NOTE

THE UPROOTING OF THE AMERICAN DREAM: THE DIMINISHED AND DEFERRED RIGHTS OF THE U.S. CITIZEN CHILD IN THE IMMIGRATION CONTEXT

*Joanne Joseph**

"The humblest citizen in all the land, when clad in the armor of a righteous cause, is stronger than all the hosts of error." - William Jennings Bryan[1]

How should the Board of Immigration Appeals respect the rights of the U.S. citizen children of undocumented immigrants in deportation proceedings? This Note suggests that the current "extreme hardship standard" is an inadequate safeguard against the effective deportation of U.S. citizen children.

Instead, the Board should consider that U.S. citizen children have constitutionally-rooted rights to family unity, to opportunity, and to remain in the United States. These interests should not be delayed merely because of the citizen's age or dependency, or marginalized due to an undocumented parent's culpability. Courts should intentionally reposition U.S. citizen children to be at the center of immigration jurisprudence given their unique position, acknowledge the important fundamental rights at stake, and recognize that children are autonomous rights-bearing individuals. Under the Mathews v. Eldridge *framework, the citizen children's interests require more procedural protection in the removal context than the current "extreme hardship" standard provides. The current "extreme hardship" standard frames citizen children as mere bystanders, rather than as citizens with constitutional rights that are directly at stake in their parents' removal proceedings. By providing*

* B.A., Adelphi University, 2012; Candidate for J.D., Cornell Law School, 2015; Acquisitions Editor, *Cornell Journal of Law and Public Policy*, Volume 24. I would like to thank Professor Stephen W. Yale-Loehr for inspiring me to engage with the intricacies of immigration law. I am also grateful to my friends and colleagues on the *Cornell Journal of Law and Public Policy* for their diligent work and thoughtful insight throughout the editing process. Finally, I would like to give my deepest gratitude to my parents, Rajoo and Anna Joseph. My family's story is an immigrant story, and my parents tirelessly sowed the seeds of sacrifice so that I might realize every dream, including this one. Thank you.

[1] Democratic National Convention Address: A Cross of Gold (July 8, 1896) (transcript available at http://www.americanrhetoric.com/speeches/williamjenningsbryan1896dnc.htm).

precisely tailored procedural safeguards during undocumented parents' removal proceedings, the U.S. can protect citizen children's constitutional rights without abandoning its significant interest in maintaining a uniform immigration system.

INTRODUCTION

On August 23, 2013, U.S. Immigration and Customs Enforcement (ICE) issued a directive that emphasized the special and vulnerable role of minor children in the deportation proceedings of their undocumented parents.[2] The directive primarily focused on the rights of noncitizen parents, but it also noted that "[p]articular attention should be paid to immigration enforcement activities involving . . . parents or legal guardians whose minor children are physically present in the United States and are [U.S. citizens]."[3] ICE released this directive in response to a substantial rise in the number of undocumented parents who have been deported from the United States,[4] recognizing that citizen children's interests must

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[2] *See* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, DIRECTIVE 11064.1: FACILITATING PARENTAL INTERESTS IN THE COURSE OF CIVIL IMMIGRATION ENFORCEMENT ACTIVITIES (2013), *available at* http://www.ice.gov/doclib/detention-reform/pdf/parental_interest_directive_signed.pdf.

[3] *Id.* at 1.

[4] *Falling Through the Cracks: The Impact of Immigration Enforcement on Children Caught Up in the Child Welfare System*, IMMIGRATION POLICY CTR., AM. IMMIGRATION COUN-

be better protected within the current immigration scheme.[5] President Obama has also noted that deportation should target "violent offenders and people convicted of crimes; not families, not folks who are just looking to scrape together an income," because "[w]hen nursing mothers are torn from their babies, when children come home from school to find their parents missing . . . the system just isn't working."[6]

Although domestic law has specially protected the interests of children,[7] and the Supreme Court has recognized that deportation is a harsh penalty,[8] the rights of children in the immigration context are anomalously dulled. Children of undocumented immigrants are already at a severe socioeconomic disadvantage compared to other U.S.-born children.[9] These hurdles are exacerbated when children's parents are facing removal.[10] However, under the extreme hardship standard, courts and the Board of Immigration Appeals (Board) generally disregard these setbacks as incidental and expected consequences.[11] Under that standard,

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CIL (Dec. 12, 2012), http://www.immigrationpolicy.org/just-facts/falling-through-cracks ("Reflecting a dramatic increase in recent years, statistics released by DHS reveal that 204,810 parents of U.S.-citizen children were removed from the U.S. between July 1, 2010 and September 31, 2012, accounting for nearly 23 percent of all individuals deported during that period. This is likely an underestimate since parents may be reluctant to reveal that they have children." (emphasis omitted)).

5 *ICE Memo: A Kinder, Gentler Approach to Undocumented Immigrant Parents*, MURTHY LAW FIRM (Sept. 18, 2013), http://www.murthy.com/2013/09/18/ice-memo-a-kinder-gentler-approach-to-undocumented-immigrant-parents (noting that reasonable people will understand that this policy "makes sensible use of limited resources, and shows respect for family integrity and the needs of children").

6 *Parents Deported, What Happens to US-Born Kids*, ASSOCIATED PRESS (Aug. 25, 2012), http://bigstory.ap.org/article/parents-deported-what-happens-us-born-kids-0.

7 *See, e.g.*, Bridgette A. Carr, *Incorporating a "Best Interests of the Child" Approach to Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120, 124–27 (2009) ("In both domestic and international law, a common legal standard for cases involving children is the 'best interests of the child' standard. The [U.S.] immigration system runs counter to this prevailing norm."); Erica Stief, *Impractical Relief and the Innocent Victims: How United States Immigration Law Ignores the Rights of Citizen Children*, 79 UMKC L. REV. 477, 500 (2010) ("The 'best interest of the child' is already the primary consideration in the practice and formation of laws regarding child abuse, child custody, post-divorce visitation, adoption, and termination of parental rights. Further, best interest of children is considered in determining paternity, establishing guardianship, asylum for unaccompanied minors, and intestate claims." (footnotes omitted)).

8 Gastelum-Quinones v. Kennedy, 374 U.S. 469, 479 (1963).

9 *See* Carola Suárez-Orozco et al., *Growing Up in the Shadows: The Developmental Implications of Unauthorized Status*, 81 HARV. EDUC. REV. 438, 461 (2011) (noting that children of undocumented immigrants face "uniformly negative" effects and are "at risk of lower educational performance, economic stagnation, blocked mobility and ambiguous belonging").

10 *Id.* at 443 ("[W]ell over one hundred thousand citizen children have experienced their parents' deportation in the last decade . . . [a]nd those who have not had this experience nonetheless live in the daily nightmare of knowing their parents may be swept away at any time") (internal citations omitted).

11 *See, e.g.*, Chiaramonte v. INS, 626 F.2d 1093, 1101 (2d Cir. 1980) (holding that the extreme hardship standard is not met "where the deportation would result in nothing more than the emotional or even financial tribulations which generally follow the separation of the fam-

the Board may only cursorily consider affected citizen children and does not recognize that these children are full rights-bearing persons.[12] Immigration law's consideration of children in removal proceedings is not in alignment with the law's prioritization of children in other realms, leading to an incoherent national policy.

Attempting to articulate the role and rights of children in immigration proceedings is a natural tug-of-war between governmental objectives and fundamental individual and social rights. Is the sanctity of the family central in immigration proceedings, or should this consideration be subject to the United States' sovereign authority to control its own borders? Should there be discrete classes of personhood and citizenship, where the children of an undocumented parent cannot exercise the same level of rights as an adult? What level of process is due to a U.S. citizen child, and are these additional safeguards feasible? How can the Board and the courts appropriately protect the rights of U.S. citizen children without softening national policy, creating perverse incentives, and unraveling immigration policy? These are a few of the difficult questions that this Note attempts to answer.

This Note analyzes whether U.S. citizen children retain specific constitutional rights or special protections in the immigration context and explores how the Board can appropriately prioritize these considerations without infringing on U.S. sovereignty. Part I examines the plenary power doctrine and how the current "extreme hardship" standard falls short of fully considering the rights of the U.S. citizen child. Part II considers the citizen child as a rights-bearing person under the Constitution and the immigration system's efforts to indirectly stifle this status. Part III explores the possible constitutional rights of citizen children in removal proceedings, including the right to remain in the United States, the right to family unity, and the right to achieve under the Equal Protection Clause. This Part further applies the *Mathews v. Eldridge* framework to the citizen child facing constructive deportation and determines that greater procedural safeguards are required. Part IV concludes and posits recommendations on how the Board and courts' decision-making framework can be altered to better accommodate the citizen child's vulnerable position and fundamental rights.

