PROTECTING OUR VULNERABLE CITIZENS: BIRTHRIGHT CITIZENSHIP AND THE CALL FOR RECOGNITION OF CONSTRUCTIVE DEPORTATION

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I. INTRODUCTION

A problem exists when a woman comes to the United States illegally and has a child. The child, by virtue of its birth within the border of the United States, automatically becomes a United States citizen. This creates a "mixed-status" family, where citizens and illegal aliens combine to create a family unit. Nearly one out of every ten families constitutes a mixed-status family.[1] Eighty-five percent of immigrant families are comprised of U.S. citizen children.[2]

Situations such as these can lead to what the courts refer to as constructive deportation. Constructive deportation occurs where the deportation of an illegal alien effectively causes the deportation of an American citizen.[3] For example, when a child is born in the United States, he becomes a citizen of the United States, not subject to deportation. Yet, when their parents are deported from the country and take these citizen children, it effectively results in the deportation of the citizen. This topic is important because, as the statistics above illustrate, this is a problem that could face many families who have made homes in the United States. These families fear opening their mail to find an impending deportation hearing notice that could

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1. MICHAEL FIX & WENDY ZIMMERMAN, ALL UNDER ONE ROOF: MIXED-STATUS FAMILIES IN AN ERA OF REFORM (The Urban Inst. 1999), pdf available at http://www.urban.org/ UploadedPDF /409100.pdf (last visited Apr. 19, 2007). *See also* Molly H. Sutter, *Mixed-Status Families and Broken Homes: The Clash Between the U.S. Hardship Standard in Cancellation of Removal Proceedings and International Law*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 783, 785 (2006).
2. Kaiser Commission, Key Facts on Medicaid and the Uninsured, available at http://www.kff.org/uninsured/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=22152 (last visited Apr. 19, 2007).
3. *See* Oforji v. Ashcroft, 354 F.3d 609 (7th Cir. 2003) (arguing constructive deportation). *See also* Coleman v. United States, 454 F. Supp. 2d 757 (N.D. Ill. 2006) (arguing constructive deportation).

tear their family apart. There could be many parents who are forced to decide the fate of their citizen child.

The core of this article deals with the ramifications and justifications of constructive deportation. Section II will give the law and reasoning behind birthright citizenship. This section is needed to highlight why the constructive deportation of children is a problem and to give an overview of the law so the reader can understand the discussion of constructive deportation. Section III of the article will discuss the law behind constructive deportation. Section IV will give an analysis of constructive deportation and explains why courts should recognize the deportation of illegal alien parents of citizen children as constructive deportation of citizen children. Finally, section V of this article will give this author's ideas for a possible solution that would address concerns of scholars from both camps. This solution includes allowing the parent to stay in the country until the child is of age of majority, then deporting the parent without any possibility for citizenship.

II. BIRTHRIGHT CITIZENSHIP

Courts have widely recognized that an individual can become a citizen in one of three ways: (1) birth, (2) blood, or (3) naturalization.[4] Although extensive literature exists regarding the various ways of obtaining citizenship by blood, the main method covered in this article is birthright citizenship. Birthright citizenship is the conferring of citizenship on a child who is born in the United States. Scholars have debated the applicability of birthright citizen, or "jus soli," to children born in the U.S. to illegal aliens. Scholars for and against birthright citizenship have argued about whether birthright citizenship should be repealed as it applies to these children. Despite the amount of debate, the Supreme Court has never taken a case dealing with the issue of citizenship for children born to illegal aliens.[5] Because birthright citizenship is founded in the Citizenship Clause of the Fourteenth Amendment of the Constitution, the Court is unlikely to hear a case dealing with the issue.[6] Also, the Court may never hear a case about this topic due to the plenary

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4. *See* United States v. Wong Kim Ark, 169 U.S. 649, 702 (1898); Miller v. Albright, 523 U.S. 420, 423–24 (1998); Scales v. Immigration and Naturalization Serv., 232 F.3d 1159, 1164 (9th Cir. 2000).

5. 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). Although the Court has never answered the question as it pertains to children of illegal aliens, it did answer the question as it pertains to children born to permanent residence who were legally in the country at the time of his birth. *Wong Kim Ark*, 169 U.S. at 651.

6. U.S. CONST. amend. XIV, § 1.

power of Congress to deal with issues of immigration.[7] The Supreme Court will likely only decide the issues if future legislation is questioned.[8]

A. Fourteenth Amendment and Judicial Support for Birthright Citizenship

The first formal definition of citizenship for persons born within the United States was created by the 1866 Civil Rights Act ("CRA").[9] The 1866 CRA was not predicated on immigration grounds; it was based on the rights of former slaves to have full citizenship benefits.[10] The debate of the Congress was aimed at the discrimination toward former slaves after slavery was abolished by a Constitutional amendment.[11] The remarks of Senator Trumbull, who introduced the bill, state that the purpose of the amendment was to confer citizenship of slaves who were born in the country.[12] The final version of the 1866 Civil Rights Act stated, "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby . . . citizens of the United States."[13]

The Citizenship Clause of the Fourteenth Amendment was modeled after the 1866 Civil Rights Act.[14] It states "[a]ll persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[15] The only difference between the CRA and the Fourteenth Amendment was a phrase substitution, in which "subject to the jurisdiction of the United States" replaced "not subject to any foreign power."[16] Many scholars believe the citizenship clause of the Fourteenth Amendment confers citizenship on an individual who is born in the United

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7. *See* Kif Augustine-Adams, *The Plenary Power Doctrine After September 11,* 38 U.C. DAVIS L. REV. 701, 702 (2005). The power that Congress has over issues of immigration is far greater than the power of the courts to deal with the same issues.
8. *See* Margaret Graham Tebo, *Who's a Citizen?: Immigration Reformists Want to Deny Citizenship to "Anchor Babies"*, A.B.A. J. Jan. 2007, at 32–33.
9. Dan Stein & Jon Bauer, *Interpreting the 14th Amendment: Automatic Citizenship for Children of Illegal Immigrants*?, 7 STAN. L. POL'Y REV. 127, 129 (1996).
10. *See* CONG. GLOBE, 39th Cong., 1st Sess. 474–81 (1866). *See also* Michael R.W. Houston, *Birthright Citizenship in the United Kingdom and the United States: A Comparative Analysis of the Common Law Basis for Granting Citizenship to Children Born of Illegal Immigrants*, 33 VAND. J. TRANSNAT'L L. 693,709 (2000).
11. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).
12. CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866). *See* Houston, *supra* note 10, at 709.
13. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1981 (2000)).
14. Pettit, *supra* note 5, at 269.
15. U.S. CONST. amend. XIV, § 1.
16. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1981 (2000)); U.S. CONST. amend. XIV, § 1. *See* Stein & Bauer, *supra* note 9, at 129.

