rights and advocate for a more discretionary-based state devolution. After this appropriate backdrop has been laid, I discuss in Part IV the problem of what I call the Citizenship-Benefits question and the phenomenon of Citizenship Reductionism. In Part V, I articulate the importance of these concepts for our understanding of the state of modern citizenship and what it means for forgotten immigrant children.

Through this extensive foray, I argue that given normative, systematic, and institutional deficiencies, federal immigration and citizenship law appear antithetical to notions of family integrity and reunification, unless one of three things occur: (1) children obtain the immediate ability to self-petition for the immigration status of their parents; (2) children garner their own immigration status independent of parents’ seeking legal recourse on their behalf; or (3) courts recognize substantive due process rights of immigrant children to a parent-child relationship. Given the paltry chance that any of these options bear fruit, I reflect on a model for analyzing future citizenship discussion that respects the child’s vulnerability and the need for the child’s voice and agency in immigration and family law. Thus, I ultimately determine that recognizing the child as a rights-holder cannot be squared with the dependency theme rampant in immigration. In other words, immigration law establishes a vexing orment: children’s lack of a valid immigration status justifies differential treatment and supersedes the state’s interest in child welfare and protection. To the courts and the larger public, immigrant children appear to have legal capacity to protect their parents from deportation, warranting a denial of their substantive due process rights. Not only is this formulation incorrect, as the anchor baby problem is a myth, but denying children constitutional protections offends our

14 The anchor baby problem is the idea that granting citizenship to children born in the U.S. provides an incentive for parents to illegally immigrate, so as to use such children as a “conduit to obtain their own citizenship status or avoid deportation.” Nicole Newman, Note, Birthright Citizenship: The Fourteenth Amendment’s
notions of fairness, morality, and civic responsibility to children. If anything, it appears that courts are grappling with whether the accumulation of unlawful presence in the U.S. by noncitizen parents outweighs children petitioning at the age of twenty-one. Indeed, the latter represents the normal, regular, and preferred path to eventual citizenship. It respects the laws and upholds a sense of fairness, even if the child breached our borders in the first instance. If children could petition without permitting parents to accumulate unlawful presence, society may be more receptive to having them within U.S. borders. Providing them the immediate ability to petition as children, they might not need to enter the country illegally in the first place.


however, would lead to extravagant influxes resulting in grave economic and social implications for the nation. The paradox cannot be understated: for children to be full agents, it is logical that they have the ability to self-petition, but providing this entitlement incentivizes illegal immigration and would purport to legitimize the anchor baby dilemma. A full child as rights-holder model remains terribly rebuffed by the economic and political realities of the world.

Cardinal concerns over resource allocation and social services drive the anti-immigrant sentiment despite these populations being ostensibly open to assimilation and integration. These concerns have led to widespread inflammatory and erroneous ad hominem attacks against the immigrant population, which have only intensified with the broad liberalization of immigration quotas and surge in immigration in recent years.\footnote{Immigration and Nationality Act of 1965 (INA), Pub. L. No. 89-236, 79 Stat. 911 (abolishing the national origins quotas).} Riding this wave has been acrimonious legislation, culminating in a hostile and discriminatory atmosphere for immigrants.\footnote{The 1996 immigration reforms enhanced the possibility of removal, even for the most minor crimes. \textit{See} Kaiti L. Griffith, \textit{Perfecting Public Immigration Legislation: Private Immigration Bills and Deportable Lawful Permanent Residents}, \textit{18 Geo. Immigr. L.J.} 273, 276 (2004) (stating that “even if an LPR has lived in the United States since childhood, she can be subject to mandatory deportation for almost any criminal conviction—including misdemeanors, such as shoplifting or a bar fight.”).} To be obvious, the existing parent-centered immigration framework\footnote{See David B. Thronson, \textit{You Can’t Get Here from Here: Toward a More Child-Centered Immigration Law}, \textit{14 Va. J. Soc. Pol’y & L.} 58, 67-72 (2006) [hereinafter Thronson, \textit{Here from Here}] (providing analysis that the systematic devaluation of children and their interests supports conceptualization of current immigration regime as parent-centered).} is highly politicized, draconian, and problematic. Any due process revolution seeking to value the undocumented child as worthy of substantive and procedural due process requires fundamentally changing not simply state or federal laws, but the manner in which we appreciate the parent-child relationship, that is, the family unit itself. We must address a family’s rights versus an individual immigrant’s rights within that family and the discordance that such relationality causes. It is inevitable that preserving the best
interests of the family through a child-centered methodology entails
difficult conceptual and fiscal costs and subverts the fundamental
necessity—a language that appreciates immigrant families as valu-
able and on par with the institution of the traditional non-immigrant
family.  

I. THE DUE PROCESS REVOLUTION HAS
EVOLVED DIFFERENTLY FOR IMMIGRANT
CHILDREN THAN IT HAS FOR CITIZEN
CHILDREN

The marginalization of the child in juvenile law is paralleled
in many ways by its corollary in immigration, the immigrant minor.
It is no surprise, then, that American scholars have liberally argued
for an incorporation of juvenile and family law principles, most
notably the best interests of the child standard, to offset increasingly
restrictive and destructive immigration policy. What scholars have
largely missed, however, is that substantive and procedural protec-
tions for the immigrant, non-citizen minor have not evolved similarly
or as benevolently as they have for citizen minors. While I concede
that the best interest standard may find solace in placating inadequate
detention conditions, I am not convinced that the best interest stan-
dard can be actualized absent an exhaustive overhaul of the existing
immigration regime. Rather, as a result of the different way constitu-
tional jurisprudence has developed for the immigrant child, the best
interest standard remains pragmatically irreconcilable with immigra-
tion law due to immigration’s confounding difficulty with balancing
the benefits of (birthright) citizenship and immigration restriction-

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18 See Naomi R. Cahn, Children’s Interests in a Familial Context: Poverty, Foster Care, and Adoption, 60 OHIO ST. L.J. 1189, 1223 (1999) (noting that federal law should return to presumption that children are best cared for in their own families and communities of origin); see also Victoria Degtyareva, Note, Defining Family in Immigration Law: Accounting for Nontraditional Families in Citizenship by Descent, 120 YALE L.J. 862, 903-08 (2011) (arguing that immigration law should adopt a unified definition of family based on interpersonal, not biological, relationships).
isn't.\textsuperscript{19} Put differently, I illuminate lessons that draw not only from the similarities between citizen and immigrant juveniles, but the differences that immigrant juveniles face in navigating U.S. immigration laws.\textsuperscript{20}

To fully appreciate the anomalies in immigration jurisprudence touching the state of constitutional protection of immigrant children, it is useful to discuss domestic juvenile law cases and juxtapose their differences with cases affecting immigrant minors. Such a comparative analysis, most notably through an examination of the seminal cases of \textit{In re Gault},\textsuperscript{21} \textit{Santosky v. Kramer},\textsuperscript{22} and their progeny contrasted with \textit{Reno v. Flores}\textsuperscript{23} and the resulting Settlement Agreement, has rarely been done, but sheds light on the difficult-to-rationalize failure of juvenile justice to filter into immigrant children’s lives.

\textsuperscript{19} Indeed, the only reference statutorily to best interests of the child is in the case of Special Immigrant Juvenile Status (SIJS). See Immigration Nationality Act (INA), 8 U.S.C. § 1101(a)(27)(J) (2012). This form of relief deals with children who are dependent on a juvenile court, and for whom reunification with one or both parents is not viable due to neglect, abuse, abandonment, or similar basis under state law, and for whom it has been determined that it would not be in the best interest of the child to be returned to the previous country of nationality or habitual residence. While this is an excellent first step to infusing best interest principles into immigration law, it will be a long while until the standard can actually be said to influence immigration’s current petition-based system.

\textsuperscript{20} Because juveniles lack the ability to petition others into the U.S. until they are twenty-one and no longer “children,” the current forms of immigration relief available to them only continue to subject them to dependency, objectification, and to a secondary, less than full agent status. This relief, found in Title VII of the United States Code, consists of asylum, § 208; SIJS, § 1101(27)(J); T-Visas, § 1101(a)(15)(T); U-Visas, § 1101(a)(15)(U); and Violence Against Women Act (VAWA) or “battered child” petitions, § 1154(a)(1)(A)(iv), (a)(1)(B)(iii). Such relief, where they can self-petition as full agents, often requires the juvenile to suffer harm or become wards of the state—no relief exists where they can petition independently of this harm “requirement,” and only SIJS is particular and exclusive to children. See 8 C.F.R. § 204.11(c)(1) (2009) (requiring SIJS applicants be under twenty-one).

\textsuperscript{21} 387 U.S. 1 (1967).
\textsuperscript{22} 455 U.S. 745 (1982).
\textsuperscript{23} 507 U.S. 292 (1993).
In re Gault established that children, like adults, possess certain liberty interests. The case demanded that children in delinquency proceedings must be afforded procedural due process through notice of charges, right to counsel, right to confrontation and cross-examination, and the privilege against self-incrimination. In that landmark decision, the child at issue was hauled into custody, without notification to the parents, because a neighbor complained that he and a group of friends were the perpetrators in an offensive telephone call to her. The parents received no notice at the time of custody and only oral notice the day before the hearing, which failed to set out the charges against the child. In re Gault, undoubtedly, represented a paragon of children’s due process rights. The Court’s analysis reflected that the juvenile’s possibility of detention until the age of majority represented a substantial likelihood of a deprivation of liberty comparable to felony imprisonment for adults. The Court realized that what was necessary was an infusion of adult protections applied to juveniles.

The Gault legacy only blossomed in Santosky v. Kramer. In Santosky, the Court professed that the liberty interest in family integrity is “far more precious than any property right” and went further to hold that “the State cannot presume the child and his parents to be delinquent.”

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24 387 U.S. at 13 (1967) (stating “whatever may be the precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone”).
25 Id. at 33-57.
26 The case is hailed as “the most significant case of the first century of the juvenile court.” ALIDA V. MERLO, Courts, Juvenile, 1: History, in ENCYCLOPEDIA OF JUVENILE JUSTICE 79, 82 (Marilyn D. McShane & Frank P. Williams III eds., 2003).
27 In re Gault, 387 U.S. at 4.
28 Id. at 33-34.
29 Id. at 36 (“A proceeding where the issue is whether the child will be found to be ‘delinquent’ and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.”).
30 In proclaiming those adult protections, the Court stated that, “The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.” Id.
31 See 455 U.S. 745, 753 (1982).
32 Id. at 758.
parents are adversaries" at the preliminary fact-finding stage.\footnote{Id. at 760.} Most notable however, for its possible application for immigrant children, is the Court’s conclusion that the “fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.”\footnote{Id. at 753.} Unfortunately, this profound statement led not to a principle or rule regarding family unity or the sanctity of the parent-child relationship generally, but in the now well-settled clear and convincing standard for parental termination hearings.\footnote{Id. at 747-48.} While the standard is an incredible gain, a determination concerning the protection due the parent-child relationship\footnote{It is essential to address the family unit or parent-child relationship through a citizenship gloss, and at the same time, address citizenship through family’s lived experiences in the U.S. For a similar call of the need for courts to converse over and legal importance of the parent-child relationship, see Julia Halloran McLaughlin, The Fundamental Truth About Best Interests, 54 St. Louis U. L.J. 113, 160-64 (2009).} would have clarified the existing perplexity caused by parental deportation proceedings in the immigration context.

The application of the \textit{Gault} and \textit{Santosky} legacy applied to immigrant minors may only produce mixed results. First, \textit{Gault}'s recognition of adult protections applied to children does not equate nicely in immigration where the parents actually possess weaker claims to status and are more constitutionally infirm. The little, if any, rights immigrant children receive from their “illegal” parents raises doubt whether \textit{Gault} can breach the barrier legal status imposes on immigrant children specifically. Moreover, any infusion of adult protections applied to immigrant juveniles will only buff the collateral impact of immigration status on the family, and while this is worthwhile, it is hardly satisfying. Second, \textit{Santosky}'s language that the liberty interest “does not evaporate” simply because parents have not been “model parents” may, by comparison, be efficacious if it is afforded substantial constitutional weight in future proceedings.
While dicta, the Court’s strong appraisal appears enticing for immigrant families.

Where In re Gault and Santoksy spawned an era of due process revolution for citizen children, Reno v. Flores has narrowed due process rights for immigrant children.37 Flores curtailed the constitutional protections generally granted to even aliens whose presence in the U.S. is unlawful.38 Proponents who assert that immigrant children substantially benefit from general juvenile law protections fail to observe the different way in which due process has evolved in the realm of immigration. The saying that children receive the worst of both worlds39 certainly holds greater application for immigrant children who receive the short end of juvenile law, immigration law, and state welfare law.40 In Flores, unaccompanied minors41 were held in detention pending their deportation hearings, and the question arose under whose care these alien children should be released while they await their deportation hearing.42 Whereas Gault expanded procedural due process protections for citizen

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38 But see Matthews v. Diaz, 426 U.S. 67, 77 (1976) (citing Wong Yang Sung v. McGrath, 339 U.S. 33, 48-51 (1950) (“Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.”)).
39 See In re Gault, 387 U.S. 1, 17-18 & 18 n.23 (1967) (“There is evidence...that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”) (internal quotation marks omitted).
41 These alien juveniles were certified as a class, consisting of those under the age of 18 detained by the INS because “a parent or legal guardian fails to personally appear to take custody of them” (internal quotation marks omitted). 507 U.S. at 296.
children in delinquency proceedings, *Flores* denied substantive protections for immigrant minors because the latter’s lack of immigration status justified this differential treatment (i.e. the detention or legal custody in the form of institutional confinement) and because the then-INS’s minimum standards of care, in such a facility, were “good enough.”