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ily"); Pilch, 21 I. & N. Dec. 627, 632 (B.I.A. 1996) (holding that the extreme hardship standard contains a "requirement [to show] significant hardships over and above the normal economic and social disruptions involved in deportation").

[12] David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 980 (2002) ("Immigration law and decisions continue to reflect conceptions of children that limit their recognition as persons and silence their voices.").

I. PLENARY POWER AND THE "EXTREME HARDSHIP" STANDARD

The U.S. Constitution does not directly confer the power to regulate immigration to Congress.[13] Rather than relying on constitutional language, the Supreme Court held that Congress' plenary power over immigration was rooted in the inherent sovereignty of the United States.[14] Congress' plenary power over immigration law has generally insulated immigration law from constitutional challenges and normal judicial review.[15] Ordinarily, a court will impose strict scrutiny review on any government action that infringes upon a person's fundamental rights.[16] However, in the immigration realm, courts will only provide minimal constitutional review because of the "Nation's need to speak with one voice in immigration matters."[17] Even so, the standard is surprisingly low, falling "somewhere between rational basis review and no review at all."[18] The Supreme Court has justified the low level of review by reasoning that the judiciary is not the appropriate institution to evaluate the constitutional constraints of Congress' immigration policies.[19]

In early formulations of the plenary power doctrine, the Supreme Court found that Congress' immigration authority was not restricted by fundamental constitutional limitations, such as due process. In 1954, the Court noted, "much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress" in immigration matters, "[b]ut the slate is not clean."[20] The Court also stated, in

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13 *See* Anne E. Pettit, *"One Manner of Law": The Supreme Court, Stare Decisis and the Immigration Law Plenary Power Doctrine*, 24 FORDHAM URB. L.J. 165, 172–73 (1996).

14 Chae Chan Ping v. United States, 130 U.S. 581, 603 (1889) ("That the government of the United States . . . can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own authority to that extent is an incident of every independent nation."); Ekiu v. United States, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.").

15 *See, e.g.*, Kleindienst v. Mendel, 408 U.S. 753, 769–70 (1972).

16 Roe v. Wade, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate interests at stake." (citations omitted)).

17 Zadvydas v. Davis, 533 U.S. 678, 700 (2001) (internal quotation marks omitted).

18 Meredith K. Olafson, Note, *The Concept of Limited Sovereignty and the Immigration Law Plenary Power Doctrine*, 13 GEO. IMMIGR. L.J. 433, 441 (1999) (citing Michael Scaperlanda, *Justice Thurgood Marshall and the Legacy of Dissent in Federal Alienage Cases*, 47 OKLA. L. REV. 55, 57 (1994)).

19 *Zadvydas*, 533 U.S. at 700 ("Ordinary principles of judicial review in [the immigration] area recognize primary Executive Branch responsibility. They counsel judges to give expert agencies decisionmaking leeway in matters that invoke their expertise. They recognize Executive Branch primacy in foreign policy matters." (citations omitted)).

20 Galvan v. Press, 347 U.S. 522, 530–31 (1954).

1892, that "the decisions of . . . administrative officers, acting within powers expressly conferred by Congress, are due process of law."[21] This language suggests that Congress' plenary power should be absolute in this area, stretching beyond the reach of ordinary constitutional safeguards.

However, the Court may have moved away from that position when it recently stated that "[plenary] power is subject to important constitutional limitations."[22] The strength and scope of these limitations remains unclear, as the Court has adopted deferential judicial review even when the rights of U.S. citizens were at stake. In *Fiallo v. Bell*, the Supreme Court rejected the citizen plaintiffs' claim that the Court should "scrutinize congressional legislation in the immigration area to protect against violations of the rights of citizens."[23] The majority's disregard for U.S. citizens' constitutional rights sparked Justice Marshall's dissenting view that "discrimination among citizens cannot escape traditional constitutional scrutiny simply because it occurs in the context of immigration legislation."[24] The Court ultimately held that even when a citizen's rights are implicated, congressional immigration policies are "subject only to limited judicial review."[25] It seemed that in immigration law matters, the courts would take a "hands-off" approach even if important rights were at stake.

Fortunately, Congress has not completely disregarded the interests of affected U.S. citizens in removal proceedings. Under § 244(a)(1) of the Immigration and Nationality Act (INA), one of the factors that an immigration judge should consider is whether removal will pose "extreme hardship" on a U.S. citizen spouse or child.[26] At first glance, this seems to bolster the rights of the U.S. citizen child. However, the Board has noted that "extreme hardship" is a vague standard, "not a definable term of fixed and inflexible content or meaning."[27] The Supreme Court rejected a broad and relaxed standard because doing so would impermissibly shift discretionary authority from immigration officials to the judiciary.[28] The Board now construes extreme hardship so narrowly that

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21 Ekiu v. United States, 142 U.S. 651, 660 (1892).

22 *Zadvydas*, 533 U.S. at 695.

23 430 U.S. 787, 794–95 (1977).

24 *Id.* at 809 (Marshall, J., dissenting).

25 *Id.* at 795 n.6. (majority opinion).

26 *See* 8 U.S.C. § 1254a(e) (2011).

27 Hwang, 10 I. & N. Dec. 448, 451 (B.I.A. 1964).

28 INS v. Wang, 450 U.S. 139, 145–46 (1981) ("The Attorney General . . . [has] the authority to construe 'extreme hardship' narrowly should [he] deem it wise to do so . . . . [T]he relaxed standard of the [lower court's] opinion 'is likely to shift the administration of hardship deportation cases from the [INS] to [the court of appeals].'").

most removal cases involving a U.S. citizen child will not be extraordinary enough to warrant relief.[29]

Under this heightened standard, "the mere existence of a citizen child, without more, neither validates an otherwise invalid claim of extreme hardship to the alien nor automatically establishes extreme hardship to the child."[30] Immigration judges have no obligation to give citizen children more than a cursory consideration, given the extremely deferential judicial review standard. Absent a complete failure to consider a relevant hardship factor, appellate courts can only inquire as to whether the decision was "arbitrary, irrational, or contrary to law."[31] Therefore, a child's particularly vulnerable position and citizenship status will not speak for itself in the immigration context.

According to the Board, a U.S. citizen child's hardship must be "*substantially* different from, or beyond, that which would normally be expected from the deportation of an alien with close family members here."[32] The Board has held that a child must face more than the typical educational and economic setbacks that accompany deportation to show extreme hardship.[33] In addition, although preserving family unity has been a goal of the U.S. immigration system in its prioritization of family-based immigrant visa categories, the Board has held that the emotional hardship of severing family and community ties is an ordinary consequence of deportation and does not constitute extreme hardship.[34]

Since the current "extreme hardship" standard is practically impossible to meet and the U.S. citizen child is only one of many factors that the judge must consider in a parent's removal hearing, the child's interests will often be overlooked. Courts have come up with several reasons for why a child's citizenship status should not be dispositive in these proceedings, and most have centered on the opinion that a child is not a full and autonomous rights bearer under immigration law.

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29 *See* Edith Z. Friedler, *From Extreme Hardship to Extreme Deference: United States Deportation of Its Own Children*, 22 HASTINGS CONST. L.Q. 491, 513 (1995) (stating that the hardship standard as it stands now provides "practically unattainable relief for the citizen child whose parents are subject to deportation.").

30 Wang v. INS, 622 F.2d 1341, 1348 (9th Cir. 1980), *rev'd on other grounds*, 450 U.S. 139 (1981).

31 Youssefinia v. INS, 784 F.2d 1254, 1262 (5th Cir. 1986).

32 Monreal-Aguinaga, 23 I. & N. Dec. 56, 65 (B.I.A. 2001) (emphasis added).

33 *See* Andazola-Rivas, 23 I. & N. Dec. 319, 323 (B.I.A. 2002) ("[I]t has long been settled that economic detriment alone is insufficient to support . . . a finding of extreme hardship." (citing Pilch, 21 I. & N. Dec. 627, 630 (B.I.A. 1996))); L-O-G-, 21 I. & N. Dec. 413, 417 (B.I.A. 1996) ("The fact that economic, educational, and medical facilities and opportunities may be better in the United States does not in itself establish extreme hardship.").

34 Pilch, 21 I. & N. Dec. 627, 631 (B.I.A. 1996).

II. THE U.S. CITIZEN CHILD AS AN UNPROTECTED RIGHTS-BEARER UNDER IMMIGRATION LAW

Under the Citizenship Clause of the Fourteenth Amendment, "all persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States."[35] Some scholars have argued that birthright citizenship should not extend to the children of undocumented immigrants.[36] In *United States v. Wong Kim Ark*, however, the Supreme Court held that "[t]he child born of alien parents in the United States is . . . a citizen."[37] The Court held that to deny birthright citizenship to children of undocumented immigrants "would be to deny citizenship to thousands of persons of . . . European parentage, who have always been considered and treated as citizens of the United States."[38] Therefore, even if a child's parents are undocumented immigrants, the child nonetheless retains citizenship rights and equal protection under the law.

