

Second-Class Citizens: The Schism Between Immigration Policy and Children's Health Care

by JOHN A. CASTRO*

No one is born a good citizen; no nation is born a democracy. Rather, both are processes that continue to evolve over a lifetime. Young people must be included from birth. A society that cuts off its youth severs its lifeline.

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Introduction

On February 4, 2009, President Barack Obama signed into law a bill allowing the State Children's Health Insurance Plan ("SCHIP") to remain in existence, as well as extending it for the next four years.² Programs like SCHIP illustrate the long journey that the United States has undertaken since the late nineteenth century, from first acknowledging the importance of children's health to today making large-scale nationwide programs specifically aimed at children's health care a reality. Although SCHIP and similar initiatives are admirable for their progressive and humanitarian goals, these initiatives fall short because of the conflict between America's immigration and children's health agendas. In particular, there is an entire class of children whose health is being neglected: citizen-children of undocumented immigrants. Further, President Obama

* The author would like to thank both his mother, Rosemary Castro, and Professor Jenni Parrish, both of whom were essential to the creation of this piece.

1. The 2001 Nobel Peace Prize Winner speaking to the Conference of Ministers Responsible for Youth in Lisbon, Portugal in 1998.

2. Robert Pear, *Obama Signs Children's Health Insurance Bill*, N.Y. Times, Feb. 4, 2009, at 1, available at <http://www.nytimes.com/2009/02/05/us/politics/05health.html?scp=6&sq=SCHIP&st=cse>.

and his administration are unlikely to solve this neglect. The renewing of SCHIP is indicative of such.

This article argues that the conflict between immigration law and children's health policy deprives the children of undocumented immigrants of their full citizenship rights. This deprivation occurs through the neglect and exclusion of citizen children from children's health programs because of their parents' undocumented status. Although the neglect and exclusion occur piecemeal, the final result is the treatment of citizen-children of undocumented immigrants as second-class citizens. Under the Fourteenth Amendment of the United States Constitution, all individuals born within the boundaries of the Union are to attain full-fledged citizenship.³ When citizen-children are deterred from participating in public programs for which they are eligible, such as SCHIP,⁴ the result is the de facto deprivation of full citizenship status.

This article begins by providing a brief overview of the history of children's health; an endeavor with roots that are grounded not in health, but in labor. Next, the article discusses two types of conflicts that illustrate where immigration law and children's health policy conflict. The first type is literal, where immigration law and children's health policy directly conflict. The second type is abstract, where strong anti-immigrant sentiment and ideology create de facto conflicts. Both play important roles in limiting the citizenship rights of citizen-children of undocumented parents. The article then offers a very basic sketch that would allow the United States to begin to remedy the conflicts between children's health policy and immigration law, as well as constitutional injuries inflicted upon citizen-children. Finally, the article concludes that not only is this class of citizen-children being unconstitutionally deprived of full citizenship, but the heated nature of immigration policy and the stated goals of the Obama administration will likely leave such children as constitutional victims with little legal redress.⁵

3. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.").

4. See *infra* Part II.A.

5. See *infra* Part III.

I. The History of Children's Health Policy and Immigration Policy

A. The History of Children's Health in the United States

Over one hundred years ago, American health policy was in a very primitive state. There was no comprehensive health policy established for adults, let alone health legislation tailored towards children.⁶ In 1900, the United States Census data revealed that over two million children (immigrant and natural-born alike) were working in mills, mines, fields, factories, stores, and city streets.⁷ More than two hundred fifty thousand children under the age of fifteen were working in factories.⁸ Although some states had child labor statutes, in 1900 they varied widely in terms of their content and degree of enforcement.⁹ After the revelation provided by the census data, a social and political movement began in the United States to abolish child labor altogether. This movement would eventually influence modern day children's health policy.

Labor and health are interrelated: the more abusive the working conditions, the more taxing it will be on the body. More abusive working conditions were introduced with the Industrial Revolution in the mid-eighteenth century.¹⁰ Industrial work, in terms of intensity and regularity, surpassed the labor associated with agricultural work because machines set the pace.¹¹ Keeping in mind that the

6. See Charles V. Chapin, M.D., Sc. D., *History of State and Municipal Control of Disease*, in AM. PUB. HEALTH ASS'N, A HALF CENTURY OF PUBLIC HEALTH: JUBILEE HISTORICAL VOLUME OF THE AMERICAN PUBLIC HEALTH ASSOCIATION 151 (Mazyck P. Ravenel, M.D. ed., Am. Pub. Health Ass'n 1921) (noting the origin of inspecting children at school for contagious disease around 1894, but only at the local level) [hereinafter AM. PUB. HEALTH ASS'N].

7. Our Documents, Keating-Owen Child Labor Act of 1916, <http://www.ourdocuments.gov/doc.php?flash=true&doc=59> (last visited Oct. 6, 2009).

8. Camille DeBell, *Ninety Years in the World of Work in America*, CAREER DEVELOPMENT QUARTERLY, Sept. 2001, at 1, 3, available at http://findarticles.com/p/articles/mi_m0JAX/is_1_50/ai_78398531/?tag=content;col1.

9. Child Labor Public Education Project, Child Labor in U.S. History, http://www.continuetolearn.uiowa.edu/laborctr/child_labor/about/us_history.html (last visited Oct. 6, 2009).

10. George Martin Kober, M.D., LL. D., *History of Industrial Hygiene and Its Affects on Public Health*, in AM. PUB. HEALTH ASS'N, *supra* note 6, at 366 ("Both in England and in this country the application of machinery resulted in the exploitation of child labor.").

11. Brian Gratton & Jon Moen, *Immigration, Culture, and Child Labor in the United States, 1880-1920*, 34:3 JOURNAL OF INTERDISCIPLINARY HISTORY 355, 361 (2004).

Occupational and Safety Health Act was not enacted until 1970,¹² not only were machines dangerous because of their mechanical pace, but they were also housed in hazardous factories.¹³ Also, in many places harsh physical punishment was administered on a daily basis.¹⁴

B. The Historical Intersection of Children's Health and Immigration

Immigration statistics show that in 1900 slightly over 20 percent of the native-born population had at least one immigrant parent.¹⁵ When added to the non-native, foreign-born population (children as well as adults), the data shows that a little over one-third of the entire United States population was either offspring of at least one immigrant or an immigrant themselves.¹⁶ Ignoring cultural background, child laborers tended to be from immigrant families or be immigrants themselves because it was simply a matter of familial survival in an economically depressed world.¹⁷ In fact, in the first half of the twentieth century, the United States Children's Bureau noted that immigrant families believed that putting their children to work was indeed a legitimate way to obtain the American dream.¹⁸

C. The End of Child Labor and the Rise of Children's Health

In 1916, Congress made its first attempt at regulating child labor on a national level. The Keating-Owen Child Labor Act of 1916 was a broad statute specifically aimed at curtailing child labor altogether.¹⁹ Although aimed at children, the law contained no language related to children's health, safety, or working conditions.²⁰ Any mention of condition related only to the statutory conditions of employment, such as minimum working age, or the condition of commodities

12. Occupational Safety and Health Act (OSHA) of 1970, Pub. L. No. 91-956, 84 Stat. 1590 (1970).

13. Gratton & Moen, *supra* note 11, at 360-61.

14. *Id.*

15. Campbell J. Gibson & Emily Lennon, U.S. Census Bureau, Historical Census Statistics on the Foreign-born Population of the United States: 1850-1990, <http://www.census.gov/population/www/documentation/twps0029/twps0029.html> (last visited Oct. 6, 2009).