States. The Court has interpreted this phrase to confer citizenship on the child born within the United States regardless of the parents' citizenship status or the legality of the parent's presence in the country.[17] Commentators have found the intent of birthright citizenship in the remarks of Senator Howard, who introduced the amendment. Senator Howard stated that the amendment reiterates that "every person born within the limits of the United States and subject to their jurisdiction" will be considered a United States citizen.[18] These statements have been the guide points for the interpretation for the Citizenship Clause of the Fourteenth Amendment.[19]

The United States Supreme Court addressed the question of birthright citizenship under the Fourteenth Amendment in the landmark case, *United States v. Wong Kim Ark*.[20] In *Wong Kim Ark*, the plaintiff was born to Chinese nationals who were permanent residents of the United States and legally in the country, but who were not citizens.[21] The plaintiff left the country to spend time in China, and when he attempted to re-enter the country, he was denied his application for reentry by the collector of customs because he was not an American citizen.[22] Delivering the opinion for the Court, Justice Gray addressed the issue of whether Wong Kim Ark was a citizen by birth despite the fact his parents were ineligible for citizenship and still owed their allegiance to the Emperor of China.[23] The Supreme Court held that Wong Kim Ark was a citizen by virtue of jus soli, or birthright citizenship.[24] The Court stated, "[t]he child born of alien parents in the United States is held to be a citizen thereof, and to be subject to the duties with regard to this country which do not attach to the father."[25] One can interpret this to mean that the child can become a citizen of the country, even if the parent is not, thus conferring citizenship on the child.

The Court was required to examine the common law to determine the meaning of the Citizenship Clause.[26] In regards to the history of citizenship,

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17. United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898).
18. CONG. GLOBE, 39th Cong., 1st Sess., 2545, 2890 (1866).
19. *See Wong Kim Ark*, 169 U.S. at 698. *See* Afroyim v. Rusk, 387 U.S. 253, 285 (1967) (Harlan, J., dissenting) (disagreeing with the majority which ruled that the government cannot take away citizenship from a person who votes in a foreign election).
20. This case dealt with parents who, although not citizens, were in the country legally. *Id.* at 651. It did not deal with parents who were in the country illegally. *Id.*
21. *Wong Kim Ark*, 169 U.S. at 651.
22. *Id.*
23. *Id.* at 653.
24. *Id.* at 704.
25. *Id.* at 691.
26. *Id.* at 655. Most of the law which the Court used as guidance in deciding the issue was English law. *Id*. The Court declared they needed to refer to English common law for guidance due to the lack of common law within the United States at the time of the decision. *Id*. The country was young and

the Court examined the English common law and noted that "birth within the allegiance of the king" conferred citizenship on a person and was "not restricted to natural-born subjects or those who had taken an oath of allegiance."[27] The Court stated that the rule of England was that aliens who were in the country were within the jurisdiction of the king, and thus, citizens of England upon birth regardless of the citizenship of their parents.[28]

The Supreme Court examined the history of English common law and the history of citizenship in the colonies prior to, and subsequent to, the signing of the Declaration of Independence.[29] It found that most government and court decisions ruled that birth in the United States conferred citizenship.[30] The Court reasoned that the Citizenship Clause put to rest any questions about birthright citizenship.[31] The most powerful reasoning the Court gave was the effect repealing birthright citizenship would have on many different persons:

> To hold that the fourteenth amendment of the constitution excludes from citizenship the children born in the United States of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United states.[32]

By not allowing birthright citizenship, the court reasoned, many person who are citizens and who have made this country what it is would not be considered citizens.

Two exceptions to birthright citizenship exist. They include (1) children who are born to foreign enemies who are in the country for hostile reasons and (2) children who are born to foreign diplomats or ministers.[33] According to the Court in *Wong Kim Ark*, these same exceptions are found in the common

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the laws of the country were based off those of Great Britain. *See id.* at 654–658.

27. *Id*. (citing Calvin's Case, 7 Coke 1, 4b–6a, 18a, 18b, 77 Eng. Rep. 377, (H.L. 1608)).
28. *Id.* at 658 (citing Udny v. Udny, L.R. 1 Sc. 441 (H.L. 1869); Calvin's Case,7 Coke 1, 4b–6a, 18a, 18b, 77 Eng. Rep. 377, (H.L. 1608)). It should be noted that England has changed their common law rule. England now requires the person's mother or father to be a British citizen who is settled in the United Kingdom. Houston, *supra* note 10, at 701–02 (citing British National Act, § 1, cl. (1)).
29. *Id*. at 656–89 (citing Inglis v. Sailors' Snug Harbor, 28 U.S. (3 Pet). 99 (1830); Shanks v. Dupont, 28 U.S. (3 Pet.) 242 (1830)).
30. *Id.* at 658–66 (citing McCreery v. Somerville, 22 U.S. (9 Wheat.) 354, 356 (1824); Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 576 (1856); U.S. v. Rhodes, 1 Abb. U.S. 28, 40, 41 (1866)).
31. *Id.* at 674. The Court reasoned the interpretation of the Citizenship Clause clearly conferred citizenship. U.S. CONST. amend. XIV, § 1.
32. *Id.* at 693.
33. *Wong Kim Ark*, 169 U.S. at 682.

law from which birthright citizenship is founded.[34] As the Court stated, an individual falling under these exceptions is not "understood as intending to subject himself to a jurisdiction incompatible with his dignity and the dignity of his nation."[35] Simply put, such individuals are not in the country to be subjected to the jurisdiction of the United States. Rather, such individuals are still under the power and jurisdiction of his or her home country. Also, foreign ministers and consults are immune to the laws of the United States, and therefore, not subject to the jurisdiction of the United States.[36] They are merely agents of their home countries.[37] Because of the inability of the United States to subject these persons to its laws, the children of these persons do not obtain citizenship at birth.

The United States Supreme Court, however, has never heard a case pertaining to the issues of whether children born in the United States to illegal aliens are considered under the birthright citizenship.[38] *Wong Kim Ark* does not address this precise issue, because the parents while not citizens, were legal and not deportable.[39] Thus, scholars have debated the allowance of citizenship to children born in the United States to parents who are here illegally.

B. Statutory Provisions Conferring Birthright Citizenship

The Fourteenth Amendment is not the only textual guarantee of citizenship to a child who is born within the borders of the United States. A federal statute provides that "[t]he following shall be nationals and citizens of the United States at birth: (a) a person in the United States, and subject to the jurisdiction thereof."[40] This language tracks the language of the Citizenship Clause, and thus, the courts interpret it like the Fourteenth Amendment.[41]

Some scholars believe Congress will have to amend the Constitution to repeal birthright citizenship.[42] Other scholars argue Congress can repeal birthright citizenship through statutory means.[43] Proponents of statutory change believe that birthright citizenship can be changed by passing

34. *Id.*
35. *Id*. at 684.
36. *Id*.
37. James C. Ho, *Defining "American,"* 9 GREEN BAG 2D 367, 368 (2006).
38. Pettit, *supra* note 5, at 268.
39. *Wong Kim Ark*, 169 U.S. at 651.
40. 8 U.S.C. § 1401(a) (2006).
41. Stein & Bauer, *supra* note 9, at 127. *See* U.S. CONST. amend. XIV, § 1. *See also* 8 U.S.C. § 1401(a) (2006).
42. Pettit, *supra* note 5, at 270.
43. Ho, *supra* note 37, at 367–68.