The *Flores* Court thus continues to reduce the already minimal constitutional safeguards immigrant children receive by narrowly defining the scope of due process rights for immigrant children. Indeed, the Court altered the children’s claim that they possessed a liberty right to be free from physical restraint into a question regarding whether immigrant children, or even children generally, possessed a right to non-institutional confinement where private placement may be better. Within that framing of the question, the inevitable answer must be no, as it can hardly be claimed that this preference for non-institutional custody is “so rooted in traditions and conscience of our people as to be ranked as fundamental.” Consequently, pursuant to mere rationality review, the *Flores* Court found that no substantive due process right was violated through the INS’s detention policy, and no procedural due process right was violated per lack of INS custody review.

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43 Id. at 305. This thereby satisfied, according to the majority opinion by Scalia, the requirement that the INS had a rational government interest in selecting confinement over release to other, possible more preferable custodians stating “[w]here a juvenile has no available parent, close relative, or legal guardian, where the government does not intend to punish the child, and where the conditions of government custody are decent and humane, such custody surely does not violate the Constitution. It is rationally connected to a governmental interest in ‘preserving and promoting the welfare of the child.’” Id. at 303 (internal citations omitted).


45 See *Flores*, 507 U.S. at 305. In other words, the court frames the issue to be whether these children had the right to be released to an unrelated adult when their parent, relative, or legal guardian was missing or unwilling to appear to retrieve them. Id. at 302.


47 Id.
The *Flores* court’s discussion of *Schall v. Martin* is similarly striking from the vantage point of immigrants’ rights. *Schall* approved post-arrest, pre-trial detention only for juveniles who posed a continuing danger to the community. But rather than extend this promising juvenile law principle to immigrant children, the *Flores* Court ultimately rejected its application, instead citing to *Schall* only to come to the conclusion that “minimum standards must be met, and the child’s fundamental rights must not be impaired.” The Court, through ever-clever use of framing, determined the immigrant children were in legal custody and not detention “because the facilities in which immigrant minors were detained were ‘not correctional institutions, but facilities that meet state licensing requirements for the provision of shelter care, foster care, group care, and related services to dependent children.’” The Court’s choice to find these children were in legal custody meant the higher constitutional safeguards reserved for those facing greater deprivations of liberty, as in confinement or detention, would not apply. This outcome may confuse those unversed in the peculiarities of immigration law.

Even before *Flores*, the immigrant minor’s due process rights were already extremely diminished because of plenary power’s longstanding commitment to deference to the political branches. It is

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49  Id. at 273-74. The case also stands for the popular phrase that “juveniles, unlike adults, are always in some form of custody.”  Id. at 265.
50  *Flores*, 507 U.S. at 304-05.
51  Id. at 298.
52  Id. at 303-05
53  The authority Congress possesses in immigration is broad and exclusive. See Toll v. Moreno, 458 U.S. 1, 10 (1982); Kleindienst v. Mandel, 408 U.S. 753, 769-70 (1972); Shaughnessy v. United States, 345 U.S. 206, 212 (1953) (holding that “whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned”); Ting v. United States, 149 U.S. 698 (1893) (extending lax judicial review and plenary power doctrine from exclusion to deportation of aliens); Ping v. United States, 130 U.S. 581, 606 (1889) (establishing that immigration is an area where decisions of the political branches are “conclusive upon the judiciary”). The doctrine has been discussed in depth by the literature and I do not repeat the history here. See Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1626 (1992). Indeed, Congress’s authority
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not surprising, then, when Scalia notes the juveniles’ lack of immigration status validates their detention. It is clear the majority draws the line of demarcation for protection at immigration status, regardless of the needs of the child; the denial of liberty here is appropriate because these children possessed the “offense” of alienage status.

requires that “[j]udicial power over immigration and naturalization is extremely limited.” See Miller v. Albright, 523 U.S. 420, 455 (1998) (Scalia, J., concurring); see also Fiallo v. Bell, 430 U.S. 787, 792 (1977); Nyquist v. Mauclet, 432 U.S. 1, 10 (1977) (ruling that “[c]ontrol over immigration and naturalization is entrusted exclusively to the federal government and a state has no power to interfere.”).

However, while the plenary power doctrine remains popular in the courts, it has been the subject of scathing academic attack. See Louis Henkin, The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Proernity, 100 Harv. L. Rev. 853, 862 (1987) (“It has no foundation in principle. It is a constitutional fossil, a remnant of a prerights jurisprudence that we have proudly rejected in other respects. Nothing in our Constitution, its theory, or history warrants exempting any exercise of governmental power from constitutional restraint.”); Steven R. Shapiro, Ideological Exclusions: Closing the Border to Political Dissidents, 100 Harv. L. Rev. 930, 942 (1987); Peter J. Spiro, Explaining the End of Plenary Power, 16 Geo. Immigr. L.J. 339, 340-41 (2002) (describing plenary power as “a rights-subverting constitutional anomaly” that has “long been relegated to a sort of constitutional hall of shame”). While many affirm that plenary power will likely continue to weaken over time, as the Court becomes more inclined and accustomed to finding that undocumented persons deserve stronger due process protections against arbitrary or unfair situations, the more likely trend is that plenary power only weakens in moments of historical safety, but strengthens in times of national security and fear. See Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (striking indefinite detention of deportable aliens and holding in dicta that plenary power is still “subject to important constitutional limitations”). Plenary power, at least through historical function, appears to operate in cycles that constrict and expand and with these contractions; the rights of immigrants likewise are limited or magnified. See generally Kif Augustine-Adams, The Plenary Power Doctrine after September 11, 38 U.C. Davis L. Rev. 701 (2005).

54 See Flores, 507 U.S. at 305-06 (citing Matthews v. Diaz, 426 U.S. 67, 81 (1976); Fiallo v. Bell, 430 U.S. 787, 792 (1977) (inferring that legislative power of immigration is complete and that because of Congress’s power over immigration and naturalization, Congress can create rules for immigrants that would be unacceptable if applied to citizens). Indeed, the Court has declared “over no conceivable subject is the legislative power of Congress more complete.” Fiallo, 430 U.S. at 792.

55 Flores v. Meese, 934 F.2d 991, 1014 (9th Cir. 1990) (Fletcher, J., dissenting).
Simply put, being an alien cultivates notions of difference and fear, not to mention implications for the nation’s sovereignty, self-preservation, and national values\(^5\) that result in inconceivable laws if applied to citizens.\(^6\) The bleak legislative reality surrounding the endemic immigration problem situates the immigrant child with the concomitant burdens of adults. When the rights of immigrant parents are curtailed, the undocumented child similarly stands to lose. The immigrant child has neither a parens patriae government to care for them,\(^5\) nor a family structure to nurture them. Rather, they are assaulted on all fronts: deserted or forcibly separated from their parents, circumscribed of basic legal protections and necessities, and powerless to navigate the immigration laws.\(^5\) They are in the U.S. alone: constitutionally disabled, legally incapacitated, and emotionally vulnerable.\(^5\) Plenary power has bled into traditional areas of state Tenth Amendment power, specifically family law, and immigrant children are ensnared in the tangle.\(^6\) The seminal decision in


\(^6\) See United States v. Williams, 194 U.S. 279, 290 (1940) (noting that inherent sovereign authority of a nation allows it to admit or deny foreigners because doing so is integral to self-preservation); see also Demore v. Kim, 538 U.S. 510, 521-22 (2003); Graham v. Richardson, 403 U.S. 365, 377 (1971); Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952); Ekiu v. United States, 142 U.S. 651, 659 (1892).


\(^5\) Id.

\(^5\) Id.

Flores, nevertheless, culminated in the Flores Settlement Agreement (FSA) upon remand to the District Court, which established appropriate humane conditions for immigrant children and provided for better treatment and release to parents. This development, while an achievement for immigrant children’s rights, does not address the broader constitutional question of respect due to the family unit itself. Until that central matter is assessed and a clear tenet can be devised from judicial common law regarding the parent-child relationship, we are bound to have agreements such as the FSA, which are piercing in paper, but dull and undermined in practice. The conceptual jurisprudential evasion of that question may be supported by the reality that federal plenary power has substituted state parens patriae to the immigrant child’s detriment; it victimizes immigrants and divests residents of sound constitutional principles.
II. THE PLAYERS AT THE TABLE IN JUVENILE LAW DIFFER FROM THOSE OPERATING IN IMMIGRATION LAW: COOPERATION IN THE FORMER VERSUS CONFRONTATION IN THE LATTER

While children have similar needs, notwithstanding their legal status, where these similarities diverge is the role of parents in traditional juvenile law versus their position in immigration law. These differences spawn from the fact that the agents and parties involved in domestic juvenile law have radically different interests and perspectives than those in immigration law. Domestic juvenile law can be largely organized around three polarizing, but potentially cooperating interests: the rights of the parents, the children, and the state.66 Such use of “cooperating” is not to essentialize that these parties can possess different means and often do conflict, but that these three forces fight for the care, protection, and well-being of the child albeit in different ways.67 In other words, their interests are aligned in the sense that they all share the similar goal of the welfare of the child. In immigration law, by contrast, the actors are keenly inapposite, and parents of the immigrant minor may refuse to act in the best interests of their children, as it is often the parents’ actions, their illegal entry for example, that are imputed to their children. In the specific case of U.S. born citizen children with undocumented

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66 Francine T. Sherman & Hon. Jay Blitzman, Children’s Rights and Relationships: A Legal Framework, in JUVENILE JUSTICE: ADVANCING RESEARCH, POLICY, AND PRACTICE 68-90 (Francine T. Sherman & Francine H. Jacobs eds. 2011) (describing complex interplay between child, parent, and state in legal patchwork); Martha Minow, What Ever Happened to Children’s Rights?, 80 MINN. L. REV. 267, 287 (1995) (citing Glenn Collins, Debate over Rights of Children Is Intensifying, N.Y. TIMES, July 21, 1981, at A1, B4 (quoting Robert Mnookin, Professor of Law at the University of California at Berkeley) (“You can discern three distinct themes: First, that parents have primary responsibility to raise children. Second, that the state has special responsibilities to children, to intervene to protect them. And third, that children as people have rights of their own and have rights as individuals in relation to the family and in relation to the state. These themes are constantly in conflict.”).  
67 See Minow, supra note 66.
parents, the citizenship right is seemingly rendered meaningless because if the parents are removed, so too are the children, as dependents, likely to join in that removal. Further, the federal agents in the immigration context must juggle their own labyrinth of immigration law and policy: balancing the needs of immigrant children through the Office of Refugee Resettlement (ORR), the mandate to expel unauthorized immigrants through the Department for Homeland Security (DHS), as well as the interests of all these contingencies, both in the government’s favor and in the alien’s equities, through the immigration courts, and the Executive Office for Immigration Review (EOIR).

The problem is easily realized here. Where domestic juvenile law has different interpretations and understandings of what is best for a citizen child, it nonetheless is working toward the same goal—what is best suited for the child’s well-being, growth, and development even if the means and methodology differ. The question of

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68 Immigrant parents usually determine whether their children are deported with them, unless there is a finding of abuse or neglect leading to state custody of the minor children. As is often the case, it is meaningless to remain in the U.S. without one’s parents. Courts affirm that the child can exercise his or her citizenship right at any time after the de facto deportation. See infra note 84 and accompanying text.

69 The ORR takes custody of immigrant children who cannot be repatriated. See Detention and Release of Juveniles, 8 C.F.R. § 236.3(g) (2003). While Canadian and Mexican children are exceptions, all other unaccompanied immigrant children are placed under ORR’s jurisdiction. The ORR also assumes custody of those children who cannot be reunified with family or other suitable caretakers.

70 Indeed, the development of a separate juvenile court system apart from the adult criminal system can be seen as domestic law endeavoring to accommodate the special case of children: their particular vulnerability as well as their rehabilitative potential. See Robert H. Mnookin & D. Kelly Weisberg, Child, Family, and State: Problems and Materials on Children and the Law 1227-32 (2000). The immigration system, however, has no special court for children; rather, the immigration judge must frequently consider the child’s and parents’ situation in forging his or her own determination. Immigrant juveniles, thus, are treated like immigrant adults in removal proceedings. See Thronson, Kids Will Be Kids?, supra note 7, at 1000-03 (observing that unaccompanied minors are treated as “adults by default” and that immigration courts are neither designed nor equipped to handle children). The immigration court system, therefore, takes a “one-size-fits-all approach” that fails to account for children’s unique development, that fails to recognize that children may “experience persecution differently than adults,” and
territoriality and the child’s ability to stay in the U.S. is irrelevant. By contrast, for the immigrant child, the lack of immigration status controls and subsumes the question of best interests, such that each agent in an unaccompanied minor adjudication, for example, is faced with harrowing conflicts of interest. It is certainly an understatement to say that the immigrant juvenile is caught in the middle. From a family and juvenile law perspective, a best interest of the child analysis requires stabilizing the normality of the parent-child contact with his or her noncitizen parents. From an immigration law perspective, the immigrant child should be removed from the U.S. if not born within its borders, and even for those children with birthright citizenship, removal may nonetheless be the ideal course of action to continue a normal family parent-child relationship.\footnote{1}

Family law and immigration law are incredibly at odds and citizenship becomes the battlefront—the best interest of the child is to both remain in the U.S. and do so in a stable parent-child relationship. Current immigration

\footnotetext{1}{While, at first glance, it appears that the need for the “family” itself interferes here, in actuality, it is the U.S.-born child’s dependent nature that forecloses his or her ability to properly and effectively exercise his or her birthright citizenship right to remain in the U.S. It remains virtually impossible to construct a child-directed or child as autonomous individual model when the very definition of “child,” even in the non-immigration sense, necessitates the child’s dependency and lack of agency.\footnote{2}{See David B. Thronson, Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts, 11 Tex. HISP. L. & POL’Y 45, 48 (2005) [hereinafter Thronson, Of Boarders and Best Interests] (stating that “family law and immigration law are motivated by divergent and often conflicting policies which are difficult, and on occasion, impossible to reconcile”). In explaining the “peculiar and conflicted mix” of immigration and family law, Thronson discerns that “there is no area of law in which the federal government’s power is more robust than in immigration and there is no area of law more fully reserved to the state than domestic relations.” Id. (internal citations omitted).}}
Critiquing Birthright Citizenship

law simply cannot accommodate these two interests simultaneously. An analysis of what citizenship means must enter the dialogue.\textsuperscript{73}

To nuance this critique, I discuss the different roles of citizen and noncitizen parents in relation to their children physically in the U.S. Citizen parents can argue for the best interests of their child in juvenile proceedings; they have the option even if they choose to otherwise encourage their children confess to the truth in a disposition. Additionally, these parents can develop a nurturing relationship with their children without jeopardizing their own safety and ability to remain in the U.S. They can raise issues and cases on behalf of their children, and thus meaningfully protect their children’s rights in that way.\textsuperscript{74} In other words, parents, if willing, can be agents for their children. By contrast, the adult noncitizen parents of unaccompanied minors may have trouble reaching or not being able to take custody of their children who cross the border on their own and end up in DHS custody. Thus, the noncitizen parent suffers from a Hobson’s choice: he or she often reveals his or her own unlawful presence in the U.S. when opting to preserve family unity with the child,\textsuperscript{75} and as is often the case, the undocumented parent is deported, shortly followed by the child “electing” to join in removal.\textsuperscript{76} In the latter

\textsuperscript{73} See discussion infra notes 93-112 and accompanying text in Part IV. My point is to engage the substantive meaning of citizenship underlying lived, contextualized experience of the immigrant family in order to launch discussion regarding the dynamic nature of citizenship. For a fuller exposition on the history and development of birthright citizenship instead, see Patrick J. Charles, Decoding the Fourteenth Amendment’s Citizenship Clause: Unlawful Immigrants, Allegiance, Personal Subjection, and the Law, 51 WASHBURN L.J. 211, 215-52 (2012); Dan Stein & John Bauer, Interpreting the 14th Amendment: Automatic Citizenship for Children of Illegal Immigrants?, 7 STAN. L. & POL’Y REV. 127 (1996).

