LAYING THE LEGAL FOUNDATION FOR A RIGHT TO STAY IN *DEPORTED AMERICANS*

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I. INTRODUCTION

By titling her book, "Deported Americans," legal scholar Beth C. Caldwell highlights a central tension in U.S. deportation policy: the formal legal rules do not conform with the lived realities of the people the rules impact. As Caldwell indicates in the Introduction to the book, she has purposefully used the phrase "deported *American*" to "challenge traditional notions of what it means to be American."[1] The term, she says, captures two groups—those who are technically not U.S. citizens but are "functionally American" and those who are technically U. S. citizens but are "functionally deported."[2] This essay looks at functional Americans, which Caldwell explains refers to those who are not technically U.S. citizens but are "American" due to their strong ties and sense of belonging to the country.[3] As someone who has also worked with and written about the strength of a non-citizen's self-identification despite lacking formal immigration status, I was immediately drawn to Caldwell's framing.[4]

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1. BETH C. CALDWELL, DEPORTED AMERICANS 4 (2019).

2. *Id.*

3. Provocatively, Caldwell also uses the same term to refer to those who are technically U.S. citizens but are in reality deported because they are either the spouse or child of a person who was deported and they return to the deportee's country of origin. Although beyond the scope of this essay, these deported Americans make up a significant portion of the book. In the case of spouses, this decision to live permanently in a country outside of the United States tends to be an effort to maintain family unity. *See id.* at 101-25. In the case of U.S. citizen children, the deported parent often makes the decision to take these children with them often because of a lack of caretaker in the United States. *See id.* at 127-52.

4. 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 (2008).

I was also impressed by the depth of Caldwell's qualitative work. Drawing on the stories of dozens of individuals—six in depth—Caldwell makes visible the impact of U.S. deportation policy on both functional Americans and functionally deported U.S. citizens and brings into stark relief the disparity between the legal rules that resulted in these deportations and the lived experiences of these individuals. On a narrative level, the book is highly effective, giving life to the term "deported Americans" and helping readers relate to the people in its pages with compassion. Most prominently, the stories captured by Caldwell expose the difficulties of life after deportation and the urgent need for deported Americans to return to the land they consider home. For those who were deported, the book showcases the heartbreak of family separation and difficulty finding work or enrolling in school. For those who are technically U.S. citizens, the book reveals the tribulations of living in another country under conditions that are often marked by lost economic stability, a lack of social networks and unfamiliarity with cultural norms.[5] The narratives also dismantle the one-dimensional view of immigrants with criminal convictions as somehow wholly identified by their criminal conduct.

On a more theoretical level, one of the central questions the book seeks to explore is "[m]orally and legally, should the United States deport people whose lives are inextricably tied to it?"[6] This sets up the overarching theme of the book: the relationship between an individual's subjective notions of belonging to a particular nation, their affiliations with formal citizens of that nation, and the conferring of some benefits of citizenship to these individuals by the nation state in which they live. Caldwell grounds her concrete proposals for judicial and legislative reform in a theoretical understanding of citizenship that centers on an individual's self-identification and affiliations.[7] This construction of citizenship is not necessarily about the formal immigration status of U.S. citizen. Rather, it is about one of the main protections that citizenship grants: protection against deportation. Thus, for the remainder of this article, I will use the term "citizenship" to signify this very important protection and "formal citizenship" to signify the formal legal status.

Building on the construction of citizenship as stemming from a person's self-identification with and affiliations in the United States, Caldwell proposes two constitutional reforms—treating deportation cases like denationalization cases for those with "American identities" and strong ties

5. Interestingly, all of these same "shocks" apply to those who are technically Mexican citizens but lived in the U.S. from an early age.