legislation which would interpret "subject to the jurisdiction thereof" to not include children born to illegal aliens.[44] One scholar argues that changing the interpretation would be contrary to the intent of the framers of the Fourteenth Amendment, and it would be dangerous to allow legislation to make such a drastic change when it can be repealed or changed easily.[45] If one Congress should decide to change the interpretation, the next Congress may decide to change the statute back. This would create many problems within the country and with the administration of immigration laws. Also, Congress does not have the power to define the text of the Constitution; this power is left to the Supreme Court.[46] So it would be difficult for Congress to pass legislation that gave interpretation to the Citizenship Clause of the Constitution if the Supreme Court finds that the precedent does not agree with Congress's interpretation.[47]

The recognition of birthright citizenship is not likely to change due to the fact that it has roots in the Constitution.[48] In order for an analysis of constructive deportation to have any merit, birthright citizenship must be recognized. Therefore, birthright citizenship is a required prerequisite to recognizing constructive deportation.

III. CONSTRUCTIVE DEPORTATION

The deportation of the parents effectively causes the deportation of the citizen child, thus creating constructive deportation. The Supreme Court has stated that "in the exercise of its broad power of naturalization and immigration, Congress regularly makes rules that would be *unacceptable if applied to its citizens*."[49] One could argue that the same rules should be unacceptable if the *effects* are felt by actual citizens. Because the United States Constitution confers citizenship on all children born within its borders regardless of the citizenship status of parent, problems arise. This creates a "mixed-status family," where a child is a United States citizen and the parents are illegal aliens. Children in mixed-status family are vulnerable to losing their parent or their country.[50] A conflict is created because the child, as a

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44. Pettit, *supra* note 5, at 268.
45. *Id.* at 268–69.
46. Houston, *supra* note 10, at 723.
47. Tebo, *supra* note 8, at 33.
48. *See* U.S. CONST. amend. XIV, § 1.
49. Augustine-Adams, *supra* note 7, at 702 (citing Mathews v. Diaz, 426 U.S. 67, 79–80 (1976)) (emphasis added).
50. Sutter, *supra* note 1, at 785 (citing FIX & ZIMMERMAN, *supra* note 1, at 1).

United States citizen, cannot be deported.[51] These children should be allowed to remain in the country with their parents and benefit from the citizenship they are given at birth. It begs the question, what should happen to the child?

A. Challenging a Parent's Deportation as Constructive Deportation of the Child

The most recent case concerning constructive deportation is *Coleman v. United States*.[52] In this case, Ms. Arellano, a citizen of Mexico, came to the United States illegally and had a child, Saul.[53] Saul's father left Ms. Arellano before Saul was born and his whereabouts are unknown.[54] Ms. Arellano moved with Saul to Chicago, obtained a counterfeit social security card, and acquired employment at O'Hare International Airport.[55] She signed all documentation to obtain the job with false names and included incorrect information on her application.[56] During a sweep at the airport, security found Ms. Arellano and charged and convicted her of possessing a phony Social Security Card.[57] The government decided to deport her,[58] but this left Saul, who was a United States citizen, to either be left behind or go with his mother.[59] Because of the effect his mother's deportation would have on his ability to remain in the United States, counsel for Saul argued this worked as "a constructive removal," forcing him to leave the country against his Fourteenth Amendment rights.[60] The court held that there was no infringement on Saul's constitutional rights.[61] He is still a citizen and has the option to stay.[62]

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51. Lopez v. Franklin, 427 F. Supp. 345, 347 (E.D. Mich. 1977) (citing 8 U.S.C. § 1251, currently codified as 8 U.S.C. § 1227) ("It is manifest that deportation may not be imposed upon citizens born in the United States, but only upon aliens."). *See* Robert J. Shulman, *Children of a Lesser God: Should the Fourteenth Amendment be Altered or Repealed to Deny Automatic Citizenship Rights and Privileges to American Born Children of Illegal Aliens?*, 22 PEPP. L. REV. 669, 689 (1995) (citing HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 294 (1951)).
52. 454 F. Supp. 2d 757 (N.D. Ill. 2006).
53. *Coleman*, 454 F. Supp. 2d at 760; Tebo, *supra* note 8, at 32.
54. *Coleman*, 454 F. Supp. 2d at 760.
55. *Id*. at 760–61.
56. *Id.* at 760.
57. *Id.* at 761.
58. *Id.*
59. Tebo, *supra* note 8, at 32.
60. *Coleman*, 454 F. Supp. 2d at 760.
61. *Id.* at 766.
62. *Id.* at 769.

Courts refer to this constructive removal as "de facto deportation" or "constructive deportation."[63] Saul is not the only child who has argued constructive deportation. The facts may vary with each case, but the outcome and reasoning have always been the same. The courts have held that the removal of a parent from the United States does not constitute constructive deportation and does not infringe on the citizen child's constitutional rights.[64]

Generally, two different arguments are made to allow the parent to remain in the country. The first is that the parent's deportation infringes on the child's constitutional right. The second is that the parent's deportation could cause extreme hardship on the child.

1. Constitutional Challenges

Many parties who have raised the constructive deportation issue have argued that the deportation of the parent violates the child's constitutional right.[65] The courts, however, have found that there is no infringement on *any* constitutional right of the child by refusing to allow their parents to stay in the country.[66] Individuals have included the constitutional rights of equal protection,[67] due process,[68] or a blanket argument of Fourteenth Amendment rights.[69] Regardless of the exact constitutional argument, the courts have not accepted this as a reason to suspend the deportation of the parents.

Courts give various reasons for not interfering with the decision to deport the parents. The court has reasoned that to allow the parents to stay would "open doors" to persons seeking permanent citizenship; they would simply be

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63. Oforji v. Ashcroft, 354 F.3d 609 (7th Cir. 2003); *Coleman*, 454 F. Supp. 2d at 757.

64. *See Coleman*, 454 F. Supp. 2d at 766. *E.g.,* Acosta v. Gaffney, 558 F.2d 1153, 1157 (3d Cir. 1977); Kruer v. Gonzales, 2005 WL 1529987 (E.D. Ky. 2005); Ayala-Flores v. Immigration and Naturalization Serv., 662 F.2d 444, 445 (6th Cir. 1981). All of the courts in these cases decided that the deportation of a parent did not infringe on the citizen child's rights because they were still free to exercise those rights at a later time.

65. *Coleman*, 454 F. Supp. 2d at 766; *Acosta*, 558 F.2d at 1157; *Kruer*, 2005 WL 1529987; *Ayala-Flores*, 662 F.2d at 445.

66. Gonzalez-Cuevas v. Immigration and Naturalization Serv., 515 F.2d 1222, 1224 (5th Cir. 1975). *E.g.,* Ayala-Flores v. Immigration and Naturalization Serv., 662 F.2d 444, 445 (6th Cir. 1981); Lopez v. Franklin, 427 F. Supp. 345, 350 (E.D. Mich. 1977) (emphasis added).