\textsuperscript{74} See Corneal, supra note 40, at 624-25.


\textsuperscript{76} See Carr, supra note 11, at 130-40 (discussing that in the context of families where children have different legal status than parents, the parent and child’s interest may be far from aligned and recognizing only parental interests may pose severe consequences for the child). Indeed, noncitizen parents must often choose
example, the child often follows, as best interests ordinarily entails family unification to a potentially dangerous country of origin. The noncitizen parent therefore cannot effectively advocate for their children’s rights, as doing so may implicate the authenticity of their own legal status. This contingency makes any proposed parent-as-guardian model itself conflicted. Moreover, because children may enter on their own before their parents, all too often, the parental figure, as the child’s agent, is lacking in a custody proceeding upon entry at the border. Indeed, the rights of noncitizen parents and children are already adverse, such that state intervention often comes as a necessary evil to protect interests of the latter against the former. For noncitizen or mixed-status families, both the best interests of the child and parental rights frameworks miss their mark, as the parent and children rely on state intervention, and certain actors are missing at critical stages of the custody process. Both frameworks cannot account for the political overtures involved in the dynamics of noncitizen and mixed-status families and neither comports with the increasing institutionalization and creation of the “mixed status-politicized immigrant family.” For immigrant families, neither between “abandoning their children in a foreign land and risking the torture of their children.” Id. at 120.


78 The mixed-status family is a family where “all family members do not share a common immigration or citizenship status” and this phenomenon of our immigration laws “makes it virtually impossible to conceive of policies that will affect immigrants without also intimately affecting a broader cross section of the national population, including millions of U.S. citizen children.” Thronson, Here from Here, supra note 17, at 61; see also Thronson, Of Boarders and Best Interests, supra note 72, at 49-53 (for description of rise of mixed-status families leading to immigration drastically being introduced into family courts).
parent nor child possesses complete agency or autonomy, and the parent-as-agent model for the child’s rights in immigration is non-existent.

III. THE ASFA REMAINS A PROBLEM FOR IMMIGRANT PARENTS AND TERMINATES THEIR PARENTAL RIGHTS WITHOUT A PARENTAL FITNESS HEARING


presents a challenge to the continuity of a parent-immigrant child relationship in many instances, despite arising out of the need to address the deplorable state of adoption and foster care at the time. 81

Ironically, the ASFA was enacted to foster “permanence for children in the foster care system.” 82 The ASFA embodied a new shift in child welfare policy at the time from the traditional and historical emphasis on reunification of foster children with their biological parents to promoting adoptions of these children into new families 83 while simultaneously prioritizing children’s health and safety. Of particular impact for immigrant families is the requirement that states initiate termination proceedings against parents if the child has been in foster care for fifteen of the most recent twenty-two months. 84 Such a state requirement disproportionately affects women and forces them to lose custody of their children while incarcerated and serving their

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84 42 U.S.C. § 675(5)(E) (“[I]n the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months...the State shall file a petition to terminate the parental rights of the child’s parents...”). The statute proceeds to delineate some minor exceptions to these termination proceedings: where the child is being cared for by a relative, there is a compelling reason why filing a petition would not be in the best interest of the child, or the state agency has not provided the services needed for safe reunification, § 675(5)(E)(i)-(iii). It is essential to note that the state bringing the petition and thus challenging the parents’ parental rights to the children still must satisfy by clear and convincing evidence a state ground for termination, usually neglect, abuse, or abandonment of the child. Emily K. Nicholson, Comment, Racing Against the AFSA Clock: How Incarcerated Parents Lose More Than Freedom, 45 DUQ. L. REV. 83, 85 n. 16 (2006).
sentences.\textsuperscript{85} Furthermore, many noncitizen parents, detained pending removal, will likewise lose their parental rights while in civil detention. It becomes clear that the ASFA reflects an "ideology of the ideal family,"\textsuperscript{86} that excludes the concept of immigrant and mixed-status families from that proper vision.\textsuperscript{87} The "institution" of the immigrant family, through whatever form it takes, cannot be squared with the ASFA's fifteen-month trigger provision. The impact of the ASFA on immigrant families demonstrates the severe lack of constitutional safeguards for adult noncitizen parents, who have the right to their children seized by the state. The ASFA essentially forces and deputizes states to terminate parental rights under the guise of fostering permanence within the foster system. Such a deputizing of states as enforcement agents—through the ASFA's termination of rights provision—fundamentally becomes state-level interior immigration enforcement because of the disproportionate amount of civilly detained immigrant parents kept in confinement over the fifteen-month grace period. In other words, the ASFA's fifteen-month trigger embodies the federal policy decision that a fifteen-month absence makes a parent unfit for child rearing. For immigrant families and noncitizen parents particularly, the constitutional protections traditionally afforded by parental fitness hearings\textsuperscript{88} simply do not apply. The ASFA, instead, turns out to be an outlandish and terrifying means to deprive a cardinal liberty and privacy interest.

\textsuperscript{85} Many women serve an average of 18 months in prison, thus making them ripe under ASFA to lose their parental rights. Jeremy Travis, Elizabeth Cincotta McBride & Amy Solomon, \textit{Families Left Behind: The Hidden Costs of Incarceration and Reentry}, \textit{Urb.

\textsuperscript{86} Adler, supra note 74, at 24-25.

\textsuperscript{87} Id.; Kennedy, supra note 11, at 79 ("Family law and policy are rooted in an ideology that privileges one familial idea but excludes and marginalizes the many other forms it can take.").

\textsuperscript{88} In \textit{Stanley v. Illinois}, the Court discussed the importance of the "integrity of the family unit" under the Fourteenth Amendment Due Process Clause. 405 U.S. 645, 651 (1972). The \textit{Stanley} court continued that "parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody." \textit{Id.} at 658; see also Santosky v. Kramer, 455 U.S. 745, 747-48 (holding due process of the Fourteenth Amendment demands that severance of parental rights from natural children be held to standard of clear and convincing evidence).
due process of law. This observation illustrates the uncertainty surrounding the extent that parental rights to children, in mixed status families, are matters of highest constitutional importance.\textsuperscript{89}

The trend in evaluating the impact of the ASFA on immigrant families has culminated in various legal arguments that all conform to the theme of preserving family normalcy. These arguments take the following major forms: 1) greater state participation through a higher standard of proof than traditionally employed in termination of parental rights proceedings, 2) evaluation of evidentiary standards in these termination proceedings, 3) recognition of a right to counsel in these proceedings, 4) modification of or revocation of the ASFA, 5) or reformation of detention and incarceration standards to promote normalcy through visitation, communication, and contact between the immigrant parent and child.\textsuperscript{90} I seek to add more dimension to this conversation: that for the ASFA to come through on its mission to foster family permanency, there must be a concession for the larger institutional problem that incarceration and detention presumptively make a parent unfit; and in order to resolve

\textsuperscript{89} "[T]he interests of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment." \textit{Santosky}, 455 U.S. at 774 (Renquist, J., dissenting); see also \textit{M.L.B. v. S.L.J.}, 519 U.S. 102, 117-18 (1996) (articulating that a parent’s interest in maintaining parent-child relationship is an “important interest”). Whether the fundamental right or interest vests through the liberty interest, privacy interest, or both remains open-ended. For aught that appears, only fit parents have a right to maintain a parent-child relationship, such that despite language referring to the “right,” it more practically appears to be treated as an “important interest.” That immigrant parents can have the liberty right “deprived” by the ASFA, for example, lends credence that one must deserve or show affirmatively one’s fitness as a parent to preserve the parent-child relationship. This runs counter to constitutional precepts that the state has the burden to prove unfitness by clear and convincing evidence before it can interfere in a parent’s child-rearing. See \textit{Santosky}, 455 U.S. at 747-48. The ASFA, if only by operation, essentially imposes the affirmative duty on parents to maintain continuous contact with children and continuous possession of good moral character. It can be seen as the state’s imposition and judgment of how parents should parent their children, which is certainly beyond the purview of any state or the federal government.

\textsuperscript{90} See \textit{Kennedy}, supra note 11, at 113-33. While Kennedy applies these proposals broadly to any family affected by the ASFA and incarcerated parents particularly, the arguments are germane for immigrant families as well.
this concern, the ASFA’s fifteen-month trigger—for states to initiate termination proceedings—must reflect and incorporate a greater role for states and state discretion. The inquiry regarding unfitness must go beyond the question of whether the parent is in detention. Yet, for aught that appears, it simply is irrelevant that the detainee is or would otherwise be a fit and effective parent, but for their term of incarceration or detention. Detention or incarceration, even alone, therefore becomes dispositive of unfitness.\textsuperscript{91}

In order for this problem to be resolved, however, a meaningful distinction must exist between incarceration and immigration detention. This would effectuate an understanding that civil detention is inherently different from penal incarceration, and similarly, that illegal entrants are unlike felons. This delicate balancing must come from the states: the ASFA must vest greater discretion to states to proceed with termination hearings in the particular cases that warrant state intervention. An absolute fifteen-month trigger requirement naively produces a flat line rule in an area that demands particularity and individualized facts and circumstances to matter.\textsuperscript{92} The three built-in exceptions in the statute to offset the fifteen-month trigger simply do not account for immigrant parents’ situations. Because parents have an incredible interest in child rearing, the ASFA must strike equilibrium between the permanency it seeks to promote and the absurd deterioration it has effectuated against immigrant families. Permitting states to review various cases at the fifteen-month trigger before initiating termination proceedings presents a fair compromise between the parental interest, federal interest, and state interest in family law. Indeed, devolving this discretion to the states is consis-

\textsuperscript{91} This inference was noted by Hall: “some state courts... have erroneously assumed a child’s placement in foster care for fifteen of the previous twenty-two months is dispositive of unfitness, allowing ASFA to play a substantive, rather than procedural, role in the termination process.” C. Elizabeth Hall, Where Are My Children... and My Rights?: Parental Rights Terminations as a Consequence of Deportation, 60 DUKE L.J. 1459, 1469-70 (2011).

\textsuperscript{92} Phillip M. Genty, Moving Beyond Generalizations and Stereotypes to Develop Individualized Approaches for Working Families Affected by Parental Incarceration, 50 FAM. CT. REV. 36, 37 (2012) (arguing for an individualized, qualitative approach rather than a quantitative, categorical approach to speaking about the needs of families).
tent with the Tenth Amendment, where state authority remains compelling in family and domestic relations. The ASFA, as it is now, represents an over-inclusive exercise of federal oversight into state discretion. Short of the ASFA returning to a preservation of the family/reunification model over its current child safety/adoption model, returning discretion to the states will allow a more holistic examination of the needs of families and children without the arbitrary and untailored impact.

Thus, it is apparent that the immigration law canon is that deprivation of children from the home and parental care constitutes no due process violation of either parents’ or children’s rights, and separate, rather than intact, families appear to be the norm. Immigration exceptionalism apparently justifies harsh outcomes that defeat most notions of common decency. The fact that immigrant children may be citizens does not matter, and deportation of their parents does not rise to the level of a constitutional violation because the citizen child’s right is merely delayed, not curtailed or extinguished.


See, e.g., Garcia v. Holder, 320 F. App’x 288, 290-91 (5th Cir. 2009) (“Though his minor daughter is a United States citizen, her constitutional rights are not affected by the deportation of [her] parent, even where her de facto deportation will result.”) (citing Perdido v. INS, 420 F.2d 1179, 1181 (5th Cir. 1969)); Gonzales-Cuevas v. I.N.S., 515 F.2d 1222 (5th Cir. 1975); see also David B. Thronson, Choiceless Choices: Deportation and the Parent-Child Relationship, 6 Nev. L.J. 1165, 1194 (2006) [hereinafter Thronson, Choiceless Choices] (In the case of the deportation of the noncitizen parent, the citizen child’s removal from the U.S. “merely postpone[s]” the child’s right to remain in the U.S. until the child is old enough to exercise that right (quoting Acosta v. Gaffney, 558 F.2d 1153, 1158 (3d Cir. 1977))); Lino A. Graglia, Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy, 14 Tex. Rev. L. & Pol. 1, 3 (2009) (discussing anchor baby myth and how illegal immigrant parents may use child as an excuse to prolong U.S. stay, while also observing that deportation of illegal parent “would
ASFA must be amended to incorporate parental fitness hearings that carefully examine an individual person’s merits and parenting capacities. Within the judicial calculus, the length of detention alone cannot automatically be the dispositive factor for parental unfitness, and the state should be allowed, pursuant to an amendment of the ASFA, to have prosecutorial discretion not to require termination proceedings brought against fit parents. Not only does this conserve scarce judicial resources, and promote efficiency and economy, but it also allows states to dedicate their energies on high priority cases, and, at the same time, recognizes the punitive realities and idiosyncrasies of immigration laws.