6. CALDWELL, *supra* note 1, at 4.

7. *Id.* at 154-68.

to the United States;[8] and applying the fundamental rights of marriage and family unity to deportation cases.[9] Caldwell does not explicitly limit or delimit these specific proposals for reforms to certain categories of non-citizens. One could interpret the constitutional challenges as limited to cases involving lawful permanent residents ("LPRs") facing deportation. This reading could be justified given the book's focus on long-term LPRs who were deported. Of the six main people profiled in the book, only Luis lacked the status of permanent resident (or conditional permanent resident) at the time his deportation was ordered.[10] Jurisprudentially, it could also be seen as more practical to limit constitutional arguments to LPRs. LPRs have historically enjoyed greater constitutional protections than those with less permanent statuses or no status.[11]

However, in discussing the two constitutional reforms, Caldwell does not explicitly indicate that these arguments would apply exclusively to LPRs. Moreover, the theoretical foundations that she outlines all either tacitly or explicitly refer to people with any status as the focus is on identity and affiliation, not status or lack thereof. Building from this footing, there is no principled reason to differentiate between people based on immigration status. Rather, what is important to this construct is a person's own sense of belonging and their ties to the country in which they wish to remain. On a practical level, it would also benefit more people to think of the constitutional challenges as broadly as possible. This broader impact would come closer to what political scientist Joseph Carens calls a "right to stay."[12] This essay argues that the preferable interpretation of Caldwell's proposed constitutional challenges is one that aligns with Carens's right to stay. This requires construing the two challenges expansively to include formal non-citizens with a broad range of immigration statuses, even those who lack formal status completely. Finally, in order to truly build towards a right to

8. *Id.* at 170.

9. *Id.* at 174.

10. Caldwell first describes Luis's story and the fact that he "was lawfully in the United States" in Chapter One. *Id.* at 33.

11. *See* Kwong Hai Chew v. Colding, 344 U.S. 590, 600 (1953); Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly."); Zadvydas v. Davis, 533 U.S. 678, 693 (2001); Demore v. Kim, 538 U.S. 510, 543-47 (2003) (Souter, J., concurring).

12. Joseph H. Carens, *The Case for Amnesty: Time Erodes the State's Right to Deport*, BOS. REV. (May 1, 2009), http://bostonreview.net/forum/case-amnesty-joseph-carens [hereinafter Carens, *The Case for Amnesty*]; JOSEPH H. CARENS, IMMIGRANTS AND THE RIGHT TO STAY 21 (2010) [hereinafter CARENS, RIGHT TO STAY]; JOSEPH H. CARENS, THE ETHICS OF IMMIGRATION 151 (2013) [hereinafter CARENS, THE ETHICS OF IMMIGRATION].

stay, the essay offers a legislative proposal designed to complement the constitutional arguments.

II. A BROAD READING OF CALDWELL'S PROPOSALS WOULD ENCOMPASS THOSE WITH VASTLY DIFFERENT STATUS UNDER THE IMMIGRATION LAWS.

In order to fully grasp the potentially broad reach of the two constitutional arguments promoted in *Deported Americans*, it is first necessary to understand the different types of status an immigrant might have and the constitutional protections generally enjoyed by each group.[13] Legal scholar Virgil Wiebe has described the range of immigration statuses as being structured like a hotel with the most desirable floor at the top being akin to the most protective immigration status.[14] Wiebe explains that formal U.S. citizenship is like condominium ownership on the top floor of a hotel building because it is the most protective of immigration statuses.[15] U.S. citizens cannot be deported, have the ability to work lawfully without limitation, and can sponsor more family members than any other group and often more quickly. U.S. citizens also enjoy the greatest level of constitutional protection. The next most protective status is that of a lawful permanent resident.[16] Wiebe describes this group as being like the "apartment floor" of a hotel with the ability to remain lawfully like the tenant of an apartment until a violation of the lease occurs.[17] LPRs are generally able to work without limitations and can sponsor a more limited group of family members than U.S. citizens.[18] LPRs receive the highest constitutional protection offered to non-citizens.[19] But the most significant difference between U.S. citizens and LPRs is that LPRs are subject to deportation if they fit within a list of grounds of deportability found in the Immigration and Naturalization Act.[20] Wiebe compares these grounds of deportability to lease

13. A full review of the constitutional protections provided to each of these groups is beyond the scope of this essay.

14. *The Immigration Hotel*, 68 RUTGERS U. L. REV. 1673, 1676-78 (2016).