67. Lopez v. Franklin, 427 F. Supp. 345 (E.D. Mich. 1977) (unsuccessful in arguing an equal protection violation purely because the citizens over 21 years of age would be able to sponsor persons for citizenship, but citizens under 21 years of age would not).

68. Enciso-Cardozo v. Immigration and Naturalization Serv., 504 F.2d 1252 (2d Cir. 1974) (ruling that the citizen child's substantive due process rights were not infringed because the citizen child has no right to intervene in deportation proceedings due to his status as a citizen).

69. *Coleman*, 454 F. Supp. 2d at 760 (unsuccessful in arguing the deportation was against child's Fourteenth Amendment rights).

required to sneak into the country for the child's birth.[70] Allowing for the parent's residency in the states creates a "loophole" that would go against the immigration laws as they are written.[71] The court has also reasoned that to allow illegal alien parents to escape deportation would give them an advantage over individuals who are actually complying with the law.[72]

Not only do the courts look at the implications of allowing the parents to postpone or escape deportation, but it looks to how the actual rights of the citizen child are affected. When dealing with the infringement of the citizen child's rights, the court would find a de facto deportation "if an act of the government did result in the 'outright destruction' of an essential privilege of citizenship."[73] The court went on to find that the parent's act of taking the child with them is not an "outright destruction" of the child's constitutional rights.[74]

In *Acosta v. Gaffney,* Carlos and Beatriz were separately admitted as nonimmigrant visitors and were later married in New Jersey.[75] The Acostas had a child in the United States before their deportation hearing.[76] When the Acostas were to be deported, they argued that their deportation was an imposition on their child's constitutional rights.[77] The court held that an "American citizen [has] a right to reside wherever he wishes, whether in the United States or abroad . . . ."[78]

Courts have reasoned that the child has not been completely dissolved of his decision to live in the states. The child has made no decision to actually live in the states or to return to his parent's country of origin; instead, his parents have made that decision for him.[79] When the child reaches an age where he can make that decision himself, then the child can choose to return to the United States and will have the protections he would be given as a citizen.[80] Congress did not confer the parents, who are here illegally, the right to act on behalf of those children who cannot make that decision for

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70. Acosta v. Gaffney, 558 F.2d 1153, 1157 (3d Cir. 1977).
71. *Id.* at 1158.
72. Gonzalez-Cuevas v. Immigration and Naturalization Serv., 515 F.2d 1222, 1224 (5th Cir. 1975) ("Petitioners, who illegally remained in the United States for the occasion of the birth of their citizen children, cannot thus gain favored status over those aliens who comply with immigration laws of this nation.").
73. Lopez v. Franklin, 427 F.Supp. 345, 348 (E.D. Mich. 1977) (citing *Acosta*, 413 F. Supp. at 832).
74. *Id.* at 348–49.
75. *Acosta*, 558 F.2d at 1154.
76. *Id.*
77. *Id.* at 1155.
78. *Id.* at 1157.
79. *Id.*
80. *Id.* at 1158.

themselves.[81] The children are still free to determine if they return to the United States at a later date. Thus, the action of the government is not taking away the child's rights, it is simply postponing them until a time when the child can exercise those rights.[82]

2. Hardship Challenges

Other parties have argued the deportation of the parent would create an "extreme hardship" on the child, and thus, the parent should be allowed to remain in the country with the child.[83] According to 8 U.S.C. § 1229b(b)(1) of the United States Code, "[t]he Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien . . . (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States."[84] Whether the hardship or difficulty faced rises to a level that would constitute cancellation of the parent's deportation is left to the discretion of the judge or board who is deciding the case.[85]

What constitutes extreme hardship can create problems. One problem is that "[t]he 'extreme hardship' provision . . . is not defined by the [Immigration and Naturalization Service] and the courts have declined to meaningfully review the Attorney General's discretion in its interpretation."[86] Also, the court has never tried to give a definition to the terms to serve as guidance for the Attorney General.[87] However, this is likely not allowed due to deference given agencies under the *Chevron* doctrine.[88]

Despite the valid argument that many of these children will face some hardship if they are required to return to their parent's native home, the courts have generally found that the problems the children may face are not at all extreme to qualify the parent's for cancellation under the statute.[89] In

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81. Kruer ex rel. S.K. v. Gonzales, 2005 WL 1529987, *8 (E.D. Ky. 2005).
82. *Acosta*, 558 F.2d at 1158; *Kruer*, 2005 WL 1529987, at *5.
83. Oforji v. Ashcroft, 354 F.3d 609, 617 (7th Cir. 2003); Coleman v. United States, 454 F. Supp. 2d 757, 769 (N.D. Ill 2006); Gallanosa v. United States, 785 F.2d 116, 117 (4th Cir. 1986).
84. 8 U.S.C. 1229b(b)(1)(D) (2006). This provision has other requirements, including a requirement that the alien be in the United States for 10 years prior to application and a requirement that they be of "good moral character."
85. *Gallanosa*, 785 F.2d at 120.
86. Edith Z. Friedler, *From Extreme Hardship to Extreme Deference: United States Deportation of Its Own Children*, 22 HASTINGS CONST. L.Q. 491, 507 (1995).
87. *Id*.
88. *See generally* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (determining the amount of deference an administrative agency should be given).
89. Coleman v. United States, 454 F. Supp. 2d 757, 767 (N.D. Ill. 2006); Mendez v. Major, 226 F. Supp. 364, 366–67 (E.D. Mo. 1963), *aff'd* 340 F.2d 128 (8th Cir. 1965).

Coleman, the parents unsuccessfully argued that the separation of the child from the parent constitutes an exceptional hardship which should suspend the parent's deportation.[90] The court stated that it is undoubted that any separation from the mother would be hardship, but this was not enough to be considered exceptional or extremely unusual to warrant the parent being allowed to stay in the United States.[91] The court has also found it is not enough that the child was unable to speak the language of the native land and had come accustomed to the culture of the states.[92] Also, the court has refused to find economic hardship extreme enough to be protected under the statute.[93]

The Board of Immigration Appeals ("BIA"), which is the entity that hears most appeals regarding deportation, considers factors such as:

> age of respondent . . . at the time of entry and at the time of application for relief, family ties in the United States and abroad, length of residence in this country, the health of the respondent and qualifying family members, the political and economic conditions in the country or return, the possibility of other means of adjusting status in the United States, the alien's involvement and position in his or her community here, and his or her immigration history.[94]

The BIA also considers as factors for deportation the "age, health, and circumstances" of persons who are legally in the country as lawful permanent residents or actual citizens of the United States.[95]

Irrespective of the hardship or constitutional right, courts have not allowed a parent who is in the country illegally to use its child's citizenship to obtain a stay of deportation using the constructive deportation statute.[96] Since the child lacks the ability to make the choice of where to live, the parents will be required to face a difficult decision: take the child with them and deprive the child of all the benefits of being an American citizen and growing up in this country, or leave the child behind at the risk the child may not get proper care and may never be seen again.[97] The courts, however, are not moved by the plight of the family; they instead state "a minor child who