Put differently, immigrant parents have neither been proven unfit nor should their legal status have any bearing on their fitness determination. A return to normalcy, in spite of the parent’s detention, must be cultivated, and detention as a consequence of one’s illegal entry, alone, without more, should not constitute a sufficient basis for severance of parental rights. While the cause of the actual termination is the parental failure to maintain ordinary contact and care for the child, it is unrealistic for the government to assert such a contention, as cause for termination, when they essentially set the gears in motion for the doomsday clock. The ASFA, to exculpate federal liability and responsibility, cannot simply force states to flip the switch and expect states to account for alleviating the resulting consequence of broken families. By comparison, the incarceration rationale may be more convincing in the criminal context where violent felonies committed by the adult parent more likely correlate with a parent’s actual unfitness. Illegal entry, by contrast, hardly rises to the level of murder or robbery and seems to punish the immigrant potential to deprive the child of the benefits of his or her American citizenship.”); 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) (stating that “citizen children...have been unsuccessful in pressing the view that the deportation of their undocumented parents is tantamount to the de facto deportation of the child.”). But see Edith Z. Friedler, From Extreme Hardship to Extreme Deference: United States Deportation of Its Own Children, 22 Hastings Const. L.Q. 491, 529 (1995) (providing argument that government cannot deport the illegal alien parent of a citizen child because this amounts to de facto deportation of the citizen child in violation of the Constitution).
parent for attempting to create a better life for the family. The intention and motivation for these acts are considerably different, yet the effect of each on termination proceedings is identical.

Therefore, the question of permission and whether entry is authorized—reflected in whether persons have valid immigration status—has underscored the treatment and protections that should be given to immigrant juveniles. It remains difficult to reconcile a non-citizen parent’s civil decision to cross the border with the termination of parental rights proceedings that often follow if the parent is caught by Customs and Border Control (CBP) or eventually by Immigration and Customs Enforcement (ICE). However unfair, what occurs is a judicial codification that the immigrant juvenile’s level of protection parallels his or her parent’s (meager) level of protection—that as far as ability to stay in the U.S. goes, age and minority deserve little evaluation despite what meaningful ties the child may have fostered living in the U.S. with other family members or friends, who may have citizenship status. What is so unsatisfying is that no matter the level of connection to U.S. soil, the degree of relationships cultivated here, or the hardship in returning to foreign territory, what matters most is the parental decision, in the first instance, to enter illegally.

What occurs, then, is that by virtue of \textit{jus soli}, status is granted to the children, but courts, by rejecting that de facto deportation is a violation of the child’s citizenship rights, effectively desire to impose a \textit{jus sanguinis} construct in practice. This occurs despite \textit{jus soli} citizenship’s ability to connect the child to the community, while simultaneously giving significance to parents’ past ties to the U.S. and the child and family’s prospective interest in creating bonds within the U.S. See Hiroshi Motomura, \textit{We Asked for Workers But Families Came: Time, Law and the Family in Immigration and Citizenship}, 14 VA. J. SOC. POL’Y & L. 103, 114 (2006).

Illegal entry by a noncitizen parent, therefore, justifies the uprooting of the citizen child and validates the disintegration of their emotional, moral, and physical stability. The underlying theme is that adults’ rights prevail over children’s rights irrespective of immigration status. We observe, thus, that agency problems undergird surface tensions in domestic juvenile law, but also in federal immigration law. This troubling conclusion demonstrates the problematic state that the Citizenship Clause has taken for unaccompanied minors. The erosion of traditional protections of the Citizenship Clause through the dumbing down of the (strongest) benefit of citizenship status—the ability to meaningfully reside in the U.S. renders the Clause a nullity. This, to put it bluntly, is citizenship reductionism.

opinion of Justice Field in Ting v. United States, is elucidating. 149 U.S. 698, 750 (1889) (Field, J., dissenting). Therein, Justice Field eloquently affirms:

In no other instance, until the law before us was passed, has any public man had the boldness to advocate the deportation of friendly aliens in time of peace. I repeat the statement that in no other instance has the deportation of friendly aliens been advocated as a lawful measure by any department of our government. And it will surprise most people to learn that any such dangerous and despotic power lies in our government,—a power which will authorize it to expel at pleasure, in time of peace, the whole body of friendly foreigners of any country domiciled herein by its permission; a power which can be brought into exercise whenever it may suit the pleasure of congress, and be enforced without regard to the guaranties of the constitution intended for the protection of the rights of all persons in their liberty and property. Is it possible that congress can, at its pleasure, in disregard of the guaranties of the constitution, expel at any time the Irish, German, French, and English who may have taken up their residence here on the invitation of the government, while we are at peace with the countries from which they came, simply on the ground that they have not been naturalized? Id.

97 Thronson, Of Boarders and Best Interests, supra note 72, at 52 (noting that the undocumented population lacks stability and prospects for legalization).

98 The Citizenship Clause reads “[A]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. CONST. amend. XIV, § 1. Birthright citizenship is also codified. 8 U.S.C. § 1401(a) (2012) (“The following shall be nationals and citizens of the United States at birth: (a) a person born in the United States, and subject to the jurisdiction thereof.”).

99 Most notable benefits of citizenship include the right to not be deported, the right to vote, see Ron Hayduk, DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING
IV. MIXED-STATUS FAMILIES AND THE CITIZEN-BENEFITS QUESTION PRESENTS A CHALLENGE FOR CITIZENSHIP: BIRTHRIGHT CITIZENSHIP REDUCTIONISM AND THE SOLUTION OF AGGRESSIVE ATTENDANT BENEFITS

The face of immigration is hard to define. The “other” is easily viewed as excludable and foreign, but the inner face of immigration masks more difficult issues, and upon further introspection, it becomes clear that the “foreigner” establishes a family, community ties, and a parent-child relationship, which we perceive as institutionally valuable. Unfortunately, fiscal encroachment often overwhelms and underscores how a nation is defined. Financial


Such an argument is in stark contrast to prevailing academic acceptance of birthright citizenship as a positive force of integration offsetting harsh immigration restrictionism. See Gerald L. Neuman, supra note 93, at 166 (1996); Nicole Newman, supra note 14, at 480 (“The Citizenship Clause of the Fourteenth Amendment merely serves as a backdrop, preventing the creation of a permanent subclass of people and children who would have no other route to legalized status.”). In Newman’s analysis and as promoted by many other scholars, the Citizenship Clause has been a champion for immigrants’ rights because it confers automatic citizenship, a small benefit when compared to the labyrinthian immigration system.

See Lindsay, supra note 56, at 8 (noting that the foreignness of the immigrant came to dictate immigration power itself, as “source, locus, and scope of Congress’s regulatory authority,” thus coming to conclusion of the immigrant as a distinct, legal construct).

impact and resource allocation have come to define the core of immigration policy as distributional restrictionism; that is, the immigration laws of admission and exclusion, and ultimately of national self-determination, are also influenced by the ebb and flow of whom we confer benefits and rights and whom we deprive of such rights. This rights dialectic is thus indispensable to the citizenship conundrum. I therefore aim in this section to demonstrate that the problem of citizenship reductionism or dilution can be remedied through the promotion of aggressive attendant benefits to citizenship that promote assimilation, commitment to the U.S. national identity, and increase the inherent value of citizenship.

But before that analysis, it is important to note Professor Spiro’s contribution to the scholarship on citizenship dilution. By characterizing the immigration influx as deleterious and uncontrolled and the conferral of citizenship as too inclusive and expansive, Spiro situates his radical analysis of citizenship dilution in the recent international disorientation with the U.S. and the spread of citizenship status abroad as diminishing its worth at home. In propagating that citizenship is on the decline, he grounds his thinking on the particular disconnect between receiving the status and the status’s indications of any actual dedication to U.S. soul. Inexorably, Spiro professes that the arbitrary nature of the granting of citizenship, as irrelevant to actually sustained ties in the U.S., is troubling. This leads him to conclude that the more the U.S. becomes inclusive, the importance of citizenship vanishes, the identity of the U.S. weakens,

103 For a discussion of citizenship’s impact on distributisonal justice, see Ayelet Shachar, Children of a Lesser State: Sustaining Global Inequality Through Citizenship Laws, in NOMOS: CHILD, FAMILY AND STATE 382 (Stephen Macedo & Iris Marion Young eds., 2003) (for recognition of citizenship as a property right “subject to the arguments of distributive justice”); see also Aihwa Ong, FLEXIBLE CITIZENSHIP: THE CULTURAL LOGICS OF TRANSNATIONALITY 4 (1999) (noting that traditional focus of citizenship’s legal impact obscures democratic citizenship’s distributive effect on citizens).
105 Id.
106 Id.
107 Id.
and the traditional benefits attached to citizenship become less meaningful, since non-citizens possess many of those similar benefits of citizenship. While Spiro’s arguments are laced with ideals of American exceptionalism and the definitional importance of exclusivity in citizenship and nationhood, his contention that there is no incentive to citizenship is much harder to digest. Spiro holds that the feasibility of obtaining citizenship combined with the decrease in discriminatory means to control immigrants implicates that the benefits non-citizens receive are indistinguishable from those citizens receive, such that there is no incentive to seek the status.

To lay the groundwork, it is crucial to note that the meaning and substance of citizenship has undergone a paradigmatic shift since the late nineteenth century. Who we admit is no longer necessarily related to the question of (financial, labor, or social) benefits, or of association with the nation. Instead, the “right” of citizenship at birth has become increasingly nebulous, decreasingly national in

\[108\] Id.

\[109\] Spiro, supra note 53, at 91, 95-97.

\[110\] Traditionally, the literature on citizenship has converged over the national quality of the citizenship-immigration relationship and its polarizing and exclusive ability to shape nations and demographics. See Peter H. Schuck, supra note 93, at 48 (discussing national fervor and values as carrying the day over “the earlier individualistic ideology of traditional liberalism”); 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, 263 (2002) (asserting that “racist and nationalistic views of the day go far in explaining the substantive outcomes reached in the inherent powers decisions”).

character, and progressively more individual and personal. The nature of citizenship is transforming from purely being a national, community-defining value towards a personal, self-organizing principle, originating with the atomized family unit.\textsuperscript{112} Who a person is as "citizen" becomes a personal component of that individual’s identity, and upon assumption of citizenship, one comports and integrates with the values and behaviors coveted by the existing national community.\textsuperscript{113} For many immigrants, the issue of citizenship is not national, but intrinsically individual and a personal goal or aspiration with tremendous implications for family structure and growth. The family as an organizing principle influences whether one traverses borders or complies with laws, whether one becomes a citizen or retains vagrant and wayward behaviors. It guides moral behavior and prompts accountability and American values. In other words, a family-centric immigration system provides tremendous normative and practical advantages over individual-petitioner oriented systems,\textsuperscript{114} and citizenship is becoming extremely beneficial in that family immigration dialogue.

\textsuperscript{112} By this, I do not argue that there must be individual assessments of the innumerable permutations immigrant and mixed-status families can take. Rather, it is far more instructive to examine citizenship from the lens of family and other principles or institutions that offer a self-organizing value. Families, not individuals, immigrate, so the perspective from which we evaluate citizenship benefits and confer them, must adequately address that the family is a nucleus for why we grant the right in the first instance. In this vein, discussing citizenship without also distilling the right’s impact on the family, leads to an imprecise and hostile language. We must develop the proper language, that is, the proper equipment, before we can critically explore and lucidly assess the dialogue of citizenship.

\textsuperscript{113} Id.

\textsuperscript{114} This observation is also evident in Motomura, supra note 95, at 117-18 (arguing that “Immigration as transition suggests that immigration and citizenship law should take into account, not only by recognizing existing ties, but also by promoting immigrant family life...”). Ironically, the petition-based immigration system currently in place, with all its preferences and quotas, was meant to promote family unity. See Developments in the Law: Immigration Policy and the Rights of Aliens, 96 HARV. L. REV. 1286, 1351 (1983), (citing S. REP. NO. 748, 89th Cong., 1st Sess. 13 (1965)), reprinted in, 1965 U.S. CODE CONG. & ADMIN. NEWS 3328, 3332.
As a result, citizenship discourse has experienced a scholastic revolution away from addressing citizenship critiques merely through the lenses of nationalism, racism, or nativism, but now also, and most notably, through flexible personal structures and obligations, institutional obstructions and hindrances, and unintended consequences of U.S. policy shortcomings. Rather than examining citizenship through only the lens of immigration by questioning who may enter and what their admission means for the polity, the shift in focus demonstrates the inclination to address the polity’s likewise similar impact on highly sensitive and susceptible communities.\textsuperscript{115} It

\textsuperscript{115} Such an argument for a family-focused dialogue for citizenship, that is, a language for the intersection of immigration, family, and citizenship law together, has rarely been discussed. This “trifecta” has received only limited attention. See Motomura, supra note 95, at 103; David B. Thronson, Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody, 59 HASTINGS L.J. 453, 509-13 (2008); Victoria Degtyareva, Note, Defining Family in Immigration Law: Accounting for Nontraditional Families in Citizenship By Descent, 120 YALE L.J. 862 (2011); see also Bernard Friedland & Valerie Epps, The Changing Family and the U.S. Immigration Laws: The Impact of Medical Reproductive Technology on the Immigration and Nationality Act’s Definition of the Family, 11 GEO. IMMIGR. L.J. 429, 443 (1997) (discussing immigration’s inability to recognize nontraditional families). In his account, Motomura appropriately observes that any consensus on the role of the family in immigration and citizenship law is elusive, for any “convenient temptation to think about immigrants as individuals is tempered by the reality of the family.” Id. He then reiterates that “[f]amilies can provide the social and economic support [that is] crucial for integration into the receiving society and immigrants without families tend to remain sojourners [who] never consider themselves permanent residents or potential citizens.” Id. (quoting earlier article, Hiroshi Motomura, The Family and Immigration: A Roadmap for the Ruritanian Lawmaker, 43 AM. J. COMP. L. 511, 543 (1995) (internal quotation marks omitted)). These sentiments remain alive and viable, even now, but I repeat it here to juxtapose my point that family, in the context of citizenship law, poses an inherent challenge: the family unit is both necessary for survival and integration, as Motomura explains, but at the same time represents a vehicle for the dumbing down of the right—what I coin as citizenship reductionism.