16. *Id.*

17. Gratton & Moen, *supra* note 11, at 361.

18. KRISTIE LINDENMEYER, *A RIGHT TO CHILDHOOD: THE U.S. CHILDREN'S BUREAU AND CHILD WELFARE, 1912-46*, at 138 (Chicago 1997).

19. Keating-Owen Child Labor Act of 1916, ch. 432, § 1, 39 Stat. 675, *invalidated by* *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

20. *Id.*

produced, i.e., from the hands of child workers.²¹ Indeed, the statute's main focus was to prohibit the interstate transport of any goods manufactured by children.²²

In *Hammer v. Dagenhart*,²³ the United States Supreme Court found that Congress had overstepped its authority as outlined in the Commerce Clause of the Constitution.²⁴ In overturning the anti-child labor legislation, the Court found that the clause did not grant Congress "police power" authority to force the states to prevent potential unfair competition.²⁵ This legislation prohibited the transport in interstate commerce of any goods manufactured by children under 14 years of age, or by children fourteen through 16 years of age who worked more than eight hours a day.²⁶ In determining whether this legislation was an appropriate use of Congress's Commerce Clause power, the Court found that the legislation did not appropriately deal with the exchange of goods, and thus could not be considered "commerce" because the manufacturing of goods was a stage that *preceded* commerce.²⁷ Furthermore, the legislation also dealt with the "interstate transport" of such goods manufactured by child labor. The Court used the "stream of commerce" rationale to analyze the constitutionality of the statute. Under this rationale, Congress may use its Commerce Clause power to regulate the "streams" of interstate goods between states in conjunction with its enumerated power to make laws that are "necessary and proper" to execute all of its other powers.²⁸ However, whenever Congress uses its necessary and proper power, the Court engages in a pretext analysis to determine if Congress actually has an unlawful ulterior motive in advancing the legislation.²⁹ This pretext analysis was a fatal blow to Congress's aims to curtail child labor. The Court found that Congress's interest was not in regulating the

21. *Id.*

22. *Hammer*, 247 U.S. at 269.

23. 247 U.S. 251.

24. U.S. CONST. art. I, § 8, cl. 1, 3 ("The Congress shall have Power . . . To regulate commerce . . . among the several States . . .").

25. *Hammer*, 247 U.S. at 273.

26. *Id.* at 269.

27. *Id.* at 272.

28. *Id.* (citing U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . .")).

29. See *McCulloch v. Maryland*, 17 U.S. 316 (1819).

actual goods produced by the hands of children, but in regulating the local state labor laws.³⁰ The legislation was thus found to be unconstitutional.³¹

The very next year, in 1919, Congress once again attempted national regulation of child labor with Title XII of the Revenue Act.³² This piece of legislation did not outlaw the use of child labor, but instead placed a tax upon manufacturers who wished to employ children.³³ Having learned that the Commerce Clause would be an unproductive avenue towards child labor regulation, this time Congress advanced its legislation using its taxing power “[t]o lay and collect Taxes.”³⁴ Three years later, the Court struck down the tax as unconstitutional.³⁵ The Court held that although the federal government has the power to levy taxes, since the legislation keeps child labor legal, employment of children in the states is a matter for state legislatures, per the Tenth Amendment which holds that powers not prohibited to the States by Congress are reserved to the States.³⁶

Five years later, in 1924, Congress attempted to pass a constitutional amendment allowing congressional regulation of child labor; too few states ratified it, and it never took effect.³⁷ A second failed attempt occurred over a decade later in 1937.³⁸

In 1938, Congress finally and formally enacted child labor legislation on the national level with the Fair Labor Standards Act (“FLSA”), which is still in force today.³⁹ The FLSA is a comprehensive set of laws focused on regulating commerce and labor as a whole.⁴⁰ This set of laws, unlike past attempts, does regulate children’s health.⁴¹ For example, the definition of “oppressive child labor” in section 203 includes deadly occupations such as mining, as

30. *Hammer*, 247 U.S. at 276.

31. *Id.* at 277.

32. Revenue Act of 1918, ch. 18, 40 Stat. 1057 (1919), *invalidated by* Child Labor Tax Case, 259 U.S. 20 (1922).

33. *Child Labor Tax Case*, 259 U.S. at 22.

34. *Id.* at 20.

35. *Id.* at 44.

36. *Id.* at 36–37 (citing U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”)).

37. *See* Our Documents, *supra* note 7.

38. *See* Child Labor Public Education Project, *supra* note 9.

39. 29 U.S.C. §§ 201–219 (2008).

40. *Id.*

41. *Id.*

well as jobs “found . . . to be . . . particularly hazardous for the employment of children . . . or detrimental to their health or well-being.”⁴² This principle of protecting the health and well-being of children is found throughout the legislation, including subsections related to the duty of certain entities to report instances of child labor, administrative duties, and conditions of employment.⁴³ Furthermore, the legislation holds that when federal and state legislation conflicts, the law protecting the child the most is applied.⁴⁴ Not only does this expressly circumvent any possible challenges on Supremacy Clause grounds in situations where the federal law is more lax than the state law, but it also acts as an escape hatch for states to continue their regulation of child labor, a principle that has consistently been upheld in the past.⁴⁵ This has two benefits. First, it imposes on states a minimum threshold of health and welfare protection with regards to children.⁴⁶ Second, it allows states to provide more health and welfare protection at their option.⁴⁷

Three years after its enactment, the FLSA received its first challenge in the United States Supreme Court in *United States v. Darby*.⁴⁸ But unlike the prior losses suffered by the child labor movement, this time the Court upheld the FLSA as constitutional, explicitly overturning its prior holding in *Hammer v. Dagenhart*.⁴⁹ The Court found that “‘production of commerce’ . . . includes at least production of goods . . . the employer . . . intends or expects to move in interstate commerce although . . . all the goods may not thereafter actually enter interstate commerce.”⁵⁰ At this point, children’s health policy on the national level was born.