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90. *Coleman*, 454 F. Supp. 2d at 767.
91. *Id.*
92. *Mendez,* 226 F. Supp. at 366–67.
93. *Id.*
94. In re Monreal-Aguinaga, 23 I. & N. Dec. 56, 63 (B.I.A. 2001) (citing In Matter of Anderson, 16 I. & N. Dec. 596, 597 (B.I.A. 1978).
95. *Id*.
96. *Coleman*, 454 F. Supp. 2d at 757; Salameda v. Immigration and Naturalization Serv., 70 F.3d 447 (7th Cir. 1995); Gallanosa v. United States, 785 F.2d 116 (4th Cir. 1986).
97. *See* Tebo, *supra* note 8, at 33.

is fortuitously born here due to his parents' decision to reside in this country has not exercised a deliberate decision to make this country his home, and Congress did not give such a child the ability to confer immigration benefits on his parents."[98] Instead, the court reasoned the child can exercise that right at a later time when the child has the ability to choose where it wishes to reside.[99] The courts are saying that it is the parent's choice to take the children with them, and the parents are the ones who are breaking the law. In *Salameda v. Immigration and Naturalization Service,* the court held that it was the parent's "fault" that the children will face deportation, so they cannot hide behind their children to get residency.[100]

IV. ANALYSIS OF CONSTRUCTIVE DEPORTATION

A disconnect exists between courts' decisions regarding birthright citizenship and constructive deportation. Courts have decided that the child of an illegal alien born in the United States is a United States citizen. These children and their parents should be able to remain in the country so the child can exercise his right to family and benefits of being a United States citizen. However, courts have decided the sole caretaker and lifeline of that child has no right to stay in the country for the sake of the child. Although there may be some reasons to not recognize the parent's deportation as removal of the child, more reasons exist to allow this doctrine to be recognized and keep the illegal alien parents in the country. Therefore, the courts should recognize the deportation of a citizen child's parent as constructive deportation because the courts effectively leave the parents no choice.

The court's decisions leave the child and the parent with no choice about the child's future as a citizen. The deportation of the parent, who has control over the decisions regarding the child's welfare and actions, will deprive the citizen child of their United States citizenship. The reasoning of the courts in deciding not to recognize constructive deportation is incorrect and discriminates against children who have illegal alien parents. First, this section will discuss the discriminatory effect of the court's decisions. Next, this section will examine why the court's opinions are flawed. Finally, this section will investigate the pros and cons of recognizing constructive deportation.

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98. Perdido v. Immigration and Naturalization Serv., 420 F.2d 1179, 1181 (5th Cir. 1969).

99. *Id*.

100. Salameda v. Immigration and Naturalization Serv., 70 F.3d 447, 449 (7th Cir. 1995) (stating that if the parents would have returned to the Phillipines when they were supposed to, their citizen child would have been acclimated to the culture and customs).

A. Court Decisions on Constructive Deportation are Discriminatory

The decision of the courts, which have called for the deportation of the parent, have stated that it is not against the child's right as an American citizen to deport the child's parents. These decisions mean children of illegal aliens will likely not remain in the country.[101] It is true the child can remain in the country upon the parent's deportation. However, the decisions against recognizing constructive deportation have the practical effect of deporting these children, since it is unlikely that the parent will leave their child in the U.S. while they return to their native land. Because this is the case, courts should recognize that the deportation of the child's lifeline, and possibly the only person the child has in the country, is against the child's rights. It is unfair that the child should have to postpone their rights as a citizen just because their parents are not citizens.

The postponement of rights for citizen children of illegal aliens essentially creates classes of citizens.[102] A child who is born in this country to parents who are also citizens can enjoy the rights and privileges of the country and its citizenship from the day they are born. Their citizen parents will actually have a choice of where to remain instead of being told where to go. However, a child who is born to illegal alien parents will have to postpone this right until they are able to make the choice. Therefore, it is essentially as if the courts have made two classes of citizens: (1) citizens born to illegal aliens and (2) citizens not born to illegal aliens.

Although children who are born to United States citizens can make the choice not to be citizens later in life, they get the protections of the United States until they make that decision. Children born to illegal alien parents are not afforded these protections at all if taken back to their parent's native lands. Also, children born to United States citizens get the opportunity to use the benefits of their citizenship before making the choice; where the court and the deportation boards make the choice for the child born to illegal alien parents. The constructive deportation of the citizenship child does not allow them the experience, knowledge, and education they may need to be able to make the

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101. Although the parent may make the decision to leave the child behind, it is more likely they will decide to take the child with them.

102. *See* Pettit, *supra* note 5, at 284–85. The author of this article argues that denying birthright citizenship would create different classes of individuals. If simply denying birthright citizenship would create different classes, then the government's denial of recognizing constructive deportation, after granting citizenship based on birth, would also create classes.

choice to return to the United States and use the citizen child's citizenship status.

B. Court Decisions on Constructive Deportation are Incorrect

In *Salameda*, the court reasoned the parent should not be able to stay because it was their actions that caused the situation.[103] However, this reasoning contradicts the holding and reasoning of the United States Supreme Court in *Plyler v. Doe*.[104] In *Plyler*, the Texas legislature passed a bill that withheld funds from school districts who used them to educate children who were in the country illegally and allowed the schools to deny enrollment to such children.[105] Although the basis of the issue was dealing with the equal protection and due process clause of the Fourteenth Amendment, the court was struggling with the question of jurisdiction.[106] The Supreme Court stated that children should not be punished for actions of their parents which they cannot control.[107] It stated that "legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."[108] This case dealt with children who were not citizens, yet the Court reasoned the child had no control over the situation and should not be punished. This argument would be stronger in the case of citizen children who have a right to be afforded the benefits of the Constitution and the benefits of citizenship.[109]

When looking at the reasons to allow the illegal alien parent to stay, exceptional hardship is more persuasive than the courts have stated.[110] Separation from parents would seem to constitute an exceptional hardship and not merely an ordinary hardship as the courts have stated.[111] In growing up, children need their parents. In the field of social work, scholars view the

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103. *See* note 100.
104. 457 U.S. 202 (1982). Friedler, *supra* note 86, at 502.
105. Plyler v. Doe, 457 U.S. 202, 205 (1982).
106. *Id.* at 210. The Court was dealing with the issue of whether the illegal alien children were within the United States jurisdiction under the Citizenship Clause of the Fourteenth Amendment.
107. *Id.* at 220.
108. *Id.*
109. *See* Houston, *supra* note 10, at 720–22.
110. *See* Oforji v. Ashcroft, 354 F.3d 609 (7th Cir. 2003) (holding that the threat of female genital mutilation toward the children was not enough to warrant hardship to grant asylum and cancel deportation). *See generally* Coleman v. United States, 454 F. Supp. 2d 757 (N.D. Ill 2006) (holding the child's separation from the mother would be a hardship, but not enough to qualify for cancellation of deportation); Mendez v. Major, 340 F.2d 128 (8th 1965) (holding that the hardship created by leaving the country was not enough to qualify for cancellation of deportation).
111. *See Mendez*, 226 F. Supp. at 366–67 (stating that, although there would be hardship to the citizen son if the family was deported, it was not enough to rise to the standard required under the statute).