15. *Id.* at 1739-40.

16. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1693 (2017) (distinguishing level of scrutiny required for an equal protection claim based on citizenship rules as higher than the requirement for a claim based on rules granting permanent residence).

17. Wiebe, *supra* note 14, at 1727-28.

18. The permissions granted to various non-citizens to work in the United States is found at 8 C.F.R. § 274a.12. LPR's are a class of non-citizens who can work in any industry for an unlimited amount of time. *See* 8 C.F.R. § 274a.12(a)(1). For a list of family members that LPR's can sponsor, see INA § 203(a)(2), 8 U.S.C. § 1153(a)(2).

19. *See* cases cited *supra* note 11.

20. For a list of grounds of deportability, see 8 U.S.C. § 1227.

terms that can result in eviction in the case of a tenant and deportation in the case of an LPR.[21]

Wiebe then goes on to list less protective immigration status categories and the floors that they would inhabit from top to bottom. First is humanitarian relief from deportation, such as asylum and protection under the Violence Against Women Act, which offer a permanent status that can be revoked but do not offer recipients the ability to sponsor relatives until they become LPRs.[22] Next is temporary protected status and deferred enforced departure, which give protection from deportation for an unspecified length of time and work authorization but no ability to sponsor family members.[23] Then come the so-called "non-immigrant" statuses like temporary visitors, students, and workers who are allowed to enter lawfully for a period of time but must legally extend their stay or leave once the time frame has elapsed.[24] Some non-immigrants are authorized to work, and some can bring family members, but none can sponsor family members in the same way as LPRs.[25] After the non-immigrants come those in what Wiebe calls the "legal limbo" of discretionary statuses conferred by the Executive Branch, such as humanitarian parole.[26] Finally, hidden away in the basement of the hotel, are those who lack any formal immigration status, often called "undocumented" or "unauthorized."[27]

Two groups that would benefit from protection against deportation for those with strong American identifications and family ties are those who were granted temporary protected status and those who have lived in the United States for years without status. Temporary Protected Status ("TPS") is granted to nationals of a country that has faced armed conflict or a wide range of environmental disasters.[28] In order to qualify, the person must be a national of a TPS-designated country and have entered the United States prior to the effective date of the designation of their country of origin for TPS.[29]

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21. Wiebe, *supra* note 14, at 1677, 1727-28.

22. *Id.* at 1723-24; *see also* INA § 208, 8 U.S.C. § 1158 (asylum); INA § 204(a)(1)(B)(ii)(I), 8 U.S.C. § 1154(a)(1)(B)(ii)(I) (VAWA).

23. Wiebe, *supra* note 14, at 1721-22; *see also* INA § 244(b)(1), 8 U.S.C. §1254a(b)(1) (TPS); *Temporary Protected Status and Deferred Enforced Departure*, U.S. CITIZENSHIP & IMMIGR. SVCS., https://www.uscis.gov/i-9-central/complete-correct-form-i-9/temporary-protected-status-and-deferred-enforced-departure (Jan. 21, 2021).

24. Wiebe, *supra* note 14, at 1718-19; *see also* INA § 101(a)(15)(B) & (F), 8 U.S.C. § 1101(a)(15)(B) & (F).

25. Wiebe, *supra* note 14, at 1714-15; *see also* 8 C.F.R. § 274a.12 (2020) (work authorization); 8 C.F.R. § 213a.2 (2020) (ability to sponsor).

26. Wiebe, *supra* note 14, at 1723-24.

27. *Id.* at 1742-43.