42. 29 U.S.C. § 203 (2008) (noting that this particular language was inserted in a 1949 amendment).

43. Allan D. Schwartz, Annotation, *Validity, Construction, Application, and Effect of Child Labor Provisions of Fair Labor Standards Act (29 U.S.C.A. § 212 and Related Sections)*, 21 A.L.R. FED. 391 (1974) (citing 29 U.S.C. §§ 201–219 (2008)).

44. U.S. Dept. of Labor, FLSA–Child Labor Rules Advisor, <http://www.dol.gov/elaws/esa/flsa/cl/default.htm> (last visited Oct. 6, 2009).

45. See *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding a lower court’s conviction of a parent who violated the state’s child labor laws by having their child engage in prohibited street preaching work); see also *United States v. Darby*, 312 U.S. 100 (1941).

46. 29 U.S.C. §§ 201–219.

47. *Id.*

48. 312 U.S. 100.

49. *Id.* at 125.

50. *Id.* at 118.

II. Conflicts Between Immigration and Children's Health Policy

In the latter part of the twentieth century, the documentation status of immigrants became a significant issue, presumably stemming from issues of national security and the disdain for those illegally present in the country who were widely considered to be draining public resources.⁵¹ Regardless of the cause of the anti-immigrant sentiment, what emerges today is a conflict between children's health policy and immigration policy. The result is a class of children deprived of their full-fledged citizenship rights: the natural-born children of undocumented immigrants.

A. Conflicts of Law and Anti-Immigrant Sentiment

Anti-immigrant sentiment towards this class of children is increasing. Professor Bill Piatt notes that, “[h]aving failed in our attempts to directly halt the flow of undocumented aliens, we have turned to indirect methods to stop it.”⁵² Although Professor Piatt's research goes beyond children's health, he notes generally that, “[w]e have punished children of the undocumented to discourage those parents from staying here and to discourage other parents and potential parents from either illegally bringing their children to this country or from giving birth here to United States citizen children.”⁵³ This discussion is focused on the aspects of this punishment in the context of health.

The media has played a part in fueling this anti-immigrant sentiment. They have depicted natural-born children of immigrant parents as “anchor babies,” or children whose non-citizen parents intentionally give birth in the United States so that they may act as their parents' sponsor for citizenship under the Immigration and Nationality Act of 1965.⁵⁴ For instance, syndicated columnist and journalist Michelle Malkin wrote of anchor babies that “[c]itizenship is too precious to squander on accidental Americans in [n]ame

51. Matthew Nelson, *Immigration Reform Hits Mexican Standoff*, S.F. EXAMINER, Dec. 3, 2008, at 1, available at <http://www.examiner.com/x-640-Business-Law-Examiner~y2008m12d3-Immigration-reform-hits-Mexican-standoff>.

52. Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35, 36 (1988).

53. *Id.* at 36.

54. See generally 8 U.S.C. § 1101 (2008); Wikipedia, Anchor Baby, http://en.wikipedia.org/wiki/Anchor_baby (last visited Oct. 6, 2009).

[o]nly.”⁵⁵ Without going any further into this controversial issue, it should be clarified that Malkin’s statement has never been the law.

Other times, the anti-immigrant sentiment is not so much animosity as it is apathy. Addressing the Food and Drug Administration Blood Products Advisory Committee regarding over-the-counter HIV and other disease testing programs about her experience working in public health in both governmental and non-governmental capacities, a woman named Duralba Munoz said “I don’t trust the system . . . when it comes to . . . services to non-English speaking people. I have seen posters and . . . flyers that have been paid and printed . . . by government institutions that, when you read them, they are misspelled, they have grammar errors, and sometimes they just simply make no sense”⁵⁶ Situations like these illustrate the difficulties for citizen-children of undocumented immigrants on multiple levels. While it would be easy to attribute all obstacles to children’s health services for mixed status families (families that consist of both undocumented immigrants and citizens) to those who have an affirmative will against immigrants, it cannot be forgotten that apathy at varying levels of bureaucracies also leads to such failures. If there were not people like Munoz, perceived successes (here, getting out information about governmental services to non-English speaking communities) would never be revealed for the actual failures they are.

Concrete conflicts arise between immigration and children’s health policy when the laws of one violate the objectives of the other. Lurking behind the shadows are federal reporting statutes that authorize, and in some cases mandate, that federal agencies report information on undocumented immigrants to the Immigration and Naturalization Service (now Immigration and Customs Enforcement, or “ICE”).⁵⁷ One such example is section 1324 of the Federal Immigration and Nationality Act,⁵⁸ which imposes a criminal penalty upon a person who “knowingly or recklessly assists an alien who lacks

55. Michelle Malkin, *What Makes an American?*, JEWISH WORLD REVIEW, Jul. 4, 2003, at 1, available at <http://www.jewishworldreview.com/michelle/malkin070403.asp>.

56. FDA ADVISORY COMMITTEE, FDA BLOOD PRODUCTS ADVISORY COMMITTEE DISCUSSES UPDATES ON DISEASE TESTING PROGRAMS AND OVER-THE-COUNTER HIV TESTS, (2005), available at <http://www.fda.gov/ohrms/dockets/ac/05/transcripts/2005-4190t1.htm> (statement of Duralba Munoz).

57. See, e.g., 8 U.S.C. §§ 1324, 1373, 1644 (2008).

58. 8 U.S.C. § 1324 (2008).

employment authorization, by transporting, sheltering, or assisting that alien in obtaining employment.”⁵⁹ Similar statutes include 8 U.S.C. §§ 1373 and 1644.⁶⁰ Although these statutes do not apply to citizen children of undocumented immigrants, they nonetheless affect them in very real (and detrimental) ways. Specifically, mixed status families are heavily discouraged from seeking health care in general because of these criminal statutes.

The overarching negative effect impacting natural children of undocumented parents is that such deterrence and penalties effectively relegate them to a level of health care lower than that enjoyed by their native-parented counterparts. The day-to-day negative impact is that it prevents them from taking advantage of both state and federal health services. First, federal agencies are directly within the jurisdiction of these reporting statutes. Second, many times States accept “conditional spending” from the federal government, where the federal government conditions appropriation of funds on state programs under the agreement that states will abide by certain conditions, such as the reporting statutes above.⁶¹

One startling example occurred in 1994 when California citizens passed Proposition 187, which manifested in part as California Health and Safety Code § 130: “In order to carry out the intention of the People of California[,] . . . only citizens of the United States and aliens lawfully admitted to the United States . . . may receive the benefits of publicly-funded health care”⁶² Although the proposition was overturned due to intense criticism,⁶³ and because it was preempted by federal law,⁶⁴ this example illustrates the more concrete type of conflict that has resulted between immigration and children’s health policy. Although this proposition affected only undocumented immigrants, the implications it had on natural-born citizen-children are obvious. By denying health care, this law directly raises the risk of illness or death for the parents. The lack of a parent could in turn seriously affect the child’s own health, among other things. Even when the undocumented parent is available and healthy,

59. *Id.*

60. 8 U.S.C. §§ 1373, 1644 (2008).