involvement of the parents of the utmost importance.[112] These commentators believe that interventions with problem-children require the maximization of time the child spends with their parents.[113] The parent is the figure that will spend the majority of the child's time while the child is developing, gaining skills, and learning.[114] The interactions with the mother are the most significant interactions when forming child development.[115] The mother's role in the child's life is not simply for nurturing; the parents also "introduce their children to and prepare their children for the wider world in a variety of ways (communicative, social, and cognitive), shaping their children's developing characteristics and skills . . . ."[116] If the child is left in the United States, they will have to adjust to life without the people whom they depend on for their development. This can affect their mental and physical well-being, and ultimately, the rest of their lives. This meets the exceptional requirement of the statute because the effects have such an over-arching burden on the entire life of the citizen that it could mean the child's entire future.

The view that the government is simply postponing the rights of the citizen child, not taking them away, has drawbacks. If the child goes to the parent's country of origin and then returns to the United States at a later time, that child may be disadvantaged when he returns to this country. He may not possess the same education and opportunities to build the skills that are required to thrive and be competitive in this country. It is true that, if he remains, he may not necessarily gain the necessary skills. However, remaining in the country would at least give him the opportunity, which may be impossible in other countries. Without those skills, he may require the assistance of the government through welfare or other programs because he is unable to compete in this culture. This seems to simply prolong the burden on resources, which may be a strong reason that judges and policymakers oppose allowing the families to stay in this country in the first place. The government, therefore, is essentially burdening its own citizens. This is also discriminatory in the sense that it is creating these problems for these children, but not for children born to citizens.

Although none of these circumstances alone would likely create a hardship for the child which would warrant the parent being allowed to remain in the country, taken together, they would. Considering all the factors which

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112. Gerald Mahoney & Bridgette Wiggers, *The Role of Parents in Early Intervention: Implications for Social Work*, 29 CHILD. & SCH. 7, 8 (2007).

113. *Id.*

114. *Id.* at 9.

115. *Id*. at 10.

116. Michael E. Lamb, *Attachments, Social Networks, and Developmental Contexts*, 48 HUM. DEV. 108, 109 (2005).

the BIA considers to determine hardship, and finding that the above arguments have generally proven to be unsuccessful in trying to cancel deportation, it would seem that the hardship standard is too hard to meet.[117]

C. Pros and Cons of Allowing Constructive Deportation

If a constructive deportation were recognized, the citizen child would get the benefit of being with the stable family unit to which he belongs. It would also allow the child to avoid the possibility of foster care if the illegal alien parent should leave the child behind. Also, the child will have the opportunity to benefit from the education and health care system of the United States.

However, there are also downfalls of recognizing constructive deportation. Recognizing constructive deportation could encourage illegal alien mothers to enter the United States to have their children in order for the mother to gain U.S. citizenship. It could also create loopholes in the immigration laws. Finally, it may go against the current legislation that Congress has passed regarding immigration.

1. Pros

a. Maintaining the Family Unit

There are rights that exist for children who are United States citizens. The court has long recognized that the family relationship may constitute a fundamental right.[118] The Court has found that a person's right to procreate, marry, establish a home, and bring up children are all rights that are protected under the Constitution.[119] All of these components to a familial relationship have been recognized. Therefore, the right to remain together as a family should also be seen as a fundamental right which would be abridged if the parent were deported and the child remained. Our country has created a major political push for family values and unity over the course of the last decade. However, when it comes to the family values and unity of illegal alien's citizen children, it would seem these values are not as important.

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117. *See* In re Monreal-Aguinaga, 23 I. & N. Dec. 56, 63 (B.I.A. 2001) (stating the factors the BIA considers and how these factors interact in the determination of cancellation based on hardship).

118. *See* Friedler, *supra* note 86, at 497–98 (citing Prisco v. United States, 851 F.2d 93, 96 (3d Cir. 1988)).

119. *Id.* at 497 (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

One commentator has argued that the children have a "constitutionally protected interest in the companionship of his or her parent."[120] The court in *Franz v. U.S.* reasoned that any government action that infringes on the family unit should be put to the strict scrutiny test like other fundamental rights.[121] In *Franz*, the plaintiff sued the government after the government entered his ex-wife and children into the witness protection program and he was unable to contact them to utilize his visitation rights.[122] The court held the government has to be more facilitative of the family unit when administering the witness protection program.[123] The reason the court gave was that the family unit was constitutionally protected.[124] It stated that "it is beyond dispute that 'freedom of a personal choice in matters of family life is a fundamental liberty interest' protected by the Constitution."[125] The most important right that is accorded to families under the Constitution is the "freedom of a parent and child to maintain, cultivate, and mold their ongoing relationship."[126] Therefore, the relationship between the child and the parent, regardless of the parent's citizenship status, should be recognized as fundamental.

Even though most of the rights the court has given have been for families who are not of mixed-status, the rights of these citizen children should not be abridged simply because they were unable to control the citizenship of their parents. The courts should give credence to these interests. At some point in time, the rights and interest of the citizen children must outweigh the interest of the state.

b. Avoiding the Possibility of Foster Care

As stated earlier, illegal alien parents of these citizen children have two options: (1) leave their children in the United States when they return to their native country or (2) take their children with them when deported.[127] Leaving the child in the U.S. may not be as much of a problem if there are family or

120. *Id*. at 498 (citing Franz v. United States, 707 F.2d 582, 586 (D.C. Cir. 1983)).
121. *See* Franz v. United States, 707 F.2d 582, 595 (D.C. Cir. 1983).
122. *Id*. at 588–90.
123. *Id.* at 608.
124. *Id.* at 595.
125. *Id.* (quoting Santosky v. Kramer, 455 U.S. 745, 753 (1982)). Other familial rights the court analogized companionship with include: (1) the right to choose marriage, *id.* (citing Zablocki v. Redhail, 434 U.S. 374, 383 (1978)) (2) right to procreate, *id*. (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)); (3) and the right to cohabitate with a person's extended family (citing Moore v. City of East Cleveland, 431 U.S. 494, 500–06 (1977)).
126. *Id*. (citing Quilloin v. Walcott, 435 U.S. 246, 255 (1978)).
127. *See supra* note 97.

friends who are citizens with whom the parents can leave the child. However, if there are no family or friends in the U.S. who can take of the child, a serious concern is raised. Many of these children would end up as wards of the state and placed in the foster care system. This alternative is detrimental to both the child and the government. Children who are part of the foster care system are more likely to have health problems, to have a disability, and to use illegal drugs.[128] Children in foster care are also more likely to have problems with their "neurological and cognitive development" and are also more likely to have mental health and behavioral problems.[129] By putting a citizen child of an illegal alien mother in this system, the government is putting the child at a disadvantage and making the mother less likely to choose to leave her child. This is also discriminatory because the government does not put a citizen mother in the position where they would have to make the choice to leave their citizen child.