The Supreme Court has held that the rights of children and adults are not perfectly equivalent. But it has also reasoned that children are "persons" protected by the Constitution.[39] Children have a unique status as rights bearers because they may not be able to exercise their rights and they are under the custody and care of their parents.[40] Although parents usually make decisions on behalf of their children, the Supreme Court has recognized that children's rights can be distinct from the interests of their parents and the government.[41] There is no bright-line rule determining when a child has the capacity to exercise his or her rights. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[42] Even if children are too young and "lack the capacity necessary for

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35 U.S. CONST. amend. XIV, § 1.

36 *See, e.g.*, VERNON M. BRIGGS, JR., MASS IMMIGRATION AND THE NATIONAL INTEREST: POLICY DIRECTIONS FOR THE NEW CENTURY 35 (3d ed. 2003) ("[T]here has been no consent extended by the American polity that children born to parents of illegal immigrants, who should not be in the country to begin with, ought to be automatically granted U.S. citizenship with all of the rights, benefits, and entitlements that accrue to that status.").

37 169 U.S. 649, 691 (1898), (quoting U.S. DEP'T OF STATE, OPINIONS OF THE PRINCIPLE AUTHORS OFFICERS OF EXECUTIVE DEPARTMENTS ON EXPATRIATION, NATURALIZATION, AND ALLEGIANCE 18 (1873).

38 *Id.* at 694.

39 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 ("Students in school as well as out of school are 'persons' under our Constitution" who "possess[] . . . fundamental rights which the State must respect.").

40 *See generally* Thronson, *supra* note 12.

41 *See, e.g.*, Planned Parenthood v. Danforth, 428 U.S. 52, 73–74 (1976) (holding that a minor has a right to privacy and does not have to obtain parental consent for an abortion decision).

42 *Id.*

agency, . . . they have needs and interests that the law can define and protect."[43] Scholars have argued that children's rights "need not presuppose total autonomy" and that the exercise of rights should not be confused with the existence of rights.[44]

However, in *Acosta v. Gaffney*, the Third Circuit emphasized the latent and almost accidental nature of a birthright citizen child's constitutional rights in the immigration context. In *Acosta*, an infant citizen child had no choice but to leave the United States with her deported undocumented parents, although a district court had reasoned that the constructive deportation of a citizen child was "repugnant to the Constitution" because "[t]he Fourteenth Amendment creates only one class of citizens."[45] The lower court also stated that "no act of any branch of government may deny to *any* citizen the full scope of privileges and immunities inherent in [U.S.] citizenship."[46] The district court further held that neither Congress' plenary power over immigration nor the government's national policies could override a child's constitutional rights.[47]

The Third Circuit reversed.[48] The appeals court quoted the Fifth Circuit that a "minor child who is fortuitously born here due to his parents' decision to reside in this country, has not exercised a deliberate decision to make this country his home."[49] The court noted that since the infant citizen child was only twenty-two months old, she did not have the capacity to personally exercise her rights.[50] The Third Circuit rationalized that there was no constitutional violation because the child's right to reside in the United States was not barred by her parent's removal, but only delayed until she reached the age of majority.[51]

Scholars have drawn attention to this general disregard for a birthright citizen's rights, concluding that the immigration system is more concerned with punishing an undocumented parent than protecting the interests of the child.[52] In subordinating the rights of the child to the blameworthiness of the parent facing removal, courts may be indirectly

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43 Annette Ruth Appell, *Uneasy Tensions Between Children's Rights and Civil Rights*, 5 NEV. L.J. 141, 150 (2004).

44 Thronson, *supra* note 12, at 988.

45 *See* Acosta v. Gaffney, 413 F. Supp. 827, 832 (D.N.J. 1976), *rev'd*, 558 F.2d 1153 (3d Cir. 1977).

46 *Id.* (emphasis added).

47 *See id*. (reasoning that no government policy, however relevant, could justify the "outright destruction" of a child's central vested citizenship right).

48 Acosta v. Gaffney, 558 F.2d 1153 (3d Cir. 1977).

49 *Id.* at 1157 (quoting Perdido v. INS, 420 F.2d 1179, 1181 (5th Cir. 1969)).

50 *Acosta*, 558 F.2d at 1158.

51 *Id.*

52 *See, e.g.*, Mae M. Ngai, *Birthright Citizenship and the Alien Citizen*, 75 FORDHAM L. REV. 2521 (2007).

and unfairly punishing the innocent citizen children for the acts of a parent. Under this conception, children are "passive objects in relation to adults, rather than independent persons exercising autonomy."[53]

By assuming that the rights of U.S. citizen children are latent and can only be exercised in the future, the Third Circuit severely undercut a child's status as a citizen with guaranteed liberties. Rights theorists have emphasized that limiting a child's right due to incapacity is "incoherent," "confining," and a framework under which "powerful elites continue to define which, if any, of the claims made by children they will recognize."[54] Although the U.S. legal system often characterizes rights in terms of capacity, it usually specially accommodates children's interests instead of citing this limited capacity as an excuse for overlooking them. Under domestic law, when a child is considered incapable of exercising his or her rights, the court steps in to determine and protect the best interests of the child.[55] In other areas of U.S. law judges have a responsibility to make child-centered decisions.[56] In some cases a court will appoint a guardian *ad litem* to represent the child's interests.[57]

However, the immigration system relegates U.S. citizen children to "mere bystanders" in removal proceedings, even though children are directly affected by the removal of a parent.[58] There are competing interests that complicate how the children are considered in immigration proceedings, including the Board's deference to Congress' plenary power and the government's strong interest in controlling the nation's borders. While these are valid counterpoints that should be incorporated in the Board's decision-making framework, the Board often absolutely defers to governmental sovereignty instead of weighing these interests against those of the affected children.[59]

Although courts have characterized U.S. citizen children as only incidentally affected by their parents' deportation, citizen children should have standing to make direct constitutional claims in the immigration context. Even when the citizens' claims are not purely personal, the

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53 David B. Thronson, *Thinking Small: The Need for Big Changes in Immigration Law's Treatment of Children*, 14 U.C. DAVIS J. JUV. L. & POL'Y 239, 251 (2010).

54 Katherine Hunt Federle, *Children, Curfews, and the Constitution*, 73 WASH. U. L.Q. 1315, 1316 (1995).

55 *See* Carr, *supra* note 7, at 123 ("The failure of immigration law and procedure to incorporate a 'best interests of the child' approach ignores a successful means of protecting children that is common . . . [in] domestic[ ] [law].").

56 *See* Thronson, *supra* note 53, at 262 ("Outside the realm of immigration law, the primacy of children's interests in legal decisions regarding family is ubiquitous").

57 *See* Jennifer J. Snider, *Guardians Ad Litem: Speaking for the Child*, 16 WM. MITCHELL L. REV. 1253, 1253 (1990) ("A guardian ad litem is in a unique position to provide meaningful factual information to the court [so that the court can] evaluate the best interests of the child.").

58 *See* Friedler, *supra* note 29 and accompanying text.

59 *See generally* Thronson, *supra* note 12.

Court has recognized that the potential separation of citizens' family members by immigration policy is a legally cognizable injury of association.[60] In *Fiallo v. Bell*, the Supreme Court granted standing to citizens and undocumented fathers who challenged an immigration provision that excluded their children from entering the United States.[61] The plaintiffs argued that Congress' policy violated their constitutional rights to equal protection and familial association.[62] Although the Court rejected the plaintiffs' claims under deferential judicial review, it recognized that the fathers had a potential claim to equal protection and familial association even when they were not being personally excluded.[63]

In fact, U.S. citizen children's interests are stronger than those of the fathers in *Fiallo*. First, the Court has stated that Congress' plenary power is strongest in the context of admission[64] and that immigrants who are physically present in the United States and face removal have more substantive rights and due process protections than individuals facing exclusion.[65] Unlike the plaintiffs' children in *Fiallo*, the citizen children's parents are being removed, not excluded. U.S. citizen children should have stronger due process claims in the removal context. Second, the *Fiallo* plaintiffs were not facing constructive removal while citizen children face this added hardship because of their dependence on their undocumented parents. In addition to the *Fiallo* plaintiffs' equal protection and familial association claims, the citizen children can also assert their right to remain.

Even though a child's injury may be initially derived from the parent's removal, the child still faces personal harm. In *Fiallo*, the Court accorded standing to family members in a far less compelling context. Therefore, the citizen child's rights and due process protections should not be hampered by the fact that he or she is not formally in removal proceedings. Courts should recognize that a citizen child's constructive

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60 *See* Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CAL. L. REV. 373, 391 (2004).

61 430 U.S. 787, 791 (1977); *see also* Nguyen v. INS, 533 U.S. 53 (2011) (granting standing for citizen fathers who challenged an immigration statute that restricted birthright citizenship for their illegitimate children).