28. INA § 244(b)(1), 8 U.S.C. § 1254a(b)(1).

29. INA § 244(b)(2), 8 U.S.C.. § 1254a(b)(2).

While TPS is in theory temporary, many current TPS holders have had this status for many years, some as long as two decades.[30] Constitutional protections of TPS holders to their status is currently being litigated due to a decision by the Trump administration to terminate the benefit for many designated countries in early 2017.[31] All of the lawsuits allege that the termination violates the Equal Protection Clause.[32] Significantly for the kinds of claims outlined in *Deported Americans*, one lawsuit made the equal protection arguments on behalf of the U.S. citizen children of long-time TPS holders.[33] That lawsuit, *Ramos v. Nielson*, along with other suits resulted in a preliminary injunction based in part on the equal protection arguments made by plaintiffs.[34] However, no court has yet heard arguments on the merits of the claims, and thus it is currently unclear how much constitutional protection TPS holders enjoy.

Another group that could benefit from an expansive reading of Caldwell's two constitutional arguments are long-term resident undocumented immigrants. According to the Pew Research Center, two-thirds of undocumented immigrants have lived in the U.S. for more than ten years, and the median length of residency for undocumented adults is over fifteen years.[35] Moreover, at least five million U.S. citizen children have at least one parent who is undocumented.[36] Thus, a number of undocumented immigrants have the kind of strong ties to the United States and potential identification with the country that Caldwell theorizes as underpinning

30. For example, TPS holders from Honduras and Nicaragua were first designated in 1998, and those from El Salvador in 2001. For a full list of TPS countries and their designation dates/events, see *A Snapshot of Countries Covered by TPS*, AM. FRIENDS SERV. COMM. (Oct. 13, 2017), https://www.afsc.org/story/snapshot-countries-covered-tps.

31. For a description of terminations, see Peniel Ibe & Kathryn Johnson, *Trump Has Ended Temporary Protected Status for Hundreds of Thousands of Immigrants. Here's What You Need to Know*, AM. FRIENDS SERV. COMM. (June 30, 2020), https://www.afsc.org/blogs/news-and-commentary/trump-has-ended-temporary-protected-status-hundreds-thousands-immigrants. For a summary of all lawsuits pending, see *Challenges to TPS and DED Terminations and Other TPS-Related Litigation*, CATH. LEGAL IMMIGR. NETWORK, INC., https://cliniclegal.org/resources/humanitarian-relief/temporary-protected-status-and-deferred-enforced-departure/challenges (Jan. 5, 2021).

32. CATH. LEGAL IMMIGR. NETWORK, INC., *supra* note 31.

33. *Id.*

34. *See, e.g.*, 336 F. Supp. 3d 1075, 1105 (N.D. Cal. 2018), *vacated sub nom.* Ramos v. Wolf, 975 F.3d 872 (9th Cir. 2020).

35. Jens Manuel Krogstad et al., *5 Facts About Illegal Immigration in the U.S.*, PEW RSCH. CTR. (June 12, 2019), https://www.pewresearch.org/fact-tank/2019/06/12/5-facts-about-illegal-immigration-in-the-u-s/.

36. Jeffrey S. Passel et al., *Number of U.S.-Born Babies with Unauthorized Immigrant Parents Has Fallen Since 2007*, PEW RSCH. CTR. (Nov. 1, 2018), https://www.pewresearch.org/fact-tank/2018/11/01/the-number-of-u-s-born-babies-with-unauthorized-immigrant-parents-has-fallen-since-2007/.

citizenship claims. Despite these factual similarities to long-term resident TPS holders and even LPRs, undocumented immigrants have the lowest level of constitutional protection.[37] Moreover, unlike LPRs who must fit within a particular ground of deportability to be removed from the United States, or TPS holders whose status must be revoked (or they become deportable), persons who are undocumented are vulnerable to deportation based on their lack of status alone.[38]