Thus, the family-based citizenship dialogue must continue in order to espouse a language and discourse that respects the role and significance of the family unit. Doing so respects what Motomura describes as a “prospective sense of time” that “focuses on the immigrants’ future lives in the United States,” coming eventually toward “a more instrumental view of the family in immigration and
is crucial, then, that citizenship should and must develop to keep pace with the parallel needs of the children and incidental families to whom the status is conferred. What must happen, therefore, is an internalization of the maxim “citizenship matters” into our discourse on both immigration and family law. In order to effectuate such a mandate, citizenship, as aforementioned, must consider a family-centric element into its language. Even more importantly, it must divest itself of the understanding that it is merely a legal status encompassing the ability to integrate and socialize a nation into a community.

Policy makers must evaluate the primordial question of the importance of citizenship.” Id. at 114. By contrast, the intersection between the family law and immigration (and overlooking citizenship) has come under considerable scholarly attention, particularly in areas of deportation, detention conditions, and best interest of the child arguments. See Nora V. Demleitner, How Much Do Western Democracies Value Family and Marriage? Immigration Law’s Conflicted Answer, 32 Hofstra L. Rev. 273, 26 (2003) (“Much of the analysis of immigration law tends to focus on how immigration rules regulate and channel immigration of individuals, rather than on the impact they have on migration of families and couples.”); Yahner, supra note 78, at 783-789; Julia Halloran McLaughlin, supra note 36. Again, the tripartite intersection between citizenship, family, and immigration has rarely been addressed, but is slowly gaining recent attention, and I hope to prompt more discussion with this article.


Id. (noting that importance of citizenship “does not lie exclusively in a delineation of rights, whereby citizens receive an abundance of protections not afforded to noncitizens” but that citizenship is a broader concept). Indeed, while citizenship does not expressly confer a set of rights, the rights it does confer offer little in the way of incorporation or resolving the family dilemma. It is my contention that an essentialist understanding of citizenship as mere status, even one with the capacity to integrate outsiders, misses the mark. My qualm with citizenship benefits, as they stand now, is that these attendant benefits do not push the envelope or promote integration, as scholars may suggest. It is certainly true that the right to not be deported is a crucial benefit of citizenship, and arguably the strongest benefit. See Peter J. Spiro, A New International Law of Citizenship, 105 Am. J. Int’l L. 694, 695 (2011) (noting that “trends reflect a reconsideration of citizenship status, shifting from an identity to a rights frame”). But without benefits (to follow from citizenship) that attend to the incompatibility of the family unit with immigration law, the actual citizenship status becomes much less effective in its ability to ameliorate draconian consequences or mitigate complications of mixed-
of what rights citizenship should confer, and the proper answer must inevitably be that these “benefits” should aide in incorporation and integration of that citizen into society, with the goal of establishing the citizen (and particularly U.S.-born immigrant children) within the valued institution of the family.\textsuperscript{118}

This solution is quite attractive for both non-citizens and current citizens, who would otherwise be reluctant to embrace additional members, because such immigrants appear un-assimilable or distant. Therefore, I reprimand the current attendant benefits of citizenship as not necessarily meaningless, as more radical theorists like Professor Spiro may suggest, but as failing to push the envelope of political integration sufficiently to overcome the shadow and mysticism that surrounds who these non-citizens are. In other words, the reason immigrants remain disenfranchised, unable to assimilate, culturally non-American, and a second tier shadow population is that attendant rights and benefits, that currently attach to citizenship, do not provide them the social acuity to meaningfully incorporate themselves. In order to foster the desired incorporation of immigrants status families and separated families. See Janet M. Calvo, \textit{Alien Status Restrictions on Eligibility for Federally Funded Assistance Programs}, 16 N.Y.U. REV. L. & SOC. CHANGE 395 (1988); Peter L. Reich, \textit{Jurisprudential Tradition and Undocumented Alien Entitlements}, 6 GEO. IMMIGR. L.J. 1 (1992) (arguing expanding benefits to even undocumented persons). The benefits of citizenship are estranged from healing or mending structural family problems of immigrant families. Citizenship simply must develop on par with the needs of those who possess it. We frequently emphasize the period of residence, the sense of time, and community connections people have as an indicator of their intent and commitment to permanent residence. The establishment of a fully citizen family, inevitably slowly through mixed-status ones, is an analog of that community attachment. While certainly it can be construed as a circumvention of immigration laws, many immigrants attempt to regularize their status and those of others who join them in the family unit. The family becomes an expression of long-term community attachment and should come to define the “face” of citizenship, for the argument is quite appealing that family, in some form, should be an attendant benefit of citizenship. See infra Part V.

\textsuperscript{118} Among the many models proposed for the integration of immigrants as full agents and political participants, Motomura’s classic self-definition model centered on immigrants’ rights remains quintessential. See Hiroshi Motomura, \textit{Whose Alien Nation?: Two Models of Constitutional Immigration Law}, 94 MICH. L. REV. 1927, 1944-52 (1996).
as national members, the benefits of citizenship must naturally mature to more than they are now. While this may be viewed as an enlargement of citizenship rights, it can also be seen as a different methodological approach to selecting which rights and benefits immigrants should receive. Rather than conferring more rights to immigrants, we should be granting those rights that permit immigrants to assimilate and contribute to the national dialogue, thus assuaging concerns that immigrants cannot be “American” and simultaneously providing them with self-reinforcing tools and values to disseminate to their own U.S.-born children. If we want citizenship to matter once more, the way the status confers benefits and the reasons why such rights are conferred in the first instance must be critically evaluated.

Indeed, it defies logic that current attendant benefits of citizenship status fail to aggressively incorporate immigrants. If citizenship is to have continuing validity and if immigrants are to be truly vested in the national stage, benefits that matter must matter. The greatest problem with the ambiguities in citizenship discourse is that children continue to find themselves in precarious and inequitable positions and who must ultimately pay the severe price of our institutional and integrative failures. Thus, both the concept of birthright citizenship and its attendant benefits must be modernized to address the realities of the people to whom the status extends and matter most: those who are at the borders of the law.119 Only then

119 Surely, the safe space of the family must be carved out and delineated amidst the “playground of citizenship.” Ratna Kapur, The Citizen and the Migrant: Post-colonial Anxieties, Law, and the Politics of Exclusion/Inclusion, 8 THEORETICAL INQUIRIES L. 537, 568 (2007); see also William Flores & Rina Benmayor, LATINO CULTURAL CITIZENSHIP: CLAIMING IDENTITY, SPACE, AND RIGHTS 15 (1997) (for conceptualization of cultural citizenship, as opposed to legal citizenship, that allows minorities to carve out space spaces for themselves when in foreign territory subject to native hostility). This safe space, from my own perspective, must be the support network comprising the family unit.

Perhaps assimilation of immigrants is so stunted because of current immigration’s failure to adequately recognize the institution of the family unit. There is some logic to the point that an immigrant alone in the U.S. is less likely to assimilate without the support of others (i.e. family). The family, therefore, can itself be a means of incorporation and integration into the political and economic
can we genuinely achieve a modern citizenship discourse that critically engages the dynamic nature of legal status for the immigrant and child.

To place this argument in context, it is central to address itself the state of citizenship status between the immigrant parent and child in these mixed-status families. Despite legal status afforded U.S.-born children, it appears that, functionally, the parent’s illegal status determines the child’s “citizenship” status, such that the power of citizenship has diminished. This dumbing down of citizenship can be better understood by analyzing the primary question: “[i]s a parent’s alien status, legal or illegal, a factor as to whether citizenship can inhere in a child born in the United States of such parents?” As Professor Houston accurately discerns, the doctrine whereby parents “provisionally stand in the shoes of their children, such that their illegal status is transferred to the child” contradicts Plyler v.

mechanisms of a nation. I do admit that this solution suffers from the problem of visibility, that is, the greater the family and support, the more visible immigrant status can be (possibly due to race, among other indicators), and therefore, the greater the backlash in retort. In any event, social visibility forces recognition of the reality of the family unit’s special significance in immigration and citizenship law that should not go unnoticed merely because of the unpleasant realities of U.S. law. In one interpretation, the need for family support in the U.S. is a result of the intense antagonism that undergirds not only facially neutral discriminatory laws but also the way we allocate resources and time. If solo immigrants require support in order to survive within our borders, then our melting pot culture has certainly fallen into disrepute. Awkwardly, in order to become citizens, immigrants must divorce themselves from their family. It is unacceptable for immigration and citizenship discourse to fail to consider the role of the family in that dialogue.

120 See Jennifer Gordon & R.A. Lenhardt, Rethinking Work and Citizenship, 55 UCLA L. REV. 1161, 1161-62 (2008) (launching discussion of “context-based theory of citizenship,” and the interdisciplinary advantages that context-based approaches have for persons whose identities intersect with multiple modes of being); Jennifer Gordon & R.A. Lenhardt, Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives, 75 FORDHAM L. REV. 2493 (2007). It can be said that my own analysis here contextualizes traditional theories of citizenship with the lived experiences of the family unit.

121 Houston, supra note 102, at 718.
Since Plyler has legitimized immigrant children as a suspect class worthy of strict judicial review, the notion of parental rights vis-à-vis their immigrant children is diminished. In other words, because of the troubling dichotomy in Plyler, that undocumented children are suspect but adult undocumented persons are not, constitutional protections for the children may come at the price of similar protections for immigrant parents. It is doubtful that courts will respect both undocumented children and undocumented parents as similarly situated or deserving of the same level of constitutional scrutiny. Moreover, it is impossible to have the citizenship rights of the undocumented immigrant child develop stably alongside undocumented parents' rights. This is so problematic for the immigrant child because the adult immigrant parent must be the responsible caretaker, and absent comparable due process protections developing proportionately and in conjunction with children's due process rights, children will continually be in a place of constitutional superiority, but are unlikely to exercise their rights or fully explore their protections without analogous recognition for parents.

What this conflict demonstrates, however, is that the concept of imputed or transferred status plays out differently in the realm of equal protection (and thus access to important fundamental interests) than it does for the even more basic formulation of U.S. residency and

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122 457 U.S. 202 (1981) (finding that the children of undocumented immigrants should not be punished for their parents' illegal entry by depriving them of free public school education); see Houston, supra note 102, at 718 n.151.

123 It is difficult to foresee how adult undocumented immigrants can receive rights in tandem with undocumented immigrant children when this case remains a legal barrier to the former group. See Ley, supra note 96 (for a fuller discussion of the volatility of the Plyler decision to alienage as a suspect class). If anything, it is possible that adult undocumented immigrants can slowly receive heightened judicial review as plenary power softens and as rigorous scrutiny increases. But expansion of such higher review remains consumed by the fact that despite recent findings in the area of indefinite detentions, see Zadvydas v. Davis, 533 U.S. 678 (2001), courts seem unwilling to dole out protection for undocumented adults generally or abandon plenary power any time soon. But see Spiro, supra note 53, at 339-40 (noting that the Zadvydas case and Nguyen v. INS, 533 U.S. 53 (2001), exemplify the weakening grip of plenary power).

family unification. By contrast, the citizen child is likely to be valued as a citizen and worthy of heightened constitutional review (and is therefore not punished for the parents’ illegal entry) when access to a benefit, such as education, is the issue. This disorientation makes little sense. In the area of education, children are valued citizens in need of integrative services, but as children “alone,” they are not similarly appreciated and are therefore viewed as illegal. This conflict is a testament to the fact that immigrant children simply cannot be divorced from their parents’ decisions. The critical takeaway is that the parent-child relationship in immigration law is not a valued association to the extent it is in domestic juvenile law, because the parents’ status is the only one of consequence.

This conclusion is extended to the structure of the immigration laws generally. See Thronson, Here from Here, supra note 17, at 69 (discussing that family integrity is often ignored because immigration laws only permit parents to align the child’s status with their own).


See Barnhart, supra note 126, at 560 (finding that even without birthright citizenship, the Supreme Court will likely still provide government education to children of undocumented immigrants); Ley, supra note 96, at 64. Houston has come close to this conclusion. See Houston, supra note 94, at 722 (“Caselaw does not require formal consent by the United States to the parent’s presence in order for children of illegal immigrants to be recognized as citizens. Neither, however, does the case law definitely state the converse proposition—that these children are, in fact, citizens.”).

Valerie Leiter, Jennifer Lutzy McDonald & Heather T. Jacobson, Challenges to Children’s Independent Citizenship: Immigration, Family and the State, 13 CHILDHOOD 11, 20 (2006) (While all citizen children have the same formal rights to social benefits, informally parents and street-level bureaucrats who implement
Most notably, this conflict demonstrates that we are more amenable to accommodating the fiscal impact of immigrants than prevailing anti-immigrant political sentiment may dictate. That the Plyler court found children of undocumented parents worthy of state funding for education illustrates that what clearly divides the national community is what level of respect we should accord the petitioning ability of a U.S.-born immigrant child. That such children can have the eventual ability to incorporate persons into the U.S. is what I identify as delayed participation or the deferred agency problem. In other words, immigrant children do not become full agents, and thus full members of society, until they can either petition for others or meaningfully self-petition themselves. What this reinforces is the chronic inability of immigrant children to be independent rights-holders. Their existence, instead, is tied to the family unit or primary caretaker until they reach the age of majority and cease to be children. This brazen aspect of immigration law translates to the indefensibility of any child-directed approach in immigration law for the dependency construction of childhood constricts so pervasively in the statutory, constitutional, and systematic framework. More importantly, this observation manifests a remarkable inference. Because agency does not ripen until the immigrant child matures, the project of national self-definition appears to ferment only in adults. In other words, the opinion of adults concerning who is admitted, excluded, or deported is the only opinion that is reflected in the nation’s growth and valuation.