62 *See Fiallo*, 430 U.S. at 791.

63 *See id.* at 798 ("With respect to each of these legislative policy distinctions, it could be argued that the line should have been drawn at a different point and that the statutory definitions deny preferential status to parents and children who share strong family ties.").

64 *See id.* at 792 ("This Court has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909))).

65 *See, e.g.*, Landon v. Plasencia, 459 U.S. 21, 26 (1982) ("[T]he alien who loses his right to reside in the United States in a deportation hearing has a number of substantive rights not available to the alien who is denied admission in an exclusion proceeding . . . ."); Maldonado-Sandoval v. INS, 518 F.2d 278, 280 (9th Cir. 1975) ("The differences between proceedings of exclusion and those of deportation are significant.").

deportation is not an incidental or indirect consequence. Citizen children, as "persons," have standing to make constitutional claims that are complete and separate from those of their undocumented parents.

III. THE CITIZEN CHILD'S CONSTITUTIONAL RIGHTS IN THE IMMIGRATION CONTEXT

Citizen children, as rights-bearing persons under the law, have many constitutional claims that are affected during parental removal proceedings. These rights include the citizen's rights to remain in the United States, to family unity and integrity, and to equal protection under the law.[66] Immigration judges should not pick and choose from these claims, but instead, should consider the child's entire bundle of constitutional rights in making removal decisions. Once the Board recognizes the child as a rights-bearing person under the Constitution, the role of the citizen child will be recast from a cursory consideration to a fundamental concern.

A. The Child's Right to Remain

A citizen has "the constitutional right under the Fourteenth Amendment to remain in the United States."[67] Even though "[b]eing a U.S. citizen is a defense to removal,"[68] citizen children usually have no other option but to leave the United States and accompany their removed parents. Even if the children remain in the United States with a distant relative or with a foster family, they would be sacrificing the critical care and attention of their parents. Citizen children face either losing their parents or losing their home. Claimants have noted that this "Sophie's choice" may amount to constructive or de facto removal of citizens in violation of their constitutional rights.[69] The right to remain is a central feature of U.S. citizenship[70] and when a citizen child's parent is removed the child must effectively surrender this right.[71]

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66 I adapted this analytical framework from Alison M. Osterberg, *Removing the Dead Hand on the Future: Recognizing Citizen Children's Rights Against Parental Deportation*, 13 LEWIS & CLARK L. REV. 751 (2009).

67 Coleman v. United States, 454 F. Supp. 2d 757, 766 (N.D. Ill. 2006).

68 LENNI B. BENSON ET AL., IMMIGRATION AND NATIONALITY LAW: PROBLEMS AND STRATEGIES 977 (2013).

69 *See, e.g.*, Jessie M. Mahr, Comment, *Protecting Our Vulnerable Citizens: Birthright Citizenship and the Call for Recognition of Constructive Deportation*, 32 S. ILL. U. L.J. 723, 730–31 (2008) .

70 Perdido v. INS, 420 F.2d 1179 (1969); *see also* Acosta v. Gaffney, 413 F. Supp. 827, 832–33 (D.N.J. 1976) ("What this Court will not do, however, is to use its view of legislative policy to countenance the outright destruction of the central privilege of an American citizenship already vested: the right to live in the United States for as long as one sees fit."), *rev'd*, 558 F.2d 1153 (3d Cir. 1977).

71 Mahr, *supra* note 69, at 723.

However, almost every circuit court has held that even if the removal of a parent from the United States leads to de facto deportation, this does not violate any of the citizen child's constitutional rights.[72] The Supreme Court has not ruled on this issue. However, if the Court were to hold that a U.S. citizen child's constructive deportation is constitutionally acceptable in agreement with the majority of the circuits, this would be a fatal blow to the citizen child's rights in the immigration context.

In *Perdido v. INS*,[73] undocumented parents facing deportation made two claims on appeal: first, deportation would violate their citizen children's rights; second, it was unconstitutional that young children could not bestow immediate relative benefits upon their parents. The Fifth Circuit rejected both propositions. The court held that Congress acted rationally in limiting the right to remain to "citizens who had themselves chosen to make this country their home" and not to "minor children whose noncitizen parents ma[d]e the real choice of family residence."[74] Even though the court conceded that it is "undisputed that the Perdido children have every right to remain in this country," it held that undocumented parents have no such right.[75] In addition, children could not impute citizenship benefits to their parents because they were incapable of choosing to make the United States their home.[76] This again hearkens to the restrictive notion of the child as an accidental and latent rights bearer. Courts have rationalized that constructive deportation does not absolutely

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72 *See* Payne-Barahona v. Gonzales, 474 F.3d 1, 2 (1st Cir. 2007) ("We choose to follow the path of other courts [in determining whether constructive deportation of a citizen child is unconstitutional and] . . . [t]he circuits that have addressed the constitutional issue . . . have uniformly held that a parent's otherwise valid deportation does not violate a constitutional right."); Gallanosa v. United States, 785 F.2d 116, 120 (4th Cir. 1986) (holding "[t]he courts of appeals that have addressed this issue have uniformly held that deportation of alien parents does not violate any constitutional rights of the citizen children" and concluding similarly); Newton v. INS, 736 F.2d 336, 343 (6th Cir. 1984) (holding that the citizen children's de facto deportations were constitutionally acceptable because they could return to the United States once they reached the age of majority); Delgado v. INS, 637 F.2d 762, 764 (10th Cir. 1980) ("This Court has repeatedly held that the incidental impact [of constructive deportation] visited upon the children of deportable, illegal aliens does not raise constitutional problems."); Mamanee v. INS, 566 F.2d 1103, 1106 (9th Cir. 1977) ("We reject the petitioner's contention that her deportation will result in an unconstitutional de facto deportation of her [citizen] child."); Acosta v. Gaffney, 558 F.2d 1153, 1158 (3d Cir. 1977) (holding that an infant citizen child's constructive deportation did not violate her constitutional rights but only delayed them); Gonzalez-Cuevas v. INS, 515 F.2d 1222, 1224 (5th Cir. 1975) (reasoning that the deportation of undocumented parents does not violate any constitutional right of citizen children); Mendez v. Major, 340 F.2d 128, 131 (8th Cir. 1965) (holding that the citizen child's constitutional rights would not be violated if he were effectively forced to leave the country with his parent due to a two year residence abroad requirement).

73 420 F.2d 1179 (5th Cir. 1969).

74 *Id.* at 1181.

75 *Id.*

76 *See id.* at 1180.

bar a citizen child's right but merely delays it.[77] When courts broadly categorize the child's right to remain in this way, rather than as a right against constructive deportation, the immigration system can effectively "avoid[ ] acknowledging any meaningful rights of citizen children in the immigration context."[78]

The only partial outlier to this view is the Second Circuit, but even this perspective has changed. In *Enciso-Cardozo v. INS*,[79] the court was "not prepared . . . to endorse the language [of other circuits, which] indicat[ed] that under no circumstances does due process require that an infant be permitted to participate in the deportation proceedings against his parent."[80] The court drew attention to "the dependence of an infant upon his parents and the possibility of substantial effects upon the infant from his involuntary departure."[81] The court denied intervention to the plaintiff "on the facts of this case," because it found that the mother was capable of raising all the appropriate issues to safeguard the child's interests.[82] This reasoning, though more accommodating than other circuits, still equated the interests of the U.S. citizen child and the undocumented parent and took for granted that the child's constitutional rights were appropriately represented. However, the court left open the possibility that under the appropriate circumstances, it would recognize the right of the child to intervene.[83] In a later case, a district court stated that "[t]he *Enciso-Cardozo* court recognized that the infant mother's deportation would force an involuntary departure on the infant, and thus the *Enciso-Cardozo* court noted that such prejudice might ordinarily justify intervention."[84] The question of when due process requires that a citizen child intervene in his or her parent's removal proceedings seemed unanswered.

However, in *Yuan Liu Chao v. BIA*, the Second Circuit changed its tune and fell in line with the reasoning of the rest of the circuit courts: in

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77 *See Acosta*, 558 F.2d at 1158; *Newton*, 736 F.2d at 343.

78 Alison M. Osterberg, *Removing the Dead Hand on the Future: Recognizing Citizen Children's Rights Against Parental Deportation*, 13 LEWIS & CLARK L. REV. 751, 761 (2009).

79 504 F.2d 1252, 1253 (2d Cir. 1974) ("[T]he petitioners . . . contend that the infant petitioner, a United States citizen, was denied procedural due process when he was not permitted to intervene in the deportation proceedings brought against his mother. More specifically, petitioners contend that the infant citizen has a right to be reared in the United States, that the deportation of his mother necessarily implies his *de facto* deportation and that, therefore, since his rights and interests are so vitally affected by the deportation of his mother, he has a constitutional right to intervene in these proceedings, especially the portion of the proceedings dealing with the discretionary grant of voluntary departure.ë).