61. *See* 8 U.S.C. §§ 1324, 1373, 1644.

62. CAL. HEALTH & SAFETY CODE § 130 (2008).

63. *Id.*; Julie F. Costich, *Legislating a Public Health Nightmare: The Anti-Immigrant Provisions of the “Contract With America” Congress*, 90 KY. L.J. 1043, 1048 (2002).

64. *See* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 771 (C.D. Cal. 1995).

his or her fear of being reported to immigration authorities acts as another, perhaps even stronger, barrier against children getting the health care they need.⁶⁵ This deterrence and exclusion of natural-born citizen-children to health services to which they are legally entitled essentially relegates them to a lower class when juxtaposed against their native-parented counterparts. Such a result is nothing less than the denial of full-fledged citizenship rights under the Fourteenth Amendment.

California's situation also highlights the inconsistencies that plague the intersection of children's health policy and immigration policy. For instance, ten years before the Proposition 187 fiasco, the California Supreme Court held "that the equal protection clause of the California Constitution does not permit the state to disadvantage citizen children eligible for governmental assistance on the basis that they live with undocumented siblings."⁶⁶ Although parents are not siblings, the principle motivating the California Supreme Court's decision is still applicable: citizen children in mixed-status families should not be penalized for the citizenship status of their family members. Here, citizen-children, as citizens, should enjoy the benefits, aid, and assistance the government has laid out for them without any fear of repercussion to themselves or their loved ones. Little did the court know, ten years later the State's voters would seek to amend their state constitution with Proposition 187.

Other courts have acted in the same vein as the California Supreme Court. Mixed-status families in Illinois have successfully obtained an [preliminary] injunction against the implementation of a state policy that forced the undocumented parents of citizen-children to withdraw food stamp applications on their behalf, as well as disclose information about the parents' documentation status to ICE.⁶⁷ The United States District Court for the Northern District of Illinois held that such policies were unlawfully penalizing citizen children for the undocumented status of their family members by subjecting the parents to intrusive, unnecessary questioning about

65. Johanna Neuman, Editorial, *Growing political battle over the Census: Latinos versus Republicans*, L.A. TIMES, Top of the Ticket, Feb. 9, 2009, at 1, available at <http://latimesblogs.latimes.com/washington/2009/02/battle-over-the.html>.

66. Piatt, *supra* note 52, at 37 (citing *Darces v. Woods*, 679 P.2d 458 (1984)).

67. *Doe v. Miller*, 573 F. Supp. 461, 469 (N.D. Ill. 1983).

their immigration status, and threatening to report them to the INS if they insisted on applying for benefits of their children.⁶⁸

Other cases involving citizen-children have achieved similar success. In New York, for example, a citizen-child prevailed in a suit against the State of New York, which had denied him publicly funded daycare services on the grounds that his mother was an undocumented immigrant.⁶⁹ The United States District Court for the Southern District of New York, without even assessing the constitutional issues, found the policy invalid under Title XX of the Social Security Act.⁷⁰ Similarly, the Idaho Supreme Court rejected one of the State's county's attempts to exclude citizen-children of undocumented parents from indigent healthcare.⁷¹ Finally, both the United States District Court for the Eastern District of Wisconsin and a Washington state court "rejected a Department of Health and Human Services policy under which citizen-children of undocumented parents were prevented from receiving benefits under the Aid to Families with Dependent Children – Unemployed Parents Program."⁷²

Courts from around the country have generally solidified a uniform response: they will protect citizen-children against claims that they are less eligible to receive benefits because of their parents' undocumented status.⁷³ These cases show that courts have been sympathetic to the general principle of not punishing children for the citizenship status of their parents, and in upholding that principle, courts will not require children to waive their right to benefits nor require their parents to turn themselves in to immigration authorities as a condition of receiving such assistance.⁷⁴ These court decisions highlight two important points. First, the courts play up the conflict between children's health policy and immigration policy, showing how the tension in these opinions spans across states, and across decades. Second, although these particular decisions have been advantageous to citizen-children and their battle to enjoy their

68. *Id.* at 467.

69. Piatt, *supra* note 52, at 39 (citing *Ruiz v. Blum*, 549 F. Supp. 871 (S.D.N.Y. 1982)).

70. *Ruiz*, 549 F. Supp. at 877.

71. *Intermountain Health Care, Inc. v. Bd. of Comm'rs of Blaine County*, 707 P.2d 1051, 1053 (1985).

72. *See id.*; *Ruiz*, 549 F. Supp. at 877; Piatt, *supra* note 52, at 39 (citing *Doe v. Reivitz*, 85-C-0793 (E.D. Wis. 1986) (unpublished opinion)).

73. Piatt, *supra* note 52, at 40.

74. *Id.*

constitutional rights, they call into question the capacity of courts to resolve these conflicts adequately. For example, these decisions do not erase the scores of other administrative and judicial decisions that have arguably treaded on the rights of citizen-children, whether by separating mixed-status families by deporting undocumented loved ones, or by merely forcing mixed-status families to live in fear of deportation at the expense of their citizen-children rights.⁷⁵ In other words, since court decisions can be so inconsistent, and because policy agendas in general are characterized by their vague and systemic nature, a more holistic response to the plight of the citizen-child who has undocumented parents should be addressing the policy inconsistencies themselves, as opposed to letting courts perform damage control, especially when the constitutional rights afforded by citizenship are at stake.

Regardless of the role courts play, there are federal provisions that do in fact protect medical assistance to undocumented parents. Their effects, however, are nullified by conflicting immigration policy. For instance, a federal court enjoined the enforcement of California's Proposition 187⁷⁶ in part because federal law preempted it.⁷⁷ Such preemption stems from statutes like 42 U.S.C. § 13969(a), and those like it. Section 13969(a), a statute under the Public Health and Welfare Code, states that "[a] state plan shall provide medical assistance with respect to an alien who is not lawfully permitted residence."⁷⁸ Theoretically, this statute should alleviate an undocumented immigrant's fear of being reported if he or she attempts to seek medical care. If the immigrant has no fear of going to the hospital, the argument goes, the parents should not be deterred from taking their natural born child to the hospital. But this Public Health and Welfare statute's force is rendered moot when federal

75. See generally Neuman, *supra* note 65; Suzanne Gamboa, *Report: Parents of 100,000 U.S. Citizens Deported*, THE HOUSTON CHRONICLE, Feb. 13, 2009, at 1, available at <http://www.chron.com/disp/story.mpl/politics/6262927.html>; Cindy Carcamo, *Report: Nearly 109,000 Deported Parents Had U.S. Citizen Children*, THE ORANGE COUNTY REGISTER, Feb. 13, 2009, at 1, available at <http://www.ocregister.com/articles/report-removed-parents-2308179-children-immigration>; Julie Johnson, *Reluctant Ex-Pats: U.S. Born Kids Face Deportation As Well*, NEW AMERICA MEDIA, Apr. 4, 2007, at 1, available at http://news.newamericamedia.org/news/view_article.html?article_id=8eed8f1d611ca75f2f24c05f2861905c.