III. THEORIES OF CITIZENSHIP IN *DEPORTED AMERICANS* DO NOT DISTINGUISH BASED ON IMMIGRATION STATUS

In *Deported Americans*, Caldwell presents four theoretical constructs of citizenship that either tacitly or explicitly extend citizenship claims to those with different levels of immigration status: citizenship as identity, social membership based on affiliations, immigration as contract, and citizenship as the exercise of rights. Under the first construction, the subjective identification of the non-citizen in question (in the case of the book, *Deported Americans*) matters in determining their legitimate claim to membership within a community.[39] Caldwell provides examples of such identification in the form of explicit references by deportees to being American and the fact that deportation actually reinforces this sense of belonging to the United States.[40] In this section, Caldwell explicitly refers to the stories of people who were deported after living in the United States without documentation. Just as I found in my work with undocumented youth, Caldwell found that many were surprised to learn of their lack of status and their vulnerability to deportation because they felt so much a part of U.S. society.[41] Thus, arguments for social membership based on identity can be made with equal force for those who are formally non-citizens with status as well as those who lack any formal status in the United States.

The second theory, social membership based on affiliation, can also be applied with equal force to all non-citizen groups, including those who lack formal status. Affiliation here refers to things and people that tie these migrants to the United States, such as their cultural reference points and family ties.[42] Thus, Caldwell argues, like citizenship as identity arguments,

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37. *See, e.g.*, Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1963-64 (2020) (finding that those who have never been formally admitted to the United States enjoy far less due process rights than LPRs).

38. *See* INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i).

39. CALDWELL, *supra* note 1, at 155-59.

40. *Id.* at 156-57.

41. *Id.* at 158-59; Shah, *supra* note 4, at 639-40.

42. CALDWELL, *supra* note 1, at 160.

citizenship as affiliation arguments stem from factual realities.[43] These same factual realities—presence of U.S. citizen family members and U.S. music, food, and popular culture as reference points—exist for those who are in the United States as LPRs with TPS or without status. But Caldwell also points to the recognition of these factual realities in the formal legal rules. Drawing on the analysis of legal scholar Hiroshi Motomura, Caldwell shows how protection from deportation rises as a formal matter as either ties to United States or time in United States increases.[44] Many of these examples of protections from deportation apply to non-citizens with a range of legal statuses. In fact, one form of relief discussed, cancellation of removal for non-permanent residents, is designed precisely for those who are undocumented but whose deportation would cause a U.S. citizen or lawful permanent resident family member "exceptional and extremely unusual hardship."[45]

The theoretical construct that most explicitly refers to unauthorized migrants is the section on immigration as contract. Drawing again from Motomura, Caldwell points out that key concepts in contract theory have influenced immigration law.[46] These include the concept of an express agreement—such as when the U.S. government grants a non-citizen a visa or lawful status subject to the non-citizen's agreement to abide by the terms of the visa or status—and the concept of acquiescence—and an implied agreement—such as when the U.S. government acquiesces to the entry and presence of millions of unauthorized migrants.[47] The majority of this section discusses implied agreements in the context of unauthorized migration. Thus, it seems from this section that Caldwell seeks to assert rights on behalf of all migrants whether authorized or not, despite her earlier focus on the stories of those who had LPR status.

The final theory of social membership is called "citizenship as the exercise of rights" and is described as the presumption that those who enjoy rights in a society also enjoy citizenship.[48] Caldwell indicates that this

43. *Id.* at 163.

44. *Id.* at 161 (citing HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 99 (2006)).

45. INA § 240a(b), 8 U.S.C. § 1229b(b); *see* CALDWELL, *supra* note 1, at 161.

46. CALDWELL, *supra* note 1, at 163-66 (citing HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 107 (2014)) ("Broadly, Motomura characterizes 'immigration as contract' as 'a set of concepts of fairness and justice that are associated with contracts and sometimes with property rights. These ideas are often phrased in terms of promises, invitations, expectations, notice, and reliance.'").