130 Because of the anchor baby conundrum, it seems quite impossible to fathom a system where children are fully embodied, self-petitioning individuals. A child-centered immigration system would appear to create an open-door policy. One possible imagination for a child-centered immigration system would be to impose harsh exterior enforcement, so as to increase the set of rights and benefits available to those inside. Protecting immigrant minors and preserving family unity comes at the cost of considerable expenses at the border and for U.S. citizens. We are, in a sense, breaking the bank when we open the contours of citizenship, even when we may not be opening the borders.
Accordingly, this indicates that American adult citizens, and possibly also legally permanent residents, have strong affinities toward who should and should not be part of the nation. The discussion, therefore, regarding transferred illegal parental status to citizen children, actually reveals the more fundamental stricture: that the American people are willing to assume a financial burden to support a segment of the undocumented population if it means preserving their ability to define the national contours, both literally through border enforcement but also metaphorically, through how we want people entering and legalizing themselves as citizens.\textsuperscript{131} These tensions exemplify the grave extent to which many citizens have problems with the current petition-based immigration unification system. In many ways, who we admit or exclude is a political question, and one that has taken astonishingly critical social and ideological importance, such that the issue has assumed politico-constitutional prominence.\textsuperscript{132} The unfortunate consequence is that immigrant children have become “illegal citizens.”\textsuperscript{133} They are

\textsuperscript{131} This observation likely stems from the community’s acceptance of immigrants’ contributions to the U.S. economy. See Barry, supra note 111, at 51 (“But even though [the immigrants] economic engagement is welcome (and may even be framed as constitutive of their status as citizens), their direct participation in the national political community generally is not”); see also Ley, supra note 96 (for notion that citizens are receptive to taking a fiscal hit if it meant ideological exclusion of a disfavored group, namely illegal immigrants from particular states).

\textsuperscript{132} See Patrick J. Charles, The Plenary Power Doctrine and the Constitutionality of Ideological Exclusions: An Historical Perspective, 15 Tex. Rev. L. \\& Pol. 61, 66 (2010) (“It is an issue that can only be placed into this nation’s political discourse, where it has always and rightfully been.”). But see Proposed Legislation to Deny Citizenship at Birth to Certain Children Born in the United States: Hearing Before the H. Comm. on the Judiciary, Subcomm. on Immigration and Claims, 105th Cong. 10 24-25 (1997) (statement of Dawn E. Johnsen, Acting Assistant Att’y Gen., Office of Legal Counsel, U.S. Dept. of Justice) (stating that in response to the Dred Scott decision, “[i]n rebuilding our nation after [the Civil] [W]ar, we pledged that we should never again trust to judges or politicians the power to deprive from a class born on our soil the right to citizenship”). Such legislative history validates that Congress intended citizenship rights be granted through Constitutional amendment, rather than through statute that could thereafter be more feasibly reversed by Congress.

\textsuperscript{133} See Barnhart, supra note 126, at 560-61 (raising that the deprivation of benefits and services to adult undocumented aliens appears justifiable, but denying such
“illegal” and must return with their undocumented parents to their countries of origin notwithstanding their citizenship at birth. Their lack of agency and dependency on their parents render their citizenship functionally null and void. If immigration enforcement increases and the scope of citizenship continues to be curtailed by unpredictable judicial reasoning, the reality will be that children exist without families, that the cost of preserving citizenship implies a sacrifice of the most fundamental form of relationality, association, and attachment. It is disconcerting when a nation’s laws force children into deciding between being citizens or being sons and daughters.

It is even more disturbing that lack of status can compromise a seemingly fundamental interest in the parent-child relationship, such compromise not being defensible absent a fitness hearing for citizen parents. Indeed, ordinarily, the state has a burden of proving parental unfitness before it can intervene into the private sphere of the parent-child relationship: “We have little doubt that the Due Process Clause would be offended ‘[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest.’” What is not as clear, however, is that our laws distinguish, and thus discriminate, between different forms of the ideal family unit—being part of a “mixed-status immigrant family” is a euphemism for a dysfunctional family. Framed as whether lack of immigration status has any bearing on parental fitness, the clear answer is it certainly does, but should not. The fact that lack of legal status acts as a presumption of parental unfitness for immigrant families is a troubling reality in the U.S. legal landscape that

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reflects not only our normative presumptions of race, nationality, culture, and ethnicity, but our assumptions regarding what benefits citizenship should confer and how we should define “citizen” in the first instance. Professor Zug has properly observed that “these cases raise questions about the very meaning and purpose of citizenship in a liberal state” such that “the state’s interest in citizen children far exceeds the state’s interest in their noncitizen parents.”

The connection, rarely drawn however, is that the destruction of immigrant families and the declension of constitutional family law principles to the parent-immigrant child relationship is the result of our conflicting premises regarding how noncitizen children should be

(discussing juvenile court termination of parental rights based on parent’s immigration status).

136 See William Ty Mayton, Birthright Citizenship and the Civic Minimum, 22 Geo. IMMGR. L.J. 221, 253-57 (2008) (for one imagination of citizenship discourse as the “principled relation with the nation and citizenship” reflecting notions of reciprocity, fairness, and selflessness). Needless to say, there have been countless re-envisionings of how birthright citizenship should be construed: from rejections of jus soli toward jus sanguinis citizenship and even membership-oriented critiques. See Linda Bosniak, Being Here: Ethical Territoriality and the Rights of Immigrants, 8 THEORETICAL INQUIRIES L. 389, 389-90 (2007) (“rights and recognition should extend to all persons who are territorially present within the geographical space of a national state by virtue of that presence”); Linda S. Bosniak, Exclusion and Membership: The Dual Identity of the Undocumented Worker under United States Law, 1988 Wis. L. Rev. 955 (1988); Linda Bosniak, Membership, Equality, and the Difference That Alienage Makes, 69 N.Y.U. L. Rev. 1047, 1137-45 (1994) (articulating different range of models for granting rights based on minimalistic versus expansive understandings of membership, territorial personhood, and community). What is essential to note, however, is the underlying message: that only citizens are fit parents and that only citizens deserve intact families. Thus, one “benefit” of citizenship is the ability to maintain a normal parent-child relationship, but even this once settled contention is dubious given citizenship reductionism. Society has shaped the lack of legal status to mean that the undocumented family is a lesser mode of being than the citizen family, with mixed status families in a nebulous in-between.

treated socially and legally. Efforts to address the lack of constitutional protections for immigrant families must also address the difficult assumptions we have about noncitizen children, the role they play vis-à-vis their noncitizen parents, and the state of judicial protection and level of scrutiny for both immigrants and children. The immigrant child is a special creature within constitutional jurisprudence, drawing from immigration, where they receive fewer protections, and from juvenile law, where they are afforded stronger due process rights. The two distinct fields and intersection between this duality reveals that immigrant children, all too often, fall through the cracks. The duality is further intersected by the citizenship mode of being, and despite the “protection” of that status, the immigration dimension frequently overrides concerns for the child. This

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138 Indeed, “critics of conferring territorial birthright citizenship are generally criticizing U.S. policy decisions directed at immigration and social services, not the children themselves.” Houston, supra note 102, at 726. The underlying problem thus becomes how to properly protect the citizenship rights of U.S.-born children while protecting the integrity of immigration laws and deterring or disincentivizing illegal entry by immigrant parents. See Patrick J. Charles, Decoding the Fourteenth Amendment’s Citizenship Clause: Unlawful Immigrants, Allegiance, Personal Subjection, and the Law, 51 WASHBURN L.J. 211, 255 (2012) (questioning the effectiveness of federal law to solve the illegal immigration dilemma and preserve political institutions). The likely response is that these laudable goals cannot be accomplished without destroying the parent-child relationship—the immigration tradition remains incompatible with juggling the rights of (citizen) immigrant juveniles, on the one hand, and rights of the nation, fellow citizens, and parents on the other. The parent-child animosity in immigration is even stronger and poses an even greater conflict of interest than can be imagined. See Linda Kelly Hill, The Right to Know Your Rights: Conflict of Interest and the Assistance of Unaccompanied Alien Children, 14 U.C. DAVIS J. JUV. L. & POL’Y 263, 302-08 (2010) (providing critique of Legal Orientation Program as conflicted).

139 But see Motomura, supra note 95, at 1626-28, who avoids this difficult question by proposing that courts need not grapple with such normative inquiries, since they nevertheless can infuse constitutional rights through procedural due process or other forms of non-substantive review.

140 The child certainly lacks agency and a voice in immigration. All the actors (scared parent, prosecutorial government, and “impartial” immigration court) seemingly should protect the child’s interest, but cannot because of a conflict of interest and diverse roles they must occupy relative to the child. This leads to “limit[ing] the use of children and their interests as organizing forces in family immigration.” Thronson, Here From Here, supra note 17, at 69.
conclusion demonstrates that federal immigration regulation is parent-focused where it should instead reflect the reality that immigrants traverse borders as families, not individuals, and that the parent’s decision to enter bears no indicia of unfitness.

Indeed, the image of the immigrant child as a ward of the state, upon exercise of citizenship to remain in the U.S., itself raises deep questions.\textsuperscript{141} Insofar as the consequences of our immigration regime tears apart immigrant families, there is an underlying problem that requires examination: the dumbing down of the concept of birthright citizenship, what I previously described as citizenship reductionism.\textsuperscript{142} In this area, it appears that birthright citizenship of immigrant minors yields to immigration policy.\textsuperscript{143} While birthright

\footnotesize{\textsuperscript{141} Schuck & Smith, supra note 124, at 4 (increase in illegal immigration and rise of the welfare state “raise profound questions about distributional justice, national autonomy, and political community in contemporary American life”).

\textsuperscript{142} The Supreme Court has read the Citizenship Clause as accepting \textit{jus soli} citizenship, first enunciated in Calvin’s Case, (1608) 77 Eng. Rep. 377 (K.B.), over \textit{jus sanguinis} citizenship arguments. United States v. Ark, 169 U.S. 649 (1898) (declaring birthright citizenship for all U.S.-born children of noncitizens, except for children of diplomats as immune from U.S. law and children of a hostile occupying force in the United States). What I imply by this concept of citizenship reductionism is that the immigrant citizen child’s rights, are—in effect—actually reduced, such that there is a devaluation of not only the right, but of the “belonging” of the citizen child as well in our nation.

\textsuperscript{143} But see Rachel E. Rosenbloom, \textit{Policing the Borders of Birthright Citizenship: Some Thoughts on the New (and Old) Restrictionism}, 51 WASHBURN L.J. 311, 313 (2012) (providing thoughtful analysis that “it has been immigration policy, not birthright citizenship, that has ultimately yielded” and which has mitigated historical effects of exclusionary and discriminatory immigration laws).

While birthright citizenship has ameliorated the effects of harsh immigration law, it has not resolved the problem of family separation espoused by immigration laws, nor do I assert that it necessarily should. Rather, what must be addressed is the broader question of whether birthright citizenship, and therefore citizen children’s rights generally, are being curtailed by the plenary power doctrine itself; it appears that they are. Citizenship arguments, as a means toward effectuating rights for immigrant children, remain extremely conflicted by the anchor baby problem and the politicized nature of the myth. But perhaps proponents of birthright citizenship, moving forward, can endorse a view that the Citizenship Clause provides an avenue for affirmative immigrant children’s rights if properly contextualized in lived family experience. We should seek to cultivate jurisprudence on citizenship that reflects the limited scope of immigrant children’s
citizenship has certainly mitigated the effects of immigration policy by conferring a status-mean for immigrant juveniles, eventually culminating in legal pathways for their immigrant parents, birthright citizenship as an inherent “benefit” for immigrant children is doubtful. The phenomenon of mixed-status families as an entity invariably compromises the benefits of citizenship possessed by individual citizens within the family unit. When one particular citizen receives a specific benefit of citizenship, such as food stamps or Medicaid, that benefit must be shared among the whole family, which means that those non-citizens too absorb the citizenship benefits. Citizenship benefits themselves are therefore dispersed and increasingly reduced, the greater the size of the family. The argument, in response, is that this reductionism of the potency of citizenship benefits for mixed-status families is but a necessary evil for the more vital ability to stay in the U.S.

rights in order to tackle much harder questions regarding the role of the immigrant child relative to adult immigrant parents.

See generally Thronson, Here from Here, supra note 17, at 79-80. To quell stereotypes that immigrants present unbearable financial drains on our resources, it is important to note that their use of federal benefits is not as extreme as public outcry suggests. The limited availability of public benefits to immigrants underscores that something more than financial impact influences American distaste toward such populations. See Kevin R. Johnson, Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class, 42 UCLA L. Rev. 1509, 1518, 1537 (1995); see also Calvo, supra note 117 (for discussion of eligibility for various benefits). What this mystical force is presents a popular topic of debate amongst scholars. Moreover, access to healthcare and other services is rarely the seminal motivation for immigration into the U.S. Rather, many immigrants desire work and do not, at least consciously, expect to present themselves as public charges—job prospects, income, and family unity are the primary justifications for the increase in legal (and illegal) immigration. See WAYNE A. CORNELIUS, THE FUTURE OF MEXICAN IMMIGRANTS IN CALIFORNIA: A NEW PERSPECTIVE FOR PUBLIC POLICY 47 (1981); RAFAEL ALARCON, PROPOSITION 187: AN EFFECTIVE MEASURE TO DETER UNDOCUMENTED MIGRATION TO CALIFORNIA? 14-23 (1994); see also MICHAEL FIX & JEFFREY S. PASSEL, IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT 3-6 (1994) (for view that immigrants present a positive financial impact); Richard A. Boswell, Restrictions on Noncitizens’ Access to Public Benefits: Flawed Premise, Unnecessary Response, 42 UCLA L. Rev. 1475 (1995); Stephen H. Legomsky, Immigration, Federalism, and the Welfare State, 42 UCLA L. Rev. 1453 (1995).
To be fair, it is accurate to say “marginalizing parents inevitably results in marginalizing children,” just as it may hurt to deny benefits to a citizen child. The impact of any such denial reverberates throughout the family unit. But what citizenship reductionism illustrates is that marginalizing children, often the legal status holders in mixed-status households, unquestionably produces grave consequences not only for the welfare of the family unit, but disgraces the esteem of citizenship itself. Mixed-status families have complex needs and each citizen person in the household suffers from their non-citizen parents or siblings. When it becomes too burdensome to obtain citizenship, where juxtaposed with the reciprocal rights one receives from the status, not only is citizenship objectified as a scarce commodity, its elusive nature makes it not worth the investment and further suffers from reductionism. Ever clear is that the difficulties of mixed-status families are reflections of the inability of children to navigate the immigration laws and of the family unit to be a focal point in framing the petition-based system.