76. See *supra* Part II.A.

77. See *League of United Latin Am. Citizens*, 908 F. Supp. at 787.

78. 42 U.S.C. § 13969(a) (2008).

reporting statutes⁷⁹ prevent mixed-document status families from seeking health care in the first place.

Conflict even resides in the United States Code under the Public Health and Welfare chapter in provisions that do not directly concern medical care. Section 13925, for example, concerns violent crime against domestic partners.⁸⁰ The congressional notes state that Congress found in January 2006 that “[p]roblems of domestic violence are exacerbated for immigrants when spouses control the immigration status of their family members, and abusers use threats . . . to deport spouses and children as powerful tools to prevent battered immigrant women from seeking help.”⁸¹ When the spouses are undocumented, this only increases their fear to go to the authorities to report their abuse. The result is that not only are the wives subjected to unhealthy and unsafe living conditions, but so are their children, including natural-born children. Granted, threats of deportation are less serious with regards to the natural-born child when the abusive parent making the threats is a citizen, but that leaves open the possibility of the natural-born child remaining in the sole custody of an abusive parent after the immigrant parent is deported.⁸² If for some reason the court is aware of the abusive nature of the citizen-parent, then the natural born child could be deported with the mother, resulting in the deportation of a United States citizen, a flagrant denial of the constitutional rights of the natural-born child.⁸³ The more realistic result is that battered immigrants, documented or not, stay in abusive households, and so do their children.

More health-related implications arise with regards to Temporary Assistance for Needy Families (“TANF”), otherwise known as welfare.⁸⁴ Simply put, undocumented immigrant-parents, even those in mixed-document status households with their natural-born children, are less likely to utilize the federal legislation. In fact, nearly twice as many households with native-born parents utilize

79. See 8 U.S.C. §§ 1324, 1373, 1644.

80. 42 U.S.C. § 13925 (2008).

81. *Id.*

82. Carcamo, *supra* note 75, at 1; Gamboa, *supra* note 75, at 1.

83. Julie Johnson, *Reluctant Ex-Pats: U.S. Born Kids Face Deportation As Well*, NEW AMERICA MEDIA, Apr. 4, 2007, at 1, available at http://news.newamericamedia.org/news/view_article.html?article_id=8eed8f1d611ca75f2f24c05f2861905c.

84. 42 U.S.C. § 601(2008).

TANF.⁸⁵ Consequently, mixed-status families are more likely to be poorer than other families.⁸⁶ The first inevitability is that like other federal regulations, TANF is subject to the same reporting requirements discussed above.⁸⁷ The second inevitability is that because the undocumented parents of natural-born children are less likely to take advantage of financial assistance, the impacts on a family household with less money directly affects the child. For instance, “[c]hildren in low-income working immigrant families were more than twice as likely as those in comparable native families to lack health insurance coverage in 2002.”⁸⁸ Not only is a household strapped for cash less likely to invest in preventative care, but because of tight budgeting, other aspects of life, such as diet may also be negatively impacted. Even if issues of health were put aside, Professor Piatt wisely points out that “[i]f [citizen] children of illegal aliens were denied welfare assistance, made available by government to all other children who qualify, this also . . . would be an impermissible penalizing of children because of their parents’ status.”⁸⁹

Health care policy in the latter part of the twentieth and first part of the twenty-first centuries has culminated in legislation specifically tailored for children. The most notable is the SCHIP.⁹⁰ This statute provides federal funding to States so that they may either initiate or expand programs that are specifically designed to provide uninsured, low-income children with health assistance.⁹¹ About two-thirds, or approximately 2.1 million, of the recent immigrant-children that have come to the United States fall within this bracket.⁹² As a matter of law, natural-born children of immigrants are full-fledged citizens and

85. Ayana Douglas-Hall & Heather Koball, National Center for Children in Poverty, Children of Low-Income, Recent Immigrants, 2004, available at http://www.nccp.org/publications/pub_609.html.

86. David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453, 471 (2008) (citing Michael E. Fix & Wendy Zimmerman, All Under One Roof: Mixed-Status Families in an Era of Reform, Oct. 6, 1999, at 1, 2, available at <http://www.urban.org/url.cfm?ID=409100>).

87. See 8 U.S.C. §§ 1324, 1373, 1644 (2008).

88. Thronson, *supra* note 86, at 471.

89. Piatt, *supra* note 52, at 38 (quoting *Darces v. Woods*, 679 P.2d at 472).

90. 42 U.S.C. § 1397aa (2008).

91. 42 U.S.C. § 1397aa(a) (2008).

92. Douglas-Hall & Koball, *supra* note 85.

those born after August 22, 1996, are entitled to receive the same health care benefits as natural-born children of citizen-parents.⁹³ Thus, the immigration status of their parents should not be an issue. When the statute is applied, however, the immigration status of the parents becomes quite a significant issue, primarily because legislation such as SCHIP, although philanthropic towards the health needs of children, is in a state of high tension with immigration policies.

One of the more obvious illustrations of this tension is that in the past States have enacted radically anti-immigrant legislation, such as California's Proposition 187.⁹⁴ At the very least, federal government agencies are authorized, and in some cases required, to provide information related to the immigration status of individuals.⁹⁵ In reality, although such legislation makes plain the resentment towards undocumented immigrants, in a way such laws do not matter because the overall situation after their passing never changed. Undocumented immigrants experience an underlying fear that they will be reported to authorities if they utilize institutionalized services such as hospitals.⁹⁶ This fear in turn results in decreased health care access to the citizen children of these undocumented immigrants. Programs like SCHIP are therefore unnecessarily inefficient because citizen-children do not utilize them when their undocumented parents do not take them to the doctor.⁹⁷ This is the likely reason why only 34 percent of low-income children of immigrants receive SCHIP or Medicaid, compared to 41 percent of children of native-born parents in similar financial situations.⁹⁸ Consequently, not only is the inefficiency of such programs increased, but so are the costs associated with emergency room care.⁹⁹

Anti-immigration policy affects citizen-children, depriving them of a full-fledged citizenship before they are even born. In *Lewis v. Thompson* the United States Court of Appeals for the Second Circuit held that the denial of prenatal care to undocumented immigrant

93. Costich, *supra* note 63.

94. *See supra* Part II.A.