c. Gaining Benefit of the Education System

Although education may not be a right solely for citizen children, it is a fundamental reason to recognize constructive deportation. A citizen child who is taken back to his parent's country will miss out on the opportunities that are associated with the education available in the United States. According to one source, "[t]hose who are educated in the U.S. tend to have greater earnings than their peers educated abroad."[130] Therefore, it could affect the citizen for their lifetime when they have to compete with other citizens for employment. A citizen child may be required to go back to a country where they will not be able to obtain the education needed to be successful in the United States. According to the U.S. Department of Labor's

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128. Sharon Vandivere, Rosemary Chalk, & Kristen Anderson Moore, *Children in Foster Homes: How are They Faring?*, 23 CHILD TRENDS RES. BRIEF 1, 2 (Dec. 2003), *available at* http://www.childtrends.org/files/FosterHomesRB.pdf (last visited Feb. 28, 2008). Children who are in foster care are more like to suffer physical health problems, such as poor health. *Id.* These children are also four time more likely to have a physical disability or handicap. *Id.* This physical disability or handicap, however, may not be caused by foster care, but it may be the reason the child is in foster care. *Id.* Also, children between the ages of eleven and fourteen have reported the use of cigarettes, alcohol, and illegal drugs. Even though the numbers may be small, this is cause for concern. *Id*.

129. *Id.* at 3–4. Despite these problems, there is a possibility that they can be overcome with different types of interventions and support of adults who care about them. *Id.* These impairments may be due to the care of the children prior to their entering the foster care system. *Id.* However, this has not been proven. *Id*. Also, not every foster care child is becomes a bad seed. There are many children who prosper in the system. *Id.*

130. National Center for Policy Analysis, Immigrant Census Data, http://www.ncpa.org/pd/immigrat/pdimm/pdimm4.html (last visited Feb. 28, 2008).

Bureau of Labor Statistics, individuals who have higher levels of education earn greater wages per week and have lower levels of unemployment.[131] Therefore, higher education available in the United States is imperative to the citizen child's future. Higher education may not be feasible for children who do not have the basis to be accepted in those programs, and therefore, their way of life could be affected. Although not every foreign nations have substandard education, many do. Therefore, every child should be allowed the opportunity to take advantage of the education that is offered in the United States because it could have an effect on their lives should they choose to return to this country.

d. Having Opportunity to Utilize the Health Care System

Another major benefit of citizenship that is offered in the United States is medical and health care benefits. There are several nations which are lacking the basic medical and health care facilities and methods that are enjoyed by persons in the United States. By requiring a parent to leave, and more than likely take their child, the government is taking away the opportunity of the citizen child to obtain the best medical and health care he can obtain. This also seems discriminatory because children who are born to citizen parents are allowed to seek this medical attention. For example, when dealing with urgent health care needs, facilities in Malawi are unable to keep even a minimum level of healthcare; many districts have less than 1.5 nurses per facility, with some having none.[132] According to the World Health Organization, while the United States has between 9 and 28.5 psychiatrists per 100,000 people, all but one country in Africa and many countries in Asia have .06 or less psychiatrists per 100,000 people.[133] Also, a comparison of health care providers in all the countries who are members of the World Health Organization shows that the United States is among the top countries for the number of physicians per 1,000 people.[134] Although not every United States citizen has a right to healthcare, and many cannot afford to take advantage of the system in the U.S., this opportunity should still be available to the child.

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131. U.S. Department of Labor, Bureau of Labor Statistics, Education and Training, Education Pays, http://www.bls.gov/emp/emptab7.htm (last visited Feb. 28, 2008).

132. WORLD HEALTH ORG., WORLD HEALTH REPORT 2006: WORKING TOGETHER FOR HEALTH 22 (2006), available at, http://www.who.int/whr/2006/whr06_en.pdf (last visited Apr. 19, 2007).

133. *Id*. at 27.

134. *Id.* at 190–98.

2. Cons

a. Encouraging Mothers to Enter the Country Illegally

Commentators and some courts argue that allowing parents who are here illegally to remain in the country would encourage illegal immigration and give illegal aliens an incentive to come to the country to have children to gain citizenship.[135] The prospect of citizenship would be enough to encourage a mother to enter the country illegally to bear her child. If the courts and government recognized deportation, then the hope of citizenship will become more concrete because it is backed by law and the judiciary. The government and court actions would make the mother better able to argue the citizenship of their child to cancel their deportation. This could lead to more illegal immigration and hard enforcement of immigration laws.

b. Creating Loopholes in the Immigration Laws

As stated previously, the courts believe that allowing illegal alien parents to remain in the country due to their citizen children would create a loophole for illegal aliens.[136] This would allow the parent to circumvent the immigration laws as they stand simply because they have a child. It would allow the parent to circumvent the rules to which other illegal aliens must abide.

If the child were able to sponsor the parent for residency when the child was of age, recognizing constructive deportation would not necessarily be creating a loophole, as much as it would simply be curtailing the inevitable. This would simply make it quicker for the parents to be allowed in the United States. The parents may likely still be able to accomplish their goal, and the parents could obtain the same results in more time without recognition of constructive deportation. Also, other loopholes have been created in other parts of the citizenship statute.[137] However, if the parent were allowed to enter

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135. Acosta v. Gaffney, 558 F.2d 1153, 1157–58 (3d Cir. 1977).

136. *See* note 71.

137. *See* Scales v. Immigration and Naturalization Serv., 232 F.3d 1159 (9th Cir. 2000) (deciding that a child born to a Philippine citizen who married an American serviceman was considered to be a citizen of the United States even though she was not related to the American father by blood or adoption). This creates a loophole by allowing people who are not citizens by blood or birth to become citizens. Now the alien woman need only marry a citizen in a foreign country before the birth of her child to confer citizenship upon her child who is not the citizen's child.

the country freely and have children which would "anchor" them to the country, they may be more likely to enter the country for that reason.[138]

c. Contradicting the Current Immigration Legislation Enacted by Congress

To recognize constructive deportation could contradict the immigration laws as they are currently enacted by Congress. Congress has not passed legislation allowing for an exception to illegal aliens who have citizen children. As the court in *Acosta* stated, "to [recognize constructive deportation] would tend to open the doors to permanent residence in the United States to any citizen of an undeveloped country who could get here in one way or another and who desired to remain."[139] The current legislation does not call for such an exception, and if constructive deportation were recognized, it may be challenged as court-made law. In order to circumvent this problem, Congress can add new provisions which would work in accordance with the other provisions of the immigration laws.

V. SOLUTION

To appease the courts and government, while still allowing citizen children of the United States their rights and privileges without discriminating against them, this author suggests creating a separate government program for illegal alien parents of citizens. Although this will cause administrative burden on the immigration services, this burden is outweighed by the burdens these children will face by being taken back to countries where they cannot thrive or learn.