47. *Id.*

48. *Id.* at 166 (citing LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 12 (2006)).

presumption applies with equal force to both LPRs and those who are undocumented because of the many rights that they both enjoy in U.S. society. Caldwell acknowledges that LPRs have more rights than those who are unauthorized but does not see these differences as requiring a different understanding of social membership for LPRs versus unauthorized migrants.[49] Indeed, she goes on to discuss not just what rights are actually conferred by the U.S. government but what rights her interviewees *felt* they should have as contributing to this idea of citizenship based on rights.[50] Thus, she relates the citizenship as rights theory back to the citizenship as identity theory to indicate that a person's identification with rights they thought they enjoyed should factor into formal social membership.

IV. APPLICATION OF CALDWELL'S PARTICULAR CONSTITUTIONAL ARGUMENTS TO A BROAD RANGE OF NON-CITIZENS

Grounded in this theoretical understanding of citizenship and in statements of her interviewees, Caldwell argues for the application of two constitutional provisions to deportation proceedings. A number of political scientists and legal scholars have written extensively on the relationship between citizenship and the importance of the non-citizen's own subjective experience, as well as her ties to the people and places in the United States, in determining formal membership in the community.[51] Some of these scholars focus on the citizenship claims of those residing lawfully in the country,[52] while others focus on the claims of those who are unlawfully or irregularly present.[53] Caldwell builds on this work to provide concrete proposals for legal reforms that align formal inclusion in the community with lived experience and affiliations. Each of the constitutional challenges discussed by Caldwell will be analyzed in turn for the possible application to people with a broad range of immigration statuses.

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49. CALDWELL, *supra* note 1, at 167.

50. *Id.* at 167-168.

51. *See, e.g.*, CARENS, RIGHT TO STAY, *supra* note 12; CARENS, THE ETHICS OF IMMIGRATION, *supra* note 12; BOSNIAK, *supra* note 48; MOTOMURA, *supra* note 44; RUTH RUBIO-MARÍN, IMMIGRATION AS A DEMOCRATIC CHALLENGE: CITIZENSHIP AND INCLUSION IN GERMANY AND THE UNITED STATES (2000).

52. *See, e.g.*, MOTOMURA, *supra* note 44.

53. *See, e.g.*, RUBIO-MARÍN, *supra* note 51; CARENS, RIGHT TO STAY, *supra* note 12; CARENS, THE ETHICS OF IMMIGRATION, *supra* note 12.

A. *Treating Deportation as Cruel and Unusual Punishment Could Apply to a Broad Range of Immigrants*

The first argument that Caldwell makes is that deportation should be treated as cruel and unusual punishment for people with strong ties.[54] Her argument rests on an analogy to denationalization proceedings, which is a process for stripping citizenship from a person who has acquired their formal U.S. citizenship automatically.[55] Denationalization proceedings were found by the Supreme Court in 1958 to be limited by the Eighth Amendment's guarantee against cruel and unusual punishment.[56] While the Court found that the key difference between denationalization and deportation was the source of the government's authority to make rules governing each,[57] Caldwell forcefully argues that the key indicator of a challenged law's legitimacy should be the "effect on people's lives."[58]

It is easy to see how, as a practical matter, this argument can be most effectively made for long term resident LPRs. As outlined in Part II, LPRs enjoy greater due process protection than those further down in the "Immigration Hotel."[59] As recently as last summer, the Supreme Court distinguished earlier cases establishing the availability of habeas corpus to LPRs to uphold a statute that eliminated habeas relief for those who lacked any status.[60] Despite these very real practical challenges, it is difficult to take Caldwell's point concerning the importance of identification seriously as a principled matter if what actually matters is the person's immigration status rather than their self-identification. Moreover, there is a long history of literature supporting some protection from deportation for long term residents who lack any formal immigration status but have developed the kind of American identity that Caldwell describes in her book.[61]

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54. CALDWELL, *supra* note 1, at 170.

55. This is in contrast to denaturalization which is the process for stripping citizenship from those who acquire formal U.S. citizen status through naturalization.

56. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

57. *Id.* at 98.

58. CALDWELL, *supra* note 1, at 171.

59. *See supra* Part II (outlining Virgil Wiebe's *The Immigration Hotel*); *see also* Kwong Hai Chew v. Colding, 344 U.S. 590, 600 (1953); Landon v. Plasencia, 459 U.S. 21, 32 (1982); Zadvydas v. Davis, 533 U.S. 678, 693 (2001); Demore v. Kim, 538 U.S. 510, 543-47 (2003) (collecting cases in which rights of LPRs were seen as greater than those of temporary residents or those without status).

60. *See, e.g.*, Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1981 (2020) (distinguishing the instant case involving a person who had not been legally admitted to the U.S. from plaintiffs in *INS v. St. Cyr*, 533 U.S. 289, 293 (2001) who were LPRs).

61. CARENS, RIGHT TO STAY, *supra* note 12; Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 GA. L. REV. 65 (2009); RUBIO-MARÍN, *supra* note 51;

In 2000, Ruth Rubio-Marín was among the first legal scholars to argue that, after a period of time, ties to a particular country should result in protection against deportation.[62] Political scientist Joseph Carens has also made the case for protection from deportation for unauthorized migrants.[63] In 2009, Carens argued that a person born outside of a country but who spent, for example, ten years during their childhood and early adolescence inside that same country, could have a forceful argument for remaining in said country despite her lack of legal status.[64] And historian Mae M. Ngai points out that early deportation statutes in the United States all had statutes of limitations. "Deportation was thus conceived as appropriate only for persons with limited length of stay in the country."[65]

In 2008, I made a similar argument for acquired formal U.S. citizenship based on ties to the United States that developed during childhood.[66] In that article, I drew upon current and historical immigration law provisions that recognized the importance of social and familial ties as well as scholarship from psychology and the social sciences that emphasized geographical place as a source of self-identification.[67] Most recently, legal scholar Andrew Tae-Hyun Kim has argued that deportation proceedings should have a statute of limitations after which the government cannot initiate deportation proceedings even for those who have entered the United States. without permission.[68] Arguing for a statute of limitations is slightly different than arguing that a particular proceeding is cruel and unusual. However, it stems from the same underlying understanding that with time and the acquisition of ties, deportation becomes more difficult for the deportee.

B. The Fundamental Right to Marriage and Family Unity Should Apply to All Non-Citizens

The second constitutional argument Caldwell discusses is the application of the fundamental right to marriage and family unity to deportation cases. She argues that courts should treat deportation of non-

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Shah, *supra* note 4; Andrew Tae-Hyun Kim, *Deportation Deadline*, 95 WASH. U. L. REV. 531 (2017).

62. RUBIO-MARÍN, *supra* note 51, at 242.

63. *See* sources cited *supra* note 12.

64. Carens, *The Case for Amnesty*, *supra* note 12.

65. *The Case for Amnesty: Historically, America Both Legalized and Deported Migrants*, BOS. REV. (May 1, 2009), https://bostonreview.net/forum/case-amnesty/historically-america-both-legalized-and-deported-migrants.

66. Shah, *supra* note 4, at 680-82.

67. *Id.* at 654-70.

68. Kim, *supra* note 61, at 576-88.

citizens as a violation of the fundamental right to marriage and family unity where there are formal U.S. citizen family members.[69] The theoretical grounds for this argument seem to be rooted in citizenship as affiliation that finds a person should be seen as a member of a community to which she has strong ties, such as a spouse or child, who is a formal citizen of that community. Legally, Caldwell argues that if the principles of substantive due process are applied to the marriage or other family relationships of people subject to deportation, courts should find that non-citizens have a right to live in the United States with their formal U.S. citizen family members.[70]