95. *See* 8 U.S.C. §§ 1324, 1373, 1644 (2008).

96. *See* Geoffrey Cowley & Andrew Murr, *Good Politics, Bad Medicine*, NEWSWEEK, Dec. 5, 1994, at 31.

97. *See* Leighton Ku & Sheetal Matani, *Left Out: Immigrants' Access to Health Care and Insurance*, HEALTH AFFAIRS, Jan./Feb. 2001, at 249–50.

98. Douglas-Hall & Koball, *supra* note 85.

99. Costich, *supra* note 63, at 1060.

women does not violate equal protection rights, partially because the citizen children of these undocumented mothers are eligible for Medicaid at birth if they meet the same eligibility criteria (aside from documentation status) as mothers who are in the country legally.¹⁰⁰ That decision presumed, however, that these mothers even attempt to enroll in Medicaid at all. One study has noted that of all eligible mothers, native and undocumented, “[n]early a third . . . who obtained coverage as a result of Medicaid . . . expansions enrolled in the last month of pregnancy—many after admission to the hospital to give birth. Many women who received care earlier did not get care regularly enough.”¹⁰¹ This sporadic (or in some cases complete lack of) prenatal care leaves children at a severe health disadvantage from the time they are born.

A simple understanding of health makes clear that prenatal care can result in the avoidance of lifelong health problems. The court in *Lewis* noted in its opinion that this was the view of the New York State Department of Health.¹⁰² Furthermore, a 1999 study modeling the effects of denying prenatal treatment for sexually transmitted infections in undocumented immigrants estimated that treatment for the adverse pregnancy outcomes would offset about one-third of the projected savings from denying all prenatal care.¹⁰³ Other studies concur, noting that “[i]n investment terms, every dollar invested [in pre-natal care for low-birth-weight infants] has yielded \$5 in better health . . . it is clearly worth the cost.”¹⁰⁴ Because the citizen child suffers from decreased access to such health services, the result is not only a more burdened health care system later in the child’s life (from increased emergency room costs), but also a constitutional violation by depriving the natural born child of full-fledged citizenship. Such outcomes go directly against the health objectives that programs like SCHIP were designed to meet.

100. *Lewis v. Thompson*, 252 F.3d 567, 591 (2d Cir. 2001).

101. DAVID M. CUTLER, *YOUR MONEY OR YOUR LIFE: STRONG MEDICINE FOR AMERICA'S HEALTH CARE SYSTEM* 29 (Oxford Univ. Press 2004).

102. *Lewis*, 252 F.3d at 579.

103. Costich, *supra* note 63, at 1061–62 (citing H. Kuiper et al., *The Communicable Disease Impact of Eliminating Publicly Funded Prenatal Care for Undocumented Immigrants*, 3 *MATERN. CHILD HEALTH J.* at 39 (1999)).

104. Cutler, *supra* note 101, at 27.

B. The Census Issue

For programs like SCHIP and TANF to work efficiently, both federal and state governments first need to be aware of the actual number of children living in the United States. Unfortunately, anti-immigrant sentiment and governmental failures have prevented a proper head count. In the 1990 United States Census, the undercount of all children was generally disproportionate, accounting for almost half of all persons missed by the Census Bureau.¹⁰⁵ The disproportionate undercounting of children of color was even worse.¹⁰⁶ Because children are unlikely to fill out census forms themselves, mixed-status families (and their citizen-children) will be discouraged from answering the census at all.¹⁰⁷ Karen Narasaki, President and Executive Director of the Asian American Justice Center, stated that “[t]he anti-immigrant climate today will harm confidence in the confidentiality of the Census, and promote the belief that . . . the Bureau will use the information . . . in a detrimental manner.”¹⁰⁸ Narasaki noted that in the 2000 Census, although the Census Bureau attempted to work with ICE, having the latter limit their enforcement activity so that the former could gather more reliable statistics, the Bureau began working with ICE too late.¹⁰⁹ As a result, ICE performed raids in Arizona, Oklahoma, Washington and Texas, even after ICE was instructed to limit highly visible enforcement operations.¹¹⁰ This action in turn deterred many undocumented parents who were initially going to participate in the census from ultimately doing so, and has further deterred an as yet unknown number of undocumented parents from participating in the 2010 census.¹¹¹ All programs, state and federal, rely on United States Census Bureau statistics to determine their funding. To obtain accurate statistics, the Bureau needs as many people as possible to participate. Yet if undocumented parents are deterred from

105. *2010 Census: Hearing Before the Subcomm. on Federal Financial Management, Government Information, Federal Services, and International Security on the Senate Committee on Homeland Security and Governmental Affairs*, 110th Cong. (2008) (statement of Karen Narasaki, Pres. and Exec. Dir. of the Asian American Justice Center).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

participation, inaccurate statistics will lead to inaccurate funding for programs like SCHIP and TANF, which are already underutilized by mixed status families. It is a vicious circle that continuously precludes the natural born child from truly becoming a full-fledged citizen.

The fear that many undocumented parents have in participating in the census is well-founded, and is evident beyond the low-level of participation. Assuming an undocumented immigrant participates in the census, they still suffer the fear that the United States Census Bureau will improperly “share” their information with immigration authorities. This fear, unfortunately, is hardly unjustified. In 2007, information was uncovered that during World War II, the Census Bureau was sharing information about Japanese Americans in order to facilitate their internments.¹¹² Narasaki also pointed out that a more recent data sharing incident occurred in 2004 when the Census Bureau turned over data to other governmental agencies regarding Arab Americans at the zip code level.¹¹³ These incidents do little to assure undocumented parents that they will not suffer from their participation in the census.

Citizen-children of undocumented immigrants are heavily deterred from taking advantage of the luxuries that come with a full-fledged citizenship, in this case proper health care. Anti-immigration sentiment in general has led to a social alienation of these children because such children may be seen as “anchor babies,” or babies birthed specifically in the United States by their undocumented mothers in order to decrease the chances of deportation.¹¹⁴ Despite court rationales stating otherwise, it seems the conflict of laws covered in this article abridge the privileges associated with citizenship, and thus directly violate the Fourteenth Amendment of the Constitution.¹¹⁵

The census issue is unlikely to end any time soon, particularly because politicians cannot agree as to how the census should be run. First, before settling on Gary Locke, President Obama had trouble finding a Secretary of Commerce, the post to whom the United States Census Bureau normally reports to. Before being sworn in as

112. *Id.*

113. *Id.*

114. Leti Volpp, *2005 Survey of Books Related to the Law: Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595, 1598–99 (2005).