80 *Id.* at 1254.

81 *Id.*

82 *Id.*

83 *See id.*

84 Soto v. United States, No. 89 Cr 230, 1994 WL 110187, at *2 (E.D. Ill. Mar. 28, 1994).

assessing a U.S. citizen child's claims in his parent's removal hearing, the Second Circuit noted that "it is well-settled that an infant's status as a citizen and his dependence on his parent do not prevent the deportation of the alien parent."[85] Furthermore, the court preempted any potential procedural or substantive fairness concerns by holding that "the agency's streamlining regulations do not violate the Due Process Clause."[86] What was once an open question now seems closed, as any circuit that has addressed the issue of constructive deportations has affirmatively ruled against the U.S. citizen child's claim.

One reason why courts have rejected the de facto deportation theory is a fear that recognition of this right could "permit a wholesale avoidance of immigration laws" by undocumented parents who have U.S. citizen children.[87] Although control over borders and systematic fairness are legitimate considerations, these policies must be measured against the full weight of the discriminatory burden placed on the innocent citizen child.

In *Mathews v. Eldridge*, the Court crafted a three-part balancing test to determine the appropriate level of due process required under the Constitution.[88] The overarching purpose of due process is to guarantee an individual's "opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[89] The *Mathews* test balances the importance of the individual's private right at stake, the risk of an erroneous deprivation of the right under the current process and value of additional procedural safeguards, and the government's interest.[90] The Supreme Court has held that the answer to what level of process is due lies in balancing the individual's interest against the interests which the government seeks to advance by using summary proceedings.[91] Additionally, the Supreme Court has held that the government's interest in efficiency and saving costs cannot outweigh an individual's fundamental constitutional right to due process, especially when the private interest at stake is substantial.[92]

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85 Chao v. BIA., 395 F. App'x. 725, 728 (2d Cir. 2010).

86 *Id.*

87 Coleman v. United States, 454 F. Supp. 2d 757, 768 (N.D. Ill. 2006).

88 *See* 424 U.S. 319 (1976).

89 *Id.* at 333 (citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

90 *See id.* at 335.

91 *See* Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970) ("The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."(citation omitted)).

92 *Id.* at 266 ("Thus, the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens. As the District Court correctly concluded, 'the stakes are simply too

This test is context-specific, as "due process is flexible and calls for such procedural protections as the particular situation demands."[93]

The Board must not give absolute deferral to Congress' policies, especially because "this doctrine of powers inherent in sovereignty is one both indefinite and dangerous" with no clear limits and the potential to evolve into despotism.[94] This danger is a reason why the *Mathews v. Eldridge* test is an appropriate tool to calibrate fairness in this context. Courts and the Board should be required to give due process to citizen children and should be able to make balanced, well-rounded determinations. Adopting this framework would preserve focused judicial discretion rather than blind deferral to plenary power.

Further, the *Mathews* balancing test should apply in the constructive deportation context, even though the citizen child is not formally in removal proceedings, because the citizen child should have standing to make personal constitutional claims as someone whose rights are directly at stake.[95] Adopting the *Mathews* test rightly reorients the citizen child to be a central feature in the judicial decision-making process.

In this context, the importance of the private right and the government's interest seem to be opposing considerations. After all, the government's interest in enforcing a uniform system of immigration and protecting its borders is strong. Cast broadly, some of the government's main concerns include the increased possibility of terrorism and criminal activity if its control over borders is softened. It should be noted that these fears are sometimes based on misconceptions. As many scholars have reported, the rise of undocumented immigrants does not lead to a rise in criminal activity, especially because these immigrants have more to lose with the threat of deportation.[96] In addition, the September 11th

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high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great . . . .'" (quoting Kelly v. Wyman, 294 F. Supp. 893, 904–905 (S.D.N.Y. 1968)).

93 *Mathews*, 424 U.S. at 333.

94 Harisiades v. Shaughnessy, 342 U.S. 580, 600 (1952) (Douglas, J., dissenting).

95 *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976); *but see* Encisco-Cardozo v. INS, 504 F.2d 1252, 1253 (2d Cir. 1974) (showing the INS taking a contrary view that "since the immigration judge has jurisdiction to decide only the question of the deportability of the parent, the [citizen] child has no substantive rights which may be asserted at the deportation proceeding, and there is, therefore, no need to allow him to intervene.").

96 *See, e.g.*, *From Anecdotes to Evidence: Setting the Record Straight on Immigrants and Crime*, IMMIGRATION POLICY CTR., AM. IMMIGRATION COUNCIL (July 25, 2013), http://www.immigrationpolicy.org/sites/default/files/docs/setting_the_record_straight_updated_2.pdf ("The problem of crime in the United States is not caused or even aggravated by immigrants, regardless of their legal status. This is hardly surprising since immigrants come to the United States to pursue economic and educational opportunities not available in their home countries and to build better lives for themselves and their families. As a result, they have little to gain and much to lose by breaking the law. Undocumented immigrants in particular have even more reason to not run afoul of the law given the risk of deportation that their lack of legal status entails.").

terrorist attacks were committed by immigrants who entered the country legally. This fact underlines the importance of national border security in preventing terrorism, before falling back on internal enforcement.[97] This does not mean that the government's interest is invalid because the presence of undocumented immigrants on American soil is still unlawful and is a matter of national concern.

However, the government's overarching interest in a uniform immigration system is not what is weighed in the *Mathews v. Eldridge* analysis, but rather the government's interest in summary adjudication, as affected by the additional procedural safeguards.[98] In this context, the government interest factor is narrowed to those government aims that would be specifically frustrated by a bolstered procedure for citizen children. Here, a reprioritization of an immigration judge's considerations in making a removal decision does not amount to a blanket loophole to the national immigration scheme. A bolstered system may actually better serve the government's interests. After all, a judicial process that is more carefully tailored to protect the rights of U.S. citizens should be the government's primary interest. These additional procedural safeguards incentivize the government to return to the drawing board and address immigration concerns with intention, rather than using a heavy-fisted, over-inclusive standard that eradicates citizen's rights merely because it is easier. By instituting more procedural safeguards in removal proceedings, the U.S. government would be enforcing a comprehensive policy of protecting children's rights in every realm of law. In characterizing the government's interest appropriately, it becomes clear that additional procedural safeguards may more effectively promote national immigration policy than the current process.

Under the current system, however, courts and the Board of Immigration Affairs defer to government policy and plenary power to the detriment of the citizen child's interests. The citizen child's right to not be constructively deported is essential to his or her citizenship. After all, "to deport one who so claims to be a citizen obviously deprives him of liberty" and can "result . . . in the loss . . . of all that makes life worth

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97 *See*, *e.g.*, National Immigration Forum, *Top 10 Immigration Myths*, IMMIGRATIONFORUM.ORG, June 2003, *available at* http://www.immigrationforum.org/images/uploads/mythsandfacts.pdf ("No security expert since September 11th, 2001 has said that restrictive immigration measures would have prevented the terrorist attacks—instead, the[ ] key is good use of good intelligence. Most of the 9/11 hijackers were here on legal visas."); Aaron Nicodemus, *Hundreds March on City: New Bedford Joins Nation*, SOUTH COAST TODAY, Apr. 11, 2006, http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20060411/NEWS/304119994/0/SEARCH (quoting a demonstrator who stated "Eleven million people are not just going home. Undocumented immigrants are not terrorists. We should focus our attention on terrorists, not immigrants . . . We need to keep pushing to make sure that something gets done.").

98 *See* Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970).

living."[99] The citizen child's interests at stake are "enormous: the right to live as a citizen in his country of birth with the companionship of his parents."[100] The possibility that many citizens are losing fundamental rights should be of utmost concern.[101] This interest should not be unfairly diluted by the fact that the child is a minor.

If the court decides to quibble with the idea that government interest is better served with added safeguards, much of the analysis will depend on the third factor of *Mathews*: the risk of erroneous deprivation under the current process. The fact that the citizen children's interests are relegated to a single factor under the "extreme hardship" standard when they are being effectively deported could evidence lack of due process. Under the current process, citizen children are viewed as mere extensions of their parent's interests. They retain no right to intervene or be separately represented, and their constitutional interests are effectively dismissed. Judicial discretion in the removal context is so narrow that courts and the Board are effectively prohibited from fully considering the best interests of the child, rendering the procedure bereft "because the child is deprived of basic constitutional protection."[102]

Furthermore, there is an inherent and unjust asymmetry in how rights, benefits, and faults are conferred between parents and children in the removal context. In *Coleman v. United States*, the court held that even though citizens have an "independent right to not be deported," this right cannot be imputed to noncitizens, including otherwise unqualified undocumented parents.[103] This one-way flow of citizenship from parent to child has been analogized to an "earlier set of gendered assumptions"—that men could confer citizenship benefits to their wives, but not vice versa.[104] In fully valuing the child as an important person in the family unity, "[t]he restriction on children as the source of immigration

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99 Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

100 Friedler, *supra* note 29, at 526; *see, e.g.*, *Ng Fung Ho*, 259 U.S. at 284 ("Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact."); Kwock Jan Fat v. White, 253 U.S. 454, 464 (1920) ("It is better that many . . . immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country.").