This author suggests allowing the parents to stay in the country with their children, but not granting them full citizenship status. Even though the parent is an illegal alien and present in this country illegally, the rights and interests of the child should be superior to those of the state. This way the child can still grow up with the same benefits and opportunities as children who are allowed to remain in the country. Also, should the child make the choice to reside in the United States, the child can then be able to prosper in this country as an adult and have a good life which many associate with the U.S. The child could also then make an informed decision upon the age of majority to remain a United States citizen, like children born to citizens, or to return with his parent(s) to their native land. This would eliminate many discriminatory effects.

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138. *See* Tebo, *supra* note 8, at 32.
139. *Acosta*, 558 F.2d at 1157.

This does not mean that the parent can stay during the child's life indefinitely. The parent should still be deportable under certain circumstances, such as committing a crime. In this respect, the child of an illegal alien would be the same as a child of a citizen in the fact that a citizen would go to jail, and the same effects would be felt by the citizen's child.

Also, the illegal alien parent should only be given this specific status until the child reaches the age of majority. The parent can then be deported without chances of sponsorship and without regard to the exception set forth in other provisions of the code.[140] The statute itself could give the parent notice that they will not be able to remain in the country after the child reaches the age of majority. By setting these requirements, the parent is still subject to penalties. The government regulations will act as a deterrent for the parents who come to the United States to have children for the purpose of becoming citizens themselves, while allowing the citizen child the benefits and rights of United States citizenship. The child would still benefit from the systems of the United States, such as education and health care.

The government should not completely do away with cancelling deportation due to hardship the parent's deportation causes on the citizen child. It should, however, create more concrete hardship standards[141] for these individuals and offer less possibilities for cancellation due to hardship. The current standard is hard to apply. Therefore, Congress should give a somewhat exclusive list for when illegal alien parents who are in the country due to the recognition of constructive deportation will not be able to remain. In particular, they should not be allowed to argue hardship on their citizen children after the child reaches the age of majority. Then, the mother of an adult child will not be able to use their child for the sake of staying in the country. There may be other concerns, such as health concerns, which still allow for cancellation. However, new legislation should foreclose the use of the citizen child to remain in the country longer than required for the care of that child until his age of majority. Also, with a more concrete hardship standard, there would be uniform application across all decisions, and appeals on decisions could be more easily filtered, thus helping to cut down on some administrative burdens.

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140. 8 U.S.C. § 1229b(b)(2) (2006). The statute allows for special provisions with regard to abused and battered spouses and children. Other provisions that are on par with the reasoning of this provision should be postulated and accepted.

141. *See* 8 U.S.C. 1229b(b) (2006). The "exceptional or extremely unusual" standard for hardship is difficult to apply and is subjective. With a more objective standard, ease of administration may follow.

For guidance, the United States government can look to other countries who grant birthright citizenship and allow the parents to remain in the country. For example, France allows the illegal alien parents of citizen children to remain in the country without becoming actual citizens themselves.[142] Ireland also allows the illegal alien parents of citizen children some rights to remain in the country.[143] To allow a plan such as this would also be more congruent with the international law view that the family unit is of the utmost importance, the child's interest should be placed first, and the child should not be separated from their parent.[144]

If the U.S. were to allow such constructive deportation to continue, the federal government may need to assist states in the care of the children who are left behind. The federal government is the entity that is helping to create this hardship for the citizen child. The states will be left to fund the care of these children on already low resources. The courts assume the illegal alien parent will take their child with them back to their country if there exists no relative in the states who could care for the citizen child; the court may be right. However, there exists the possibility that a large number of children could be left behind. There may be circumstances in the country of origin that would force a mother to leave them in the United States for the well-being of the child. Although not every illegal alien comes from an impoverished country, many do. Situations which could force the parent to choose to leave the child in the United States include famine and disease.

VI. CONCLUSION

By virtue of birthright citizenship, children born in the United States become citizens, regardless of the citizenship status of their parents. Birthright citizenship is supported by the Constitution of the United States and legislation adopted by Congress.[145] Due to the allowance of birthright citizenship, problems exists when the illegal alien mother, who is subject to deportation, has a child in the United States. Since that child is a citizen of the United States, he may not be deported. Therefore, issues exist as to whether the deportation of the parent constitutes a constructive deportation of the child.

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142. Jacqueline Bhabha, *"More Than Their Share of Sorrows": International Migration Law and the Rights of Children*, 22 ST. LOUIS. U. PUB. L. REV. 253, 262 (2003).

143. *Id.*

144. *Id.* at 262–63 (citing International Covenant on Civil and Political Rights, art. 23, pmbl. 999 U.N.T.S. 171, 179 (Dec. 19, 1966)).

145. U.S. CONST. amend. XIV, § 1; 8 U.S.C. § 1401(a) (2006).

The courts have found that the deportation of the illegal alien mother does not constitute a constructive deportation of the child because the mother is free to leave the child in the U.S. and the child is free to come back to the country when they are able to make the choice for themselves.[146] The courts also reason that, because of this choice, there is no infringement on their constitutional rights.[147]

The decisions of the court are discriminatory and incorrect. The decisions are discriminatory because they create two different classes of citizens: (1) citizens born to illegal aliens and (2) citizens not born to illegal aliens. Children who are born to illegal aliens are not allowed to use the benefits of their citizenship free from government burdens, where children who are not born to illegal aliens are free from any burdens in their citizenship. Also, when children are not born to illegal alien parents, the parents are allowed to make the choice of where the child will reside. When the child is born to illegal alien parents, however, the deportation boards and courts effectively make the decision of where the child will reside.

Also, the courts do not give enough merit to the hardship argument. Several factors, when taken together, qualify this separation or deportation for cancellation as a hardship. The child's well-being depends on their ability to remain in the country. The child's ability to acquire skills necessary to live in the country at a later date is hindered by not being in the country. Language barriers may also exist which would make it hard to live in another country, or return to the United States. Because of the burdens, the parent is not given much of a choice.

If the parents are allowed to remain in the U.S. with the children, the child will benefit from the family unit and may foreclose the possibility of being placed in foster care. Also, the child will be able to benefit from the education and healthcare system the United States has to offer. However, recognizing constructive deportation could also create loopholes in the laws, encourage illegal aliens to come to the United States to have their children, and has the potential to counter the current state of the immigration laws.

In order to allow for constructive deportation, Congress should pass new legislation that will allow the parent to remain with their child in the U.S. This parent, however, does not get to stay in the country indefinitely and will not be eligible to gain a favorable citizenship status. This still holds the parent responsible for their illegal actions, while recognizing the well-being of the citizen child and their rights to remain in the country.

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146. Coleman v. United States, 454 F. Supp. 2d 757, 769 (N.D. Ill. 2006); Acosta v. Gaffney, 558 F.2d 1153, 1158 (3d Cir. 1977).

147. *Coleman*, 454 F. Supp. 2d at 769; *Acosta*, 558 F.2d at 1158.