115. U.S. CONST. amend. XIV, § 1 (“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .”).

President of the United States, Senator Barack Obama sought to appoint Governor Bill Richardson as Secretary of Commerce.¹¹⁶ Amid allegations of improper conduct, Richardson withdrew his nomination in early 2009.¹¹⁷ As a substitute, President Obama asked a Republican, Judd Gregg, to take Richardson's spot.¹¹⁸

During the last few census cycles (a process that is constitutionally mandated to occur every ten years¹¹⁹), representatives of minority groups such as Narasaki from the Asian American Justice Center¹²⁰ have protested, arguing that language barriers and fear of government officials have resulted in the under-counting of their numbers.¹²¹ Secretary Gregg drew considerable criticism as these minority groups pointed out that Gregg battled efforts to increase the Census budget during the Clinton administration.¹²² In response, President Obama ordered that the director of the Census Bureau report directly to the White House and not to the then-Secretary of Commerce Gregg.¹²³ In turn, Republicans cried foul, arguing that the Census Bureau would report to the Chief of Staff, i.e., Rahm Emanuel, a noted partisan Democrat. In other words, the Republicans argued the White House was trying to usurp control of the census.¹²⁴ Who controls the census is a heated issue, as the census results determines how many seats each state has in the House of Representatives, and also partially determines where voter district lines are drawn within each state.¹²⁵ Due to the allegations and strong criticism, Gregg eventually declined the nomination.¹²⁶

116. Charles Babington, *Analysis: Obscure Post Gives Obama Big Headache*, ASSOCIATED PRESS, Feb. 12, 2009, at 1, available at <http://abcnews.go.com/Politics/wireStory?id=6867598>.

117. *Id.*

118. *Id.*

119. U.S. CONST. art. I, § 2 (“The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.”).

120. *2010 Census*, *supra* note 105.

121. *See* Neuman, *supra* note 65.

122. *Id.*

123. *Id.*; Ed O’Keefe, *Gregg Links Withdrawal to Census Concerns*, WASH. POST, Feb. 13, 2009, at 1, available at http://voices.washingtonpost.com/federal-eye/2009/02/_sen_judd_gregg_said.html?hpid=topnews.

124. Peter Baker, *A Nominee’s Exit and the Nation’s Nose Count*, N.Y. TIMES, Feb. 19, 2009, at 1, available at http://www.nytimes.com/2009/02/20/us/politics/20memo.html?_r=3.

125. *Id.*

126. O’Keefe, *supra* note 123.

Second, Republicans and Democrats cannot agree as to how the census process should be improved. As Peter Baker from *The New York Times* succinctly articulates, "Almost everyone agrees that the traditional method—mail-back surveys and door-knocking follow-ups—fails to count millions of Americans."¹²⁷ Democrats wish to apply statistical sampling models, which would theoretically increase the number of minorities, immigrants and homeless that are included. Such an alteration in sampling procedure would likely benefit Democrats electorally.¹²⁸ Republicans dispute the reliability of such sampling models, and also argue that the Constitution mandates an actual count.¹²⁹ Presumably, citizen children of undocumented parents would have a better chance of being counted by statistical sampling models, given that such children are offspring of both minorities and immigrants, and also given the fact that, in any event, undocumented immigrant parents are afraid of participating in the census.¹³⁰

William Ramos of the National Association of Latino Elected and Appointed Officials explained why the Census issue is so important to citizen-children of undocumented immigrants: "This is . . . data used for demographers, cartographers, the business community, the nonprofit community, and local government entities."¹³¹ Citizen-children of undocumented immigrants are directly affected, not only by the size of the governmental programs that they are eligible for, but also by the size and concentration of resources from nonprofit entities. Republicans have responded to the notion with intense and scathing criticism, arguing that the White House seeks to keep the Census statistics secretive in a bid to engage in gerrymandering.¹³² Although Obama has pledged to make the workings of his administration more transparent,¹³³ it remains to be seen how open the conduct of the 2010 Census will be. All signs, however, point to the probability that whatever gains President

127. Baker, *supra* note 124.

128. *Id.*

129. *Id.*

130. *2010 Census*, *supra* note 105.

131. Neuman, *supra* note 65.

132. Baker, *supra* note 124.

133. See, e.g., Paul Jacob, *Transparent Obama*, HAWAII REPORTER, Feb. 12, 2009, at 1, available at <http://www.hawaiireporter.com/story.aspx?8afe95f3-e6b2-42a5-9696-f96dcc2f3c49>.

Obama may make in the census procedure, citizen-children of undocumented immigrants are still likely to suffer from significant undercounting.

III. The Obama Administration's Stance

The election of President Barack Obama ushered in a new era of hope and change. Unfortunately, unless progress is made, citizen-children of undocumented immigrants are likely to remain second-class citizens.

The Obama administration seeks to “[p]rovide affordable, accessible health care for all Americans.”¹³⁴ This should include citizen-children of undocumented immigrant-parents. President Obama took a step towards this stated goal with the signing of the SCHIP bill on February 4, 2009.¹³⁵ The extended program now eliminates a five-year waiting period for documented immigrants and their children.¹³⁶ Yet this does nothing for citizen-children of undocumented immigrants, for the very same reasons that were discussed earlier. For instance, this does nothing to battle the percolating anti-immigrant sentiment that deters undocumented parents from taking their children to the hospital. Nor does it do anything to quell more systemic problems, such as census statistics.

President Obama has alluded that politicians have used immigration policy to advance their agendas, instead of finding real solutions to the problems immigration poses.¹³⁷ In response, President Obama will seek, *inter alia*, to remove incentives for immigrants to enter illegally by “cracking down” on employers who hire undocumented immigrants.¹³⁸ Given that such criminal statutes already exist, presumably President Obama intends to simply increase enforcement of federal reporting and criminal statutes.¹³⁹ Given that the United States only accepted 1,052,415 immigrants in 2007,¹⁴⁰ and given the heated debate over immigration policy, it is highly unlikely

134. The White House, *The Agenda: Health Care*, http://www.whitehouse.gov/issues/health_care (last visited Oct. 6, 2009).

135. Pear, *supra* note 2.

136. *Id.*

137. The White House, *The Agenda: Immigration*, <http://www.whitehouse.gov/issues/immigration> (last visited Oct. 6, 2009).

138. *Id.*

139. See 8 U.S.C. §§ 1324, 1373, 1644.

140. DEPARTMENT OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS: 2007 YEARBOOK OF IMMIGRATION STATISTICS 5 (2008).

that the United States will absorb most immigrants who seek entry. Thus, with regards to citizen-children of undocumented immigrants, President Obama's plan of action will only seek to remove income from their household, and perhaps even physically separate a mixed-status family altogether.