101 *See* Woodby v. INS, 385 U.S. 276, 285 (1966) ("This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification.").

102 Friedler, *supra* note 29, at 526 ("While the procedural due process rights of the illegal immigrant parent may be satisfied by the suspension of deportation hearing, the citizen child is not granted the same protection.").

103 Coleman v. United States, 454 F. Supp. 2d 757, 766 (N.D. Ill. 2006); Ige, 20 I. & N. Dec. 880, 885 (B.I.A. 1994) ("It has long been held that the birth of a United States citizen child does not give the child's parents the right to reside in this country.").

104 Jacqueline Bhabha, *The "Mere Fortuity" of Birth? Are Children Citizens?*, 15 DIFFERENCES: A JOURNAL OF FEMINIST CULTURAL STUDIES, no. 2, 2004, at 91, 96.

status is no more natural than the restriction that was imposed upon women."[105] The wife is no longer considered a mere extension of the husband, but rather an autonomous being with a full set of distinct rights that she is capable of exercising. In the same way, the child should be acknowledged as a separate rights-bearing person in the immigration context.

This asymmetry goes one step further: not only is it the case that citizen children cannot impute citizenship benefits to their parents, but constructive deportation effectively transfers the parents' culpability to the innocent citizen child.[106] Therefore, the citizen children of undocumented parents retain no advantage in the removal process. On one hand, their citizenship confers no benefit to their parents. On the other, they are harshly penalized for their membership in a family unit, an entity the law usually seeks to safeguard.

B. The "Collateral" Right to Family Unity and Companionship

Although "family" is not explicitly mentioned in the Constitution, courts have recognized "a fundamental right . . . [that] protects the integrity of the family unit from unwarranted intrusions by the state."[107] The centrality and sanctity of the family unit has been deeply interwoven into the fabric of the nation's history. In family law, one of the guiding principles is a strong preference to keep the family together as long as the parents are good caretakers.[108] U.S. immigration law also seems to support the family by implementing "family-sponsored immigration, derivative immigration for the family members of certain immigrants, and waivers of bars of admissibility, as well as cancellation of removal based on hardship to certain family members."[109]

The Supreme Court has noted that the parent-child relationship is particularly important. "[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized."[110] The Supreme Court has reasoned that parents have a constitutionally protected interest in "the companion-

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105 *See* Thronson, *supra* note 53, at 256–57.

106 *See* David B. Thronson, *Entering the Mainstream: Making Children Matter in Immigration Law*, 38 FORDHAM URB. L.J. 393, 409–10 (2010).

107 Sims v. State Dep't of Pub. Welfare, 438 F. Supp. 1179, 1190 (S.D. Tex. 1997).

108 *See* Barbara B. Woodhouse, *Children's Rights: The Destruction and Promise of Family*, 1993 BYU L. REV. 497, 511 (1993) (noting that under family law, the ideology of family unity is not followed only "in those exceptional cases in which parents abdicate their responsibility or abuse their authority.").

109 *See* Thronson, *supra* note 53, at 250–51.

110 Troxel v. Granville, 530 U.S. 57, 65 (2000).

ship . . . of [their] children" that "undeniably warrants deference and, absent a powerful countervailing interest, protection."[111]

The citizen children's right to family unity is stronger than citizens' First Amendment right to associate with whomever they choose. In *Kleindienst v. Mandel*, the Immigration and Naturalization Service (INS) revoked a professor's temporary admission because of his ties to the Communist party.[112] The U.S. citizen plaintiffs claimed that they had a First Amendment right to meet and hear from the professor in person.[113] The Court refused to balance these interests because "in almost every instance of an alien excluded under [the specific immigration provision], there are probably those who would wish to meet and speak with him."[114] The Court worried that this would lead to a flood of similar claims.[115]

The case of a citizen child facing constructive deportation or family separation is distinguishable. In the case of a citizen child facing constructive deportation, courts and the Board can limit the discrete group of people with viable claims to only immediate family members. The *Kleindienst* plaintiffs did not have a dependent relationship with the professor that corrupted their personal immigration status. By contrast, U.S. citizen children regularly face constructive deportation because of the nature of the parent-child relationship. Moreover, a citizen child's interest in being with his or her parent is much stronger than a citizen's interest in exchanging ideas. As the government argued, the *Kleindienst* plaintiffs could freely access the professor's ideas through reading his books,[116] but there is no similar substitute for the personal care and attention of a parent.

It is important to note that the most successful use of family rights is primarily in domestic law as opposed to immigration proceedings. However, scholars are continuously theorizing about how the tenets of family law can be incorporated into immigration law to better address the best interests of the citizen child.[117]

Courts have generally disregarded the right to family unity in parental removal proceedings unless family separation would be permanent or the right is accompanied by other claims. In *Aguilar v. ICE*, the petitioners claimed that because U.S. Immigration and Customs Enforcement

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111 Lassiter v. Dep't of Soc. Services, 452 U.S. 18, 27 (1981); *see also* Stanley v. Illinois, 405 U.S. 645, 651 (1971) ("The integrity of the family unit has found protection in the Due Process Clause . . . the Equal Protection Clause . . . and the Ninth Amendment.").

112 *See* 408 U.S. 753, 759 (1972).

113 *See id.* at 760.

114 *Id.* at 768.

115 *See id.*

116 *See id.* at 765.

117 *See, e.g.*, Mahr, *supra* note 69.

(ICE) did not allow them to make arrangements for their noncitizen children's care before they were detained, their rights to family unity were violated.[118] The court dismissed the right to family unity as only "tenuous[ly] connected" and "collateral" to the parents' removal.[119] Courts seem especially hesitant to consider family unity when the undocumented parent is being removed for criminal grounds.[120] For example, in assessing an undocumented felon's claim of family unity, the First Circuit found there was a logical disparity in this case, since "it [would be] difficult to see why children would not also have a constitutional right to object to a parent being sent to prison."[121] In another case, the court found the right to family unity troublesome in the removal context because of its unwieldy consequences:

> [I]f a candidate for cancellation of removal could [prevail], by [simply] stating that he or she would choose to have the child or children remain in this country while he or she would go back to another country[,] and that if such would be deemed to be the requisite degree of hardship[,] as a practical matter[,] the birth of the child would give the candidate for cancellation an [effective] right of relief. . . . [F]or better or for worse our Congress has not seen fit to adopt such a policy in the [INA].[122]

However, in *Recinas*, the Board considered family unity and cancelled removal for the petitioner, a single mother who was the sole provider for her four citizen children.[123] In this case, family unity was one claim among many that satisfied the "exceptional and extremely unusual hardship" standard; other factors included the fact that the mother had no immediate family in Mexico, faced financial difficulties, and that the children did not speak Spanish.[124] The Board also noted that the respondent's family "reside[s] *lawfully* in the United States,"[125] much like the citizen child. In *Mojica v. Reno*, the court found that the immigration system had a "duty to respect family" and that "[i]f the deportation of the family member makes the maintenance of family life practically impossi-

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118 *See* 510 F.3d 1, 19 (1st Cir. 2007).

119 *Id.*

120 *See* Payne-Barahona v. Gonzales, 474 F.3d 1 (1st Cir. 2007).

121 *Id.* at 3.

122 Cabrera-Alvarez v. Gonzales, 423 F.3d 1006, 1008–09 (9th Cir. 2005) (reciting statements made by the immigration judge overseeing the proceedings below, which the court ultimately agreed with).

123 *See* Recinas, 23 I. & N. Dec. 467 (B.I.A. 2002).

124 *See id.* at 471–72.

125 *Id.* at 472.

ble, then the obligation to respect family life will exclude the removal of the applicant."[126]

In contrast to immigration law's general disregard of the right to family integrity, a domestic case poses a strong model for how this right can be reinstated, even when there are strong competing governmental interests. In *Franz v. United States*, the D.C. Circuit found a fundamental constitutional right for family unity and held that any government action that infringed upon this interest required strict scrutiny analysis.[127] In that case, the government had legitimate reasons for permanently separating the family as part of the Witness Protection program, including safety and the administration of justice.[128] However, the court found that that the Constitution grants "reciprocal rights of parent and child to one another's 'companionship,'"[129] even in the case of a noncustodial parent.[130] The court noted that the nation benefits from a parent's efforts in molding "'socially responsible citizens'" who will "preserve and promote our system of government and our way of life" while also cultivating diversity.[131] This language suggests that a nation will receive future societal value when it prioritizes the sanctity of the family unit and the importance of the parent-child relationship.