Undeniably, a rights-based language for citizenship would help define the tension that exists between the government and citizen polity and could accentuate the primary inquiry involved for any rights-conferring status: whether citizenship—a status of constitutional and social magnitude—can truly be bestowed at birth when government, courts, and institutions restrict the right to what is, in effect, a privilege and license. The Constitution will act as a mere linguistic assurance of U.S.-born immigrant children’s second-rate status, unless these children are afforded the protection given to “American” citizens. The Citizenship Clause, then, is not the strongest means for political incorporation and integration. While the citizenship “right” may appear to confer outsiders a place in our national community, unless we discern the substantive meaning of citizenship, there will be considerable agitation as to whether being a citizen should automatically entail additional rights and what the scope of such rights should be. Thus, the national community so

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145 See Adler, supra note 82, 24 n. 187. The formation of any citizenship language is an ongoing dialogue that tends to escape definition. Indeed, “it is difficult to describe the precise nature of the relationship between the theoretical and policy levels of discourse.” Id.
vehemently debates to whom citizenship should extend because what is truly at issue is not simply who enters our “community,” but who can access the panoply of rights and benefits that follow once legal status is acquired.

V. UNDERSTANDING THE FACE OF BIRTHRIGHT CITIZENSHIP: HOW THE IMMIGRANT CHILD HAS BECOME THE “ILLEGAL CITIZEN”

Perhaps the most illuminating aspect to citizenship discourse is that the Constitution provides a minimalist reading into what qualifies someone as a citizen. Put differently, what is most meaningful is that the Constitution fails to specify criteria for citizenship. While the birth and jurisdictional qualifications undoubtedly narrow the scope of eligible persons, the document is void of what qualities or requirements citizens of the U.S. should possess. As the Citizenship Clause was intended to overcome the troubling Dred Scott decision, it is possible that the lack of citizenship criteria represented the Framers’ intent against a consent or allegiance-based citizenship system, and towards a more inclusive understanding. If allegiance or consent were to be expected from new citizens, some indication in the Constitution would have addressed possible procedures or prerequisites to such induction into the national community.

146 See Saenz v. Roe, 526 U.S. 489, 502-03 n. 15 (1999); see also Rogers v. Bellei, 401 U.S. 815, 835 (1971) (noting that where citizenship is obtained by birth, “Congress has no ‘power, express or implied, to take away an American citizen’s citizenship without his assent.’” (quoting Afroyim v. Rusk, 387 U.S. 253, 257 (1967))); see also Rusk, 387 U.S. at 263 (1967) (describing framers “wanted to put citizenship beyond the power of any government unit to destroy”); J.M. Balkin, The Constitution of Status, 106 Yale L.J. 2313, 2347 (1997) (“The citizenship clause is a second Declaration of Independence, announcing that equal citizenship would henceforth be available to all regardless of race or prior condition of servitude.”); James C. Ho, Defining “American”: Birthright Citizenship and the Original Understanding of the Fourteenth Amendment, 9 Green Bag 367, 369 (2006) (Citizenship Clause was enacted to “overrule Dred Scott and elevate jus soli to the level of constitutional law.”).
A conferral of naturalization power to Congress hardly seems a sufficient justification for this constitutional vacuum.

That Congress itself has a naturalization power may imply that under naturalization, but not citizenship, is where such criteria and national elitism play themselves out. That there exists a Congressional naturalization authority, but not a Congressional citizenship one, instructs that one must certainly differ from the other—that it is upon naturalization that the nation can become selective of whom joins and is incorporated as American.\textsuperscript{147} The uniform rule of naturalization, thus, functions as a uniform rule of disqualification in effect. By imposing—at the moment of transition—what requirements or conditions precedent we wish to impose on potential citizens, we are defining for ourselves through the qualities we believe are valuable for members of our community to possess. It is the uniform rule of disqualification, then, to which restrictionism should adhere, and such restrictionism should not be present in citizenship discourse through volatile criticisms of jus soli citizenship. Despite these observations, the argument for ideological exclusion of immigrant children from the national community has always been a much harder one to make.\textsuperscript{148}

To fully understand the gravity of the illegal immigration debacle, it is essential to note that the debate surrounding the issue has taken form through state legislation, culminating in the challenge in \textit{Arizona v. United States},\textsuperscript{149} and federal legislation as well.\textsuperscript{150} The

\textsuperscript{147} See W. Aaron Vandiver, Comment, Checking Ideas at the Border: Evaluating the Possible Renewal of Ideological Exclusions, 55 \textit{EMORY L.J.} 751 (2006) (for discussion of the national self-definition process through exclusion based on ideologies as resurrected after the War on Terror); see also Susan M. Akram, Scheherazade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion, 14 \textit{GEO. IMMIGR. L.J.} 51 (1999); Philip Monrad, Ideological Exclusion, Plenary Power, and the P.L.O., 77 \textit{CALIF. L. REV.} 831 (1989); Stephen R. Shapiro, Ideological Exclusions: Closing the Border to Political Dissidents, 100 \textit{HARV. L. REV.} 930 (1987).

\textsuperscript{148} This is so given that their U.S.-born identities cement a minimal level of due process and equal protection, as a result of being both child and citizen. Exclusion based on ideologies for the special group of children frequently offsets other negative contingencies, such as immigration status. Shapiro, \textit{supra} note 53.

\textsuperscript{149} 132 S. Ct. 2492 (2012).
increased legislative attention given the Citizenship Clause has focused on four positions: 1) whether amending the Constitution to reflect *jus sanguinis* citizenship is preferable to *jus soli* citizenship,\(^{151}\) 2) whether altering the existing jurisprudential interpretation of the Clause away from *jus soli* is appropriate,\(^{152}\) 3) whether a child’s abil-


\(^{152}\) Professor Ragini Shah is just one of many supporters of *jus soli* citizenship, but she argues that acceptance of *jus soli* itself is integral to the child’s development, since the youth’s attachment to place of residence and geography is essential to formation of identities. See Ragini Shah, *Sharing The American Dream: Towards Formalizing the Status of Long-Term Resident Undocumented Children in the United States*, 39 COLUM. HUM. RTS. L. REV. 637, 665-670 (2008).

The legality of the proposed federal legislation has been criticized as violative of the Citizenship Clause’s intent, of preemption, of Supreme Court judicial history, and of the core belief in equality of opportunity. See William Bingle, *Note, Birthright Citizenship: Misguided Calls for Reform*, 43 U. TOL. L. REV. 669, 685-93 (2012); see also *Legislation Denying Citizenship at Birth to Certain Children Born in the United States: Statement before the H. Comm. on the Judiciary, Subcomm. on Immigration and Claims*, 104th Cong. (1995) (statement of Walter Dellinger, Assistant Att’y Gen., Office of Legal Counsel, U.S. Dept. of Justice), available at [http://www.justice.gov/sites/default/files/olc/opinions/1995/12/31/olc-v019-p0340.pdf](http://www.justice.gov/sites/default/files/olc/opinions/1995/12/31/olc-v019-p0340.pdf) (“[B]ecause the rule of citizenship acquired by birth within the United States is the law of the Constitution, it cannot be changed through legislation, but only by amending the Constitution. A bill... that purports to deny citizenship by birth to persons born within the jurisdiction of this country is unconstitutional on its face...[t]o adopt such an amendment would not be technically unlawful, but would flatly contradict our constitutional history and our constitutional traditions.”); *Houston*, supra note 102, at 724-29 (for argument that federal legislation limiting children’s citizenship to that of parents constitutes de facto amendment of the Constitution and therefore violates § 5 enforcement power of the Fourteenth Amendment).
ity to petition, even at the age of twenty-one, for the parents’ legal status is a proper “benefit” of citizenship, and what should be said about attendant benefits,\(^{153}\) and 4) whether displacing birthright citizenship with a different system would undermine notions of fundamental fairness to children or create a secondary caste of citizens less deserving of full constitutional protections.\(^{154}\) These four broad

Generally, arguments debating the proper interpretation of the Citizenship Clause have fallen on the question of how “subject to the jurisdiction thereof” should be read. Some assert that this phrase requires excluding foreign nationals because they maintain ties and allegiance to their nation, not necessarily to the U.S. The Supreme Court’s current reading, by contrast, supports that being born on U.S. soil is in-itself sufficient to establish “subject to the jurisdiction” of the U.S. United States v. Ark, 169 U.S. 649, 653 (1898). Yet, many scholars have argued that *Wong Kim Ark* is not dispositive of the citizenship question because that case concerned the children born to lawful residents, therefore raising the ever popular consent-based theories of citizenship and whether illegal aliens really are subject to U.S. jurisdiction when they are also citizens of other countries. See Katherine Pettit, *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, 268 (2006); Dan Stein & John Bauer, *Interpreting the 14th Amendment: Automatic Citizenship for Children of Illegal Immigrants*, 7 STAN. L. & POL’Y REV. 127, 130 (1996). These scholars are not without constitutional support in their opinion that jus soli citizenship remains fragile and that birthright citizenship may be inapposite to the original intent of the Citizenship Clause. See *Elk v. Wilkins*, 112 U.S. 94, 99 (1884); *United States v. Cruikshank*, 92 U.S. 542, 549 (1875); see also *Minor v. Happersett*, 88 U.S. 162, 167-68 (1874) (cases raising specter of uncertainty as to whether children born in the U.S. to noncitizen parents are themselves citizens); see also Drimmer, *supra* note 116, at 671.

\(^{153}\) Parents can petition for their children under immigration law. The same ability does not extend to children who must wait until they turn twenty-one to petition. Only when these children are no longer “children” can they ultimately employ the immigration laws to unify with family. See 8 U.S.C. § 1151(b)(2)(A)(i) (2012). Further, under § 1153(d), a child entering the U.S. does not extend derivative status to that child’s other parent or siblings. See 8 U.S.C. § 1153(d) (2012).

\(^{154}\) The Fourteenth Amendment’s mandate of “[a]ll persons” demonstrates an intent to be inclusive, as it stated “strongly and unequivocally that there is only one class of United States citizens.” Rebecca Zietlow, *Congressional Enforcement of Civil Rights and John Bingham’s Theory of Citizenship*, 36 AKRON L. REV. 717, 730-31 (2003); Barnhart, supra note 126, at 559 (“The benefit of jus soli is that the United States will continue to have no caste of hereditary aliens, which is consistent with the intent of the framers. By eliminating the “second generation problem” for
overviews of prevailing citizenship discourse fail to reach the core issue: the need to address how the citizenship modality intersects with being a child, an immigrant, and in a family.

The first two positions regarding constitutional amendment or current interpretation of the Citizenship Clause have been discussed in detail and I need not reiterate the strong arguments on both sides.\footnote{See Houston, supra note 102. But the Supreme Court has yet to specifically answer if the Fourteenth Amendment applies to children of undocumented immigrants. See Barnhart, supra note 126, at 556; Edward Erler, Citizenship, in THE HERITAGE GUIDE TO THE CONSTITUTION 384, 384 (Edwin Meese III et al. eds., 2005) (observing that Senator Trumball’s comments that American Indians’ preserve allegiance to their tribes and remain sovereign entities necessitated exclusion from the benefit of Fourteenth Amendment citizenship). Plyler v. Doe remains the Court’s seminal opinion on undocumented children and has been severely criticized as results-oriented and devoid of future application or litigious value.} Rather, I wish to focus on the third and fourth points, which garner less attention from both policy makers and scholars. Anchor baby rhetoric continually emphasizes how adult illegal aliens traverse the immigration laws by circumventing restrictions through their U.S.-born children.\footnote{See Natalie Smith, Developments in the Legislative Branch, 20 GEO. IMMIGR. L.J. 325, 327 (2006) (quoting Proceedings, Third Conference on Nationality, Eur. Parl. Ass. (Oct. 11-12, 2004)) (“undocumented aliens and their progeny represent a net expense to society, that they dilute the traditional ethnicity, that they foster disrespect for the law, and that they provide an incentive to avoid normal immigration procedures.”) (internal quotation marks omitted).} Opponents of current immigration laws do not appreciate that immigrant children have the ability to petition for their parents, not that they harbor particular ill will toward immigrant children generally. However, the fact that these children must wait until the age of twenty-one, before the petitioning process can begin, contradicts the rhetoric that anchor babies can immediately chain migrate their parents into the U.S. Indeed, “[c]ontrary to popular myth, current immigration law does not provide an avenue to legal immigration status for any person willing to wait long enough
in some mythical line. What this shows, however, is that opponents of birthright citizenship truly disagree with this petitioning ability itself: that even at the age of twenty-one, children of undocumented parents nonetheless do not deserve to have the family structure preserved. For these opponents, imputed transfer of status is the golden rule and petitioning ability is the straw that breaks the camel’s back.