President Obama has also stated that he will also seek to "bring people out of the shadows" by supporting a system that allows undocumented immigrants who are in good standing to pay a fine, learn English, and go to the back of the line for the opportunity to become citizens.¹⁴¹ As of this writing, details have not been hashed out as to how exactly an undocumented immigrant-parent, with a family and without a lucrative career, is supposed to pay a fine and find the time to learn English.

There are other stated goals that would affect the lives of citizen-children of undocumented parents that are also likely to receive sharp opposition and criticism. One goal is the Obama administration's plan to support parents with young children by providing low-income, first-time mothers with assistance by entities that would provide home visits by trained registered nurses to expectant mothers and their families.¹⁴² The Obama administration even notes that researchers at the Federal Reserve Bank of Minneapolis concluded that programs like these (i.e., pre-natal care, post-natal care, and preventative care generally) produce an average savings of five dollars for every dollar invested, producing more than twenty-eight thousand dollars in net savings for every high-risk family enrolled.¹⁴³ Undocumented mothers, however, are unlikely to receive such health care. Thus, the program will most likely manifest as another example of citizen-children being treated as second-class citizens, compared to their counterparts who have citizen or legal resident mothers.

In sum, the Obama Administration has ambitious and laudable goals. Nevertheless, major decisions will have to be made in order to ensure that citizen children of undocumented immigrants are treated equally, and do not continue to be deprived of the benefits their very citizenship confers. The reality is that the opposition to providing health care for undocumented immigrant parents (even those with

141. See The White House, *The Agenda: Immigration*, *supra* note 137.

142. The White House, *The Agenda: Family*, <http://www.whitehouse.gov/issues/family/> (last visited Oct. 6, 2009).

143. *Id.*

citizen children) is so strong that rational discussion of this challenge is nearly impossible.

IV. The Solution

This article does not seek to provide the answers to remedying the constitutional violations of the citizenship of undocumented immigrants, nor the conflicting laws (*de jure* as well as *de facto*), nor the Census issue. This article seeks to offer a perspective that may be more conducive to remedying the injuries suffered by citizen children of undocumented immigrants.

The first step should be to acknowledge the problems and ramifications in maintaining an immigration policy that conflicts with children's health policy. One cannot redress an injury until an injury is first identified. The data shows, and this article argues, that citizen children are suffering injuries in violation of their constitutional rights under the Fourteenth Amendment.

The next, and perhaps most difficult step, is to change the mindset and perspective that causes such systemic conflicts. It is obvious that to maintain conflicting immigration and children's health policies is to maintain a population of second-class citizens. Although the children who are the subject of this article are indeed citizens, anti-immigrant sentiment is the largest obstacle in providing these citizens with full citizenship. Indeed, many seek to destroy the very path to citizenship these children traveled.¹⁴⁴ Even now there are coalitions within the United States Congress that are seeking to *increase* the conflicts between immigration policy and children's health policy. As recently as February 2009, Representative Elton Gallegly from California proposed an immigration bill that reflects an argument proffered many times before. H.R. 126, a proposed amendment to the Immigration and Nationality Act, would limit citizenship by virtue of birth in the United States to persons with citizen or legal resident mothers.¹⁴⁵ Logically, this would seem to decrease conflict, given that citizen children of undocumented immigrants would no longer be citizens. There is a high cost, however, in achieving a logic that would make immigration policy symmetric with children's health policy. Namely, two constitutional violations would result. First, given that *ex post facto* laws are

144. 155 CONG. REC. H27 (daily ed. Jan. 6, 2009) (statement of Rep. Gallegly); Malkin, *supra* note 55.

145. 155 CONG. REC. H27 (daily ed. Jan. 6, 2009) (statement of Rep. Gallegly).

forbidden by the United States Constitution,¹⁴⁶ such a law could not strip the citizenship of current citizen children of undocumented immigrants, and would do nothing to resolve the plight of current children who are citizens, yet are deprived of full citizenship. Second, even if such a law did not apply retroactively, it would still violate the citizenship clause of the Fourteenth Amendment.¹⁴⁷ A federal statute cannot override a constitutional amendment.

Only by changing our collective mindset with regards to immigration can we seek to offer our children's health policy—a product of over one hundred years worth of effort, legislation, and litigation—to all of our country's citizen children. The only other options are to allow the conflicts and constitutional injuries to continue, or to retract the country's children's health policy. Given the passage of SCHIP, it seems in this country there is a general consensus that children's health is an important value that should be maintained, and perhaps even expanded. If so, let it be retained yet applied equally to all citizen children. This requires a fundamental change in immigration policy.

Conclusion

The latter half of the twentieth century and the early part of the twenty-first century culminated with the emergence of overarching, comprehensive schemes of national policy that included a multitude of provisions aimed towards children. In the end, however, the laws that promote children's public health are in conflict with the immigration objectives of the United States government, and usually end up being sacrificed in that struggle. What results is nothing short of a deprivation of the full citizenship rights owed to natural born citizen-children of undocumented immigrants under the Constitution. Although the courts have provided rationales for why there are no constitutional equal protection violations,¹⁴⁸ their reasoning does not comport with logic or common sense. As natural-born citizens, these children deserve to reap the benefits of the legislation that was enacted for their class, such as Temporary Assistance to Needy

146. U.S. CONST. art. I, § 9 (“No . . . ex post facto Law shall be passed.”).

147. U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.”).

148. *Lewis*, 252 F.3d at 591.

Families, various legislative schemes dealing with crime and immigration, and more recent programs such as SCHIP.

Citizen-children do not receive optimal health care because their undocumented parents do not take them to the hospital for fear they will be reported to immigration authorities, and perhaps even deported. Undocumented immigrant-parents are afraid of being deported because, among a myriad of reasons, they risk further depriving their citizen-children of opportunities afforded to them through their citizenship, such as increased access to health services. No longer should a technical legal argument succeed in preventing the vulnerable citizen-child from receiving the preventative and acute medical treatment he or she not only deserves, but is entitled to.

A little over one hundred years ago in the United States, children were being exploited for their labor. Today, legislation has evolved to allow proper health care for children, inclusive of citizen-children of undocumented parents. Having become a more sophisticated society, it should be our duty to ensure that all citizens receive the benefit of their constitutional rights, especially the vulnerable child-citizen. To quote Professor David M. Cutler, an economics professor at Harvard, "We [as a society] have invested a lot in a set of intensive technologies that have brought significant benefits. On the other hand, we could do better by investing in lower-tech health care and a system that works better."¹⁴⁹ A significant part in making that system work better requires that the natural-born child of undocumented parents should not be treated as a second-class citizen.

149. See Cutler, *supra* note 101, at 30.