When citizen children's fundamental right to family unity is combined with their fundamental right to remain in the country, the balance of the *Mathews* factors changes and the importance of the private right weighs more heavily in comparison to the government's interest. It is imperative that the Board does not consider the right to family unity in isolation, but rather in conjunction with citizen children's other rights.

C. *The "Tainted" Right to Achieve Under the Equal Protection Clause*

By restricting consideration of a citizen child's rights to a severely heightened standard, the immigration system could violate the citizen child's rights under the Equal Protection Clause. When the Board disregards the usual educational, economic, and medical setbacks that children face when they are constructively removed with their parents, it may be relegating these children to a second class of citizenship.[132]

In his *Plyler v. Doe* concurrence, Justice Blackmun emphasized that by refusing to allow the noncitizen children of undocumented parents to

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126 970 F. Supp. 130, 150 (E.D.N.Y. 1997).

127 *See* 707 F.2d 582, 603 (D.C. Cir. 1982).

128 *See id.*

129 *Id.* at 595.

130 *Id.* at 588, 594.

131 *Id.* at 598 (quoting Bellotti v. Baird, 443 U.S. 622, 638 (1979) (plurality opinion)).

132 *See* Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35, 50–51 (1988).

attend public schools, the government threatened to create a "discrete underclass" of children in violation of the Equal Protection Clause.[133] This singling out was especially heinous because children who were denied an education were placed at an "insurmountable competitive disadvantage, for an uneducated child is denied even the opportunity to achieve."[134] As a result, the child is silenced in the political process, pushed to the margins of society, and this "subclass could be easily exploited and deprived of any basic rights for fear of stepping out of the shadows to assert such rights."[135] Although the Court assessed the case under an intermediate scrutiny standard, the majority found that even under a rational basis standard, noncitizen children should not be punished for the actions of their parents.[136]

Plyler v. Doe is not a perfect analogy to the plight of a citizen child facing constructive deportation because it was not an immigration case subject to the plenary power doctrine. *Plyler*, however, does demonstrate some illuminating parallels. Children cannot be denied equal treatment under the law on the basis of their race, alienage, gender, or parentage.[137] A citizen child of undocumented parents belongs to a class of other innocent citizen children who are effectively discriminated against by having their parents removed. After all, the citizen children could be constructively removed with their family to a country that provides much more limited educational and economic opportunities.

While the impediment to the child's right to achieve might not be as clear as the complete deprivation of education in *Plyler*, the uprooting of the child's entire lifestyle, language, and community could severely hamper his or her opportunities in the future.[138] Since the Supreme Court held that innocent noncitizen children should not be penalized for what their parents did wrong,[139] this interest should be even stronger in pro-

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133 457 U.S. 202, 234 (1982) (Blackmun, J., concurring).

134 *Id.*

135 Osterberg, *supra* note 78, at 785.

136 *Plyler*, 457 U.S. at 220 ("[Section] 21.031 is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control. It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States. Yet that appears to be precisely the effect of § 21.031.") This holding is especially helpful in considering how the case would have come out if were a federal, not a state, law. Although state classifications based on alienage merit intermediate or strict scrutiny analysis, federal classifications of alienage are granted more deference and only merit rational basis analysis. *Mathews v. Diaz*, 426 U.S. 67, 83 (1976). Therefore, even if *Plyler* involved a federal classification of children based on their alienage status, the government act would not have withstood rational basis analysis.

137 *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 756 (2011).

138 *See* Mahr, *supra* note 69, at 739–42 (analyzing benefits of the U.S. education system and the healthcare system, and concluding that there is generally a clear advantage for a child who remains in the United States).

139 *See Plyler*, 457 U.S. at 220.

tecting the rights of the citizen child. By characterizing the citizen children's right to remain as "delayed," the *Acosta* court unfairly discriminated against the children of undocumented parents. By delaying the rights of citizen children of undocumented immigrants, the immigration system essentially creates classes of citizens.[140]

The Board has an even stronger interest to consider this constitutional right as one that supersedes any plenary power, because while equal protection is an explicitly entrenched right in the Constitution, Congress' plenary power over immigration is only inferred. As Justice Douglas said in his *Harisiades v. Shaughnessy* dissent, "[t]he power of deportation is therefore an implied one. The right to life and liberty is an express one. Why this implied power should be given priority over [express guarantees] has never been satisfactorily answered."[141]

Rather than dismissing the usual hardships that come with removal, immigration judges must balance the *Mathews v. Eldridge* factors with the knowledge that the children are innocent citizens who may be denied a better future due to circumstances outside their control. However, if the parent is being deported to a well-developed country with similar opportunities to the United States, the court may reduce the weight of the importance of the private right in its analysis. This would not completely diminish citizen children's rights, as they would still retain the constitutional right to remain and the right to family unity.

Citizen children of undocumented immigrants must not be discriminated against in the immigration system because of their parents' culpable acts. This is a matter of fundamental fairness. "[V]isiting . . . condemnation on the head of an infant is illogical and unjust. . . . [It] is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."[142] This kind of discrimination is a transparently "ineffectual" and "unjust[ ] way of deterring the parent."[143] One judge articulated a policy rationale behind the extreme hardship standard by hypothesizing that "any foreign visitor who has fertility, money, and the ability to stay out of trouble with the police for seven years [could] change his status . . . to a permanent resident status without the inconvenience of immigration quotas."[144]

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140 *See* Mahr, *supra* note 69, at 736.

141 342 U.S. 580, 599 (1952) (Douglas, J., dissenting).

142 Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).

143 *Id.* at 175; *see also* Intermountain Health Care, Inc. v. Bd. of Comm'rs of Blaine Cnty., 707 P.2d 1051, 1055 n.2 (Idaho 1985) (characterizing as "somewhat shocking" the county's assertion that the child's citizenship was irrelevant and that the child and her parents were "legally indistinguishable" in a case in which citizen children of undocumented parents were denied healthcare).

144 INS v. Wang, 450 U.S. 139, 145 (1981) (quoting Wang v. INS, 622 F.2d 1341, 1352 (9th Cir. 1980) (Goodwin, J., dissenting)).

While the aims of avoiding loopholes in immigration law and deterring unlawful conduct are valid ones, Congress has alternative ways to resolve these problems without infringing upon citizens' fundamental rights.[145] Under the *Mathews v. Eldridge* balancing test, courts and the Board would no longer be able to make blanket plenary power justifications but would have to consider the U.S. citizen children's important competing individual interests.

The *Plyler* Court noted that even though undocumented status could be related to a proper legislative action and was the product of conscious and unlawful action, it would be unfair to discriminatorily burden children "on the basis of a legal characteristic over which children can have little control," such as parental alienage.[146] Stripping constructive deportation to its core, the immigration system is essentially imputing the sins of the parent to the innocent citizen child.

Digging deeper into the immigration system's rhetoric, when the Board rationalizes that the children's citizenship rights are only indirectly affected, it disregards the inherently dependent relationship of children to their parents and the recognized undesirability of children remaining in the United States without their families. The deportation of a parent will almost always mean the deportation of a U.S. citizen child. When a court states that the right to remain is not vested in the children of noncitizens until many years later, it demarcates an underclass of especially vulnerable citizens. The immigration system, therefore, pays lip service to the rights of birthright citizen children without actually protecting those rights.

Here, the citizen children are completely innocent and have no control over their parents' decision to remain in the United States illegally, and yet are effectively deprived of their citizenship right. Although the Board may note that this deprivation is only temporary, in practice, it will not be easy for the citizen child to make the transition from learning, growing, and living in a different country to returning to the United States after painfully severing all ties. This setback is exacerbated when courts or the Board remove children from the United States at a young age. A citizen's right to return and reside in the United States may be effectively barred by educational, socioeconomic, and language disparities.[147]

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145 *See* Acosta v. Gaffney, 413 F. Supp. 827, 833 (D.N.J. 1976), *rev'd*, 558 F.2d 1153 (3d Cir. 1977) (holding that even if prioritizing the citizen child's interests in recognizing her constructive deportation is unfair to those undocumented immigrants who are lawfully waiting in line, Congress has "ample authority to ameliorate the hardship by relaxing the quota provisions" or amending enforcement tactics).

146 Plyler v. Doe, 457 U.S. 202, 220 (1982).

147 Noreen M. Sugrue, *American-Born Children Shouldn't Be Deported*, CHRISTIAN SCI. MONITOR, July 17, 2006, at 9.

This careful sidestepping of the citizen child's constitutional rights is fundamentally the wrong way to appropriately consider the child, the family, and the nation in the context of removal proceedings. The Board should not blindly coast on Congress' policies in the face of blatant injustice, but should instead reclaim a more focused and principled scope of judicial discretion.