This argument seems even more amenable to broad application to non-citizens of different statuses because the key factor is the presence and status of family members, rather than the status of the non-citizen facing deportation. To help make the point that family unity is already taken into account in decisions about exclusion, Caldwell herself points to a decision involving a non-citizen who had not even entered the country.[71] The case, *Kerry v. Din*, was brought by the U.S. citizen-wife of an applicant for permanent residency, who had been rejected for security-related reasons.[72] Caldwell points out that six justices of the Supreme Court agreed that Mrs. Din had a fundamental right to live in her marriage to a non-citizen, even though the majority of justices ultimately found that the government could nonetheless keep her husband from entering as an LPR.[73] Thus, this argument has the greatest potential for benefitting those with U.S. citizen family members. Of course, a clear limitation of this argument is that it cannot be made for those long-term residents who lack family ties. For those potential citizens, the first argument is certainly more helpful.

V. CONCLUSION AND ADDITIONAL REFORMS FOR NON-LPRS

In arguing that Caldwell's theoretical framework applies equally to unauthorized, temporarily-authorized, and permanently-authorized immigrants, I in no way seek to water down or sound some kind of alarmist bell about her analysis of citizenship, or the proposals for reform that flow from this analysis. Rather, it is my goal to view these proposals through the most inclusive lens to be both analytically consistent with the theoretical understanding of citizenship as stemming from identification/affiliation and

69. CALDWELL, *supra* note 1, at 175-80.

70. *Id.* at 175-79.

71. *Id.* at 179.

72. 576 U.S. 86, 88-89 (2015) (plurality opinion).

73. CALDWELL, *supra* note 1, at 179; *see Kerry*, 576 U.S. at 101-02 (Kennedy, J., and Alito, J., concurring in the judgment); *id.* at 108 (Breyer, J., Ginsburg, J., Sotomayor, J., and Kagan, J., dissenting).

to potentially effect change for a larger proportion of the people whose stories are told in the book.

For LPRs, the impact of importing greater constitutional scrutiny into deportation proceedings is that they would be able to maintain their permanent resident status. For those in other immigration statuses, additional reforms may be necessary in order to create durable protection from deportation. This could be accomplished by amending the qualifications for cancellation of removal for non-permanent residents or by creating a new status that fits between permanent resident and humanitarian relief in Professor Wiebe's "Immigration Hotel" structure. For example, cancellation of removal currently allows a person to become a permanent resident if they are facing deportation and meet the following requirements: they are a non-citizen of any status who has been present in the United States for ten years or more; they have no disqualifying criminal convictions; they are a person of good moral character and their removal would cause "exceptional and extremely unusual hardship" to a U.S. citizen or LPR spouse, parent or child.[74] A possible reform could be to repeal the criminal bar and the requirement that removal cause "exceptional and extremely unusual hardship" and replace them with a provision that the non-citizen "establish that removal would result in separation from the non-citizen's spouse, parent or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." The new language would better align with a system built to honor the fundamental right to live together in a marriage or family unit. Another possibility would be the establishment of an immigration benefit that offered a permanent status like asylum or VAWA relief for those who had strong family ties but did not necessarily result in permanent resident status. The pre-requisites for obtaining this status could be the accumulation of ten to fifteen years of physical presence in the United States along with evidence of ties such as work relationships, family relationships or contributions to organizations or social movements.[75]

Whatever direction the complementary reform takes, it must provide robust protection against deportation for those whose lived realities have made them functional Americans. As Caldwell so movingly discusses, the current deportation system generates a great deal of avoidable psychic and material trauma for deported Americans. The connections to family, culture and economy and the pain of separation from home stings just as sharply for those who lack a formal permanent immigration status in the United States. In order to align immigration policy with principled considerations of

74. INA § 240a(b), 8 U.S.C. § 1229b(b).

75. Carens, *The Case for Amnesty*, *supra* note 12.

citizenship as identity, social membership, contract or an exercise of rights, policy makers must respond to the broad range of people who have acquired citizenship's traits. An immigration policy that recognizes the identity and connections of formal non-citizens regardless of their formal immigration status would allow functional Americans to just be . . . American.