Proponents of analyzing birthright citizenship’s impact on children from the third and fourth standpoints observe that \textit{jus soli} citizenship has alleviated harsh consequences of restrictionism and comport with increased protection generally afforded children, as a vulnerable group, and with our moral obligations as a nation. This contingency of scholars is substantial and this argument is certainly at least intuitively appealing. But morality rarely plays a large role when distributional justice and allocation of resources demand attention to those legally permissible within our borders. To be fair, there is certainly some appeal in creating constitutional clarity by simply divesting immigrant children of the benefits of the Citizenship Clause, and therefore, creating a uniform rule that immigrant children do not deserve the heightened protection traditionally afforded citizens. The state of alienage law is certainly unpredictable and in disarray; for a pro-alien decision, it frequently appears that courts balance random contingencies, most critically being the longstanding ties, commitment to the community, and general worthiness of the person to whom the positive grant is to be exercised. A uniform rule of disqualification would solve the problem of this functional deprivation of children’s citizenship right to remain in the U.S., as court reasoning—that the citizen child’s right to stay is not

\begin{footnotesize}

\footnotetext{157}{Thronson, \textit{Of Boarders and Best Interest}, supra note 72, at 51; \textit{see also} Stief, \textit{supra} note 11, at 487-88.}

\footnotetext{158}{\textit{See} Plyler v. Doe, 457 U.S. 202, 224-25 (1981) (describing children as morally blameless and innocent); Korematsu v. United States, 323 U.S. 214, 243 (1944) (Jackson, J., dissenting) (“if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. Even if all of one’s antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him...”).}

\end{footnotesize}
extinguished upon removal—is disconcerting and remains unconvincing.

A crucial observation by Professor Rosenbloom illuminates the more fundamental reason for the core problem of family separation: “tensions between the closed borders of immigration law and the open borders of birthright citizenship.” 159 It becomes clear that more discussion of birthright citizenship and its attendant benefits, that is, a focus on the third standpoint, or what I label the citizen-benefits question, can be helpful in eliminating the creation of mixed-status families as well as illuminating solutions to the impact parental deportation has on immigrant family structure. The focus and shift in framework toward addressing the “unintended consequences of restrictive immigration laws and heightened border enforcement” would do well for immigrant families than any isolated focus on merely restrictive immigration laws or border enforcement alone. This two-pronged approach best serves to nuance and contextualize the highly complicated and particular circumstances motivating illegal immigration and the face of immigration once within the border. The tension between closed borders and open citizenship begs the question of where children and families fall within that interplay. It is evident that families ultimately are trapped between these diametric forces. The resulting carnage on the immigrant family itself—a manifestation of citizenship reductionism—may be remedied by a proper family-centered citizenship discourse.

VI. CONSTRUCTING A PROPER FRAMEWORK TO EXAMINE THE IMMIGRANT CHILD

The debate between whether parental or children’s rights should govern and the argument for which normative framework best protects the child remains difficult to reconcile. Indeed, in the juvenile law context, fierce advocates for each framework present strong arguments for why their respective standard best protects the child’s needs and well-being. For the immigrant child stuck between two worlds, there may be situations where a parental rights standard is preferable to a best interests standard, and vice versa. As Professor Marcia Zug has argued, “in the context of undocumented immigrant families, a parental rights approach is

162 As both a child and an immigrant, the immigrant child possessing birthright citizenship can be said to exist in three worlds, not two: existing as child, immigrant, and as citizen. This third definitional category combined with the first should lead courts to offer stronger constitutional protections than it has. Rather, courts have relegated the case of immigrant children to being secondary citizens, despite having proper legal status, because of their immigrant parents. Where many scholars have focused on analyzing the intersectionality of child and immigrant, few articles have addressed the intersection of all three identities. See David B. Thronson, Entering the Mainstream: Making Children Matter in Immigration Law, 38 FORDHAM URB. L.J. 393, 402 (2010) [hereinafter Thronson, Entering the Mainstream] (“Rather, courts have relegated the case of U.S.-born immigrant children to being secondary citizens, despite having proper legal status, because of their undocumented parents.”); see also Newman, Birthright Citizenship, supra note 14, at 440 (describing children of undocumented immigrants as the most vulnerable group because of the fear against illegal immigration and their illegal parents) (citing NEUMAN, STRANGERS TO THE CONSTITUTION, supra note 85, at 178).
appropriate before deportation, but once a child’s parents have been deported, reunification and termination decisions must be made under a best-interest-of-the-child standard. This dual acceptance of both standards for an immigrant family, according to Zug, provides the proper balance: a parental rights standard permits parents to care for and maintain contact with their children, thus providing a normal parent-child relationship, and the best interest of the child standard provides the ideal framework to argue in a removal proceeding that the child would suffer extreme and unusual hardship if the parent is removed from the U.S.

A rigid either-or standard simply would not protect the immigrant juvenile in all circumstances. Both standards have their place and a flexible dual approach offers the strongest protections for not only protecting the rights of the child, but honoring the integrity and interests of the family unit as an entity itself. Immigration law has not developed to accommodate the increasingly discernible role the family unit plays—most people do not cross the border to establish a life divorced from their family. Rather, families themselves immigrate and our immigration system, whether during the visa petitioning process or the removal proceeding, has adjusted neither to that reality nor the problems that arise from family-oriented immigrations, such as the mixed-status family phenomenon. The question is not whether to advance parental interests over children’s interests or whether prioritizing certain institutional actors as child-agents best preserves child autonomy or parental freedom to “rear their own children.” Rather, the primary inquiry must be what best preserves family unity during the parent-child relationship.

163 Zug, supra note 135, at 1182.
164 Id.
165 Id. (“parental rights and children’s rights can and must coexist”).
166 Simply put, while immigration laws incorporate family-based petitions and direct sponsorship of certain members, that approach to physical admission into the U.S. fails to respect the value of the family as a unit. See Thronson, Here from Here, supra note 17, at 61-66.
167 See Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (among the liberty interests protected by the due process clause is the right to “establish a home and bring up children,… [which is] essential to the orderly pursuit of happiness by free men.”).
as well as keeps the family within the U.S.\textsuperscript{168} Fulfilling these conflicting goals requires an exhaustive review of how our immigration machine perpetuates family dissolution and the development of more creative solutions to resolving these difficulties.

The painstaking difference is clear: non-citizen juveniles must account for a possibility of removal that their citizen non-immigrant counterparts need not worry about.\textsuperscript{169} The interplay of their own lack of legal status (if an unaccompanied minor) or possession thereof (for native-born citizen children) and their parents’ immigration status therefore is of paramount concern—it is yet another contingency that complicates the question of what needs undocumented children have.\textsuperscript{170} While a fit parent has a right to a

\textsuperscript{168} The centrality of the family unit reverberates in international law: “family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) at 16(3) (Dec. 10, 1948); Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force 3 Dec. 1953); International Covenant on Civil and Political Rights art. 23(1), Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social, and Cultural Rights art. 10(1), Dec. 16, 1966, 993 U.N.T.S. 3 (“The widest possible protection and assistance should be accorded the family, which is the natural and fundamental group unit of society...”). U.S. immigration law should seek to respect the family unit, as it currently separates members. Perhaps, immigration petitioning should be family unit-based rather than individual petitioner-based in order to curtail piecemeal immigration of families one member at a time. Immigration laws already have a reputation as federal family law. See Thronson, Custody and Contradictions, \textit{supra} note 61, at 509-13; Thronson, \textit{Here from Here}, \textit{supra} note 17, at 59 (“Through immigration laws, the government directly and inevitably impacts decisions by immigrant families about where and with whom they live, sanctioning some choices and prohibiting others...[t]he application of immigration law routinely conflicts with private decisions about family composition and integrity, and in turn family decisions regarding where to live routinely result in the circumvention of immigration provisions.”).

\textsuperscript{169} This is because core juvenile law cases do not hold sway when plenary power influences and abrogates traditionally convincing Constitutional protections in the domestic juvenile law context. Instead, plenary power cases subsume the generally child-friendly juvenile common law. See Zug, \textit{supra} note 135, at 1179-80.

\textsuperscript{170} In addition to the basic needs that any child will have, immigrant children also have needs, and the state has an interest, in teaching the fundamental values of democratic society and keeping children connected to America, the latter being an
parent-child relationship, it is troubling to hold that the child has no similar right to a parent-child relationship if we are to truly arrive at a children’s rights/full agency framework. Yet this is sensible, as society does not desire that children have the determinative or ultimate decision regarding the identity of their caretakers, especially due to their age, decision-making capacity, and the possible unfitness of the parents themselves. It is evident that for children to have this right flowing reciprocally back to the parent, that is, to possess a parent-child relationship as well, the concept of citizenship must retain the immigrant child’s ability to petition. Put another way, the petitioning ability must continue to be a “proper benefit” of citizenship.

But even this point raises a fundamental difficulty: we want to protect immigrant child-citizens’ rights to reside in the U.S. but to do so an appropriate caretaker must care for the child. We must account for the fact that he or she is still a child and the person usually fit to care for that child is determined by our immigration laws to be unfit parents upon prolonged detention, and that subjecting the immigrant child to foster care undermines the family structure. These are incredibly sophisticated questions and this article only proposes a starting-point to launch such discussion.

More on point, however, is that status explains the removal of immigrant children from any parental structure, and the detention system provides no viable avenues to maintain a normal parent-child relationship during that time. Since immigration detention is likely to continue, there must be concessions to accommodate this deprivation of parental rights and its analog, the deprivation of the citizen immigrant child’s interest in a relationship with his or her parents. The government’s strong interest in reducing illegal entry should not be able to outweigh the immigrant child’s interest in maintaining normal family structure while in the U.S. The government may have a compelling interest in deterring illegal immigration and in deporting those already inside, but that rationale founders in substantiating deterioration of parent-child normalcy once family relations are established. An immigrant child whose parent is in civil even stronger state interest when the child is also a native born citizen. Id. at 1147-53.
immigration detention should have the ability to have contact with his or her parents and to maintain as ordinary a parent-child relationship as possible.\textsuperscript{171} This is the least we can do, for if our intent is to only punish parents for their illegal entry, then why likewise punish the immigrant child by forbidding parental contact?\textsuperscript{172} Detention should only serve to punish the duplicitous adult, and because of that principal proposition, the collateral effect of denying a parent-child relationship is bizarre and anathema to fundamental principles of fairness and justice.

\textbf{CONCLUSION}

The division between undocumented children and citizen children is a fine one: the only difference is legal status—all other

\textsuperscript{171} Rather, the narrative demonstrates that meaningful parenting cannot occur when the parent is incarcerated and that a prison sentence severs the parent-child bond. See Carla Elizabeth Weir Simons, CAL. RESEARCH BUREAU, CALIFORNIA LAW AND THE CHILDREN OF PRISONERS 3 (2003) (describing current law as creating a “commit a crime and lose your child policy”); Gentry, supra note 79, at 38.

\textsuperscript{172} Disrupting the parent-child relationship through the parent’s detention subjects tremendous psychological and emotional trauma on the immigrant child. See Kennedy, supra note 11, at 84-95 (for research on the impact of incarceration on children, family, and parents); Tanya Krupat, INVISIBILITY AND CHILDREN’S RIGHTS: THE CONSEQUENCES OF PARENTAL INCARCERATION, 29 WOMEN’S RTS. L. REP. 39, 40 (2007); Joseph Murray & David P. Farrington, THE EFFECTS OF PARENTAL IMPRISONMENT ON CHILDREN, 37 CRIME & JUST. 133, 172 (2008). Ironically, the ASFA, enacted to preserve family reunification through expeditious termination hearings, has had the reverse effect for immigrant families. This demonstrates that what is family law is “American” family law; that is, the immigrant family as an entity is not one that deserves protection. The immigrant family is rather an anomaly in family law, their mixed status rendering the unit unstable. The traditional “family” in immigration law is a fractured one. The traditional understanding of family does not incorporate the contingency of legal status and how that status disrupts or alters what the family should look like, how it functions, is treated, or torn apart. See Anne R. Appell, Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System, 48 S.C. L. REV. 577, 579 (1997) (observing that the “’othering’ of poor families, particular when they are of color, makes it easy for the dominant culture to devalue them to view them as dysfunctional and not families at all.”); see also Twila L. Perry, Family Values, Race, Feminism and Public Policy, 36 SANTA CLARA L. REV. 345 (1996) (discussing the impact of racism and sexism’s confluence on family law).
needs remain identical and possibly heightened for the case of undocumented children. Their lack of immigration status their parents’ separate immigration status and becomes a troubling consideration for many social agencies that desires to protect children. Furthermore, it is essential to emphasize the continuing validity of citizenship despite my professed critiques that it suffers from reductionism and an identity crisis. These deficiencies can be salvaged if citizenship discourse adapts to define its substantive meaning, and tackles the permanent question of citizen-benefits and the need for contextualization in the family unit.

Limiting birthright citizenship is therefore not the answer. Moreover, such a creation of an underclass of undocumented, without-status children would only serve to impede their integration into the U.S. political economy and coerce them into frustrated households where all members lack status. These immigrants, children-included, would fail to develop allegiances necessary for citizens to become productive contributors to American society. It is unlikely that restricting or abolishing birthright citizenship would deter illegal immigration. Employment opportunities, even without the possibility of having a U.S.-born citizen child, continue to serve as a catalyst for immigrants’ entry into the U.S., not their desire to leech off public assistance. Moreover, the need to escape persecution continues to factor into the choice to breach the border, such that any limitations would do little to prevent undesired immigration. We would, through any restriction on jus soli citizenship, be punishing the immigrant children while providing little actual effect on the immigration “invasion.”

As we dampen children’s rights, we

functionally allow plenary immigration power to muddle the distinction between domestic juvenile law and federal immigration law. There must be the recognition that meaningful child participation in the remedies and structures of the immigration laws is essential to acknowledgment of the child immigrant as a non-derivative human being with substantive and enforceable rights. Perhaps, someday, our language for citizenship will evolve to keep pace with the changing face of immigration within our borders.

It appears that the numbers of illegal entrants is decreasing for the past three years. Any “invasion” is certain hyperbole.