LAYING THE LEGAL FOUNDATION FOR

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."' 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.`

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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

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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 a

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to the United States;" 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.'0 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."

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

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."1 2 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.
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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.1 3 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.' 4 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. 5 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

Wiebe des[(hso) Tj ET BT 10.8 0 2710 10 379 Tm /TT3 1th Tf (is) Tj ET BT 10.6 0 0 10 10 379 Tm /TT3 1 Tf (gr

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terms that can result in eviction in the case of a tenant and deportation in the

case of an LPR.

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

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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.

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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

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citizenship as affiliation arguments stem from factual realities. 3 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.4 4 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

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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. 4 9 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

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A. Treating Deportation as Cruel and Unusual Punishment Could Apply to a Broad Range ofImmigrants

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. 5 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.6 0 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

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. Tropv. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).
57. Id. at 98.

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In 2000, Ruth Rubio-Mann 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

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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

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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.'` 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

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citizenship as identity, social membership, contract or an exercise of rights,

policy makers must respond to the broad range of people