IV. RECOMMENDATIONS AND CONCLUSIONS

Once the Board reshapes its decision-making process to prioritize the reality of citizen children as active rights-bearing "persons," immigration judges will be equipped to better assess the stakes and to partake in more balanced policy evaluations. The framework must be flexible to retain a high enough standard to avert loopholes in immigration law and remain consistent with national immigration policy. The key to an effective reform will be multifaceted, and should be targeted not only at courtroom procedure, but also should address overall national policies and goals. The shift to child-centered consideration should be pursued across all branches of government and all realms of law. Only then will the overall scheme achieve coherence.

Merely shifting the standard from "extreme hardship" to "best interests of the child," as many scholars recommend,[148] will not make much of a quantitative difference unless a more guided framework is implemented. In *Cabrera-Alevarez v. Gonzales*, the Ninth Circuit considered the petitioner's proposed "best interests" standard fashioned after the U.N. Convention on the Rights of the Child.[149] The court concluded that the Convention "requires only that the child's interests be 'a primary consideration,' without specifying the precise weight to be given to that consideration relative to others" and that "the child's interests are *already* a primary consideration in the agency's [removal] decision[s]."[150] The court's reasoning demonstrates that well-intentioned standards, if left open to interpretation, will only lead to the same results.

The *Mathews* balancing test provides the best guide for expanding and focusing judicial discretion to properly prioritize the interests of the child. Under this standard, the child's constitutional bundle of rights must be properly weighed against the government's interest in preserving uniform immigration policy. Due process requires effective safeguards of important rights in the removal process, including the rights of U.S. citizen children.

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148 *See, e.g.*, Carr, *supra* note 7 and accompanying text.

149 *See* 423 F.3d 1006, 1007 (9th Cir. 2005); Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, *available at* http://www.unhcr.org/refworld/docid/3ae6b38f0.html.

150 *Cabrera-Alevarez*, 423 F.3d at 1011.

The most fundamental premise in using this balancing test is the judicial recognition that U.S. citizen children's constructive deportation is a constitutional violation. In order to accept this theory and bolster current due process, the Board and courts must accept that the children's birthright citizenship rights are not accidental, fortuitous, or conveniently delayed. Instead, judges must recognize that these rights warrant special consideration. Once this understanding is accepted, it becomes clear that the current immigration process does not provide sufficient protections for U.S. citizen children's rights.

A. Granting U.S. Citizen Children a Right to Testify

First, immigration judges must have the duty to create a more comprehensive record in every case involving U.S. citizen children. If U.S. citizen children can speak on their own behalf, the Board should permit them to take the stand. The Board or courts should not mechanically assume that the parents would effectively raise every available defense on their citizen children's behalf. Instead, the children should exercise a separate right to testify and be heard. The citizen children must never be considered a mere extension of their undocumented parents' status and interest. By giving the citizen children a literal voice in the proceedings, the judge will have a more complete set of evidence and be better equipped to make a child-centered evaluation. In this way, the judge has broader discretion to discern and weigh the most important competing concerns. By expanding the narrow "extreme hardship" standard to a more precisely calibrated balancing test that focuses the scope of judicial discretion, due process in removal proceedings will be significantly improved. However, this change alone is not enough, as in many cases, the children cannot adequately represent themselves.

B. Giving U.S. Citizen Children Separate Representation

Another way to ensure that U.S. citizen children are not treated as mere bystanders is for the courts to recognize a separate right for a guardian ad litem in the case of a constructive deportation. After all, "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[151] Generally, if the court determines that representation might be inadequate or that a person's interests are not represented, it may appoint a guardian ad litem to "receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor . . . or protected person."[152] This is a particularly important safeguard in cases where the citizen children may not be able

151 Powell v. Alabama, 287 U.S. 45, 68–69 (1932).

152 *See, e.g.*, Utah Code Ann. § 75-7-305 (West 2014).

to speak for themselves. Without a representative, the children's plight is diluted into merely one of many factors the immigration judge should consider, with no special emphasis placed on the citizen child's interests.

Under *Mathews*' risk of erroneous deprivation factor, any additional procedural safeguards should be valuable in preventing the risk of erroneously depriving the right at stake. The current scheme relegates the U.S. citizen children's best interests to a cursory consideration rather than a central evaluation. Additional accommodation is especially required in a parent's removal hearing because of possible language difficulties, the need for relevant information-gathering, the vulnerability of the child, the stress and novelty of preparing for a hearing, and the distinctness of the citizen children's rights from those of the parents. The use of guardians *ad litem* is an effective way to "figuratively increase the volume of a child's voice in the court and the legal process."[153]

Given the uniquely vulnerable position of U.S. citizen children, the importance of their constitutional rights, and the near impossibility of the "extreme hardship" standard, the specific situation of a constructive deportation should garner the right to separate legal counsel. Guardians *ad litem* investigate, monitor, and champion the best interests of the child "as the balance shifts from parental decision making to judicial decision making when the state intervenes."[154] These court appointees would effectively represent U.S. citizen children without compromising the doctrine of judicial neutrality. By granting the children a separate advocate, the Board and the courts will be formally recognizing the children as directly and uniquely affected parties to the proceedings with a distinct set of valued rights.

Critics may point to the possible costs involved with granting U.S. citizen children the right to counsel, as "[t]he appearance of counsel for the citizen is likely to lead the government to provide one" and may turn the hearing into a "protracted controversy."[155] In this case, however, protecting the constitutional rights at stake and correcting the current lack of due process should be considered more important than the government's interest in frugality. Just as a child has the right to a guardian *ad litem* in family court, this right becomes even more pronounced in the immigration setting because of what is at risk. In addition, there is a limiting principle: a guardian *ad litem* will not be made available in every immigration case, but only those that involve a U.S. citizen child facing constructive deportation.

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153 Tara Lea Muhlhauser, *From "Best" to "Better": The Interests of Children and the Role of a Guardian Ad Litem*, 66 N.D. L. REV. 633, 633 (1990).

154 *Id.* at 642.

155 Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1288 (1975).

C. *Prioritizing Criminal Deportations Above Potential Family Separations*

On a broader national policy note, President Obama proposed a rational scheme in June 2012 by ordering the removal of undocumented criminals before pursuing actions that would separate families and infringe upon the rights of U.S. citizen children.[156] The safety and collective well-being of the American people is a stronger interest than mass deportations, and should be prioritized this way. It is in the nation's best interests to focus scrutiny on dangerous undocumented immigrants rather than on what may be the easiest target, the family. In this way, the immigration system and overall national policy will rightly align in placing the family unit and children as interests of utmost concern and consideration. This child-centered approach should not upset national immigration policy, but rather create coherence with government aims.

In addition, the solution should not rest completely in the hands of the Board and the courts, but can also be creatively solved by other branches of government. After all, Congress has the resources to approach immigration reform in less restrictive ways than mass deportations of U.S. citizen children. What may be easiest in the administrative sense may not be what is most beneficial for the nation in the long term.

D. *Allowing a Limited Transfer of Benefits from Child to Parent*

Another possible change would be to allow the transfer of status benefits to parents who have a sincere relationship with their child. This approach fully recognizes the U.S. citizen children as distinct and autonomous carriers of rights in a way that advantages, and does not hinder their family unit. This benefit would not confer full citizenship, but would allow the undocumented parent to remain in the United States with work authorization until the child reaches the age of majority. A parent could demonstrate a sincere relationship by a totality of circumstances, including evidence of continued presence, financial support, and significant communication. This will not be a difficult term to apply, as it already has meaning in immigration law in another context: "After a citizen or legal permanent resident has filed, on behalf of an alien relative, a visa petition . . . the Government will approve the petition after

156 *See Parents Deported, What Happens to US-Born Kids*, ASSOCIATED PRESS (Aug. 25, 2012), http://bigstory.ap.org/article/parents-deported-what-happens-us-born-kids-0 ("'When nursing mothers are torn from their babies, when children come home from school to find their parents missing . . . when all this is happening, the system just isn't working and we need to change it,' Obama declared during his first run for president in 2008. [H]e [later] told a Texas audience that deportation should target 'violent offenders and people convicted of crimes; not families, not folks who are just looking to scrape together an income.'").

verifying that the claimed familial relationship is bona fide."[157] Under this approach, citizen children can be under the financial, physical, and emotional care of their parents during their most tender and impressionable years without the threat of separation. In addition, this solution upholds the government's interest and avoids creating permanent loopholes in the immigration system.

The scheme could be structured similarly to how the Department of Homeland Security's Deferred Action for Childhood Arrivals program allows young undocumented immigrants to remain in the United States under the color of law without granting a direct path to full citizenship.[158] Once the child has reached the age of majority and parental care is not as vital, parents may then be removable under Congress' broader discretion. If Congress decides to remove the parents at that point, the parents should not be able to take advantage of the system and reapply for lawful visa status once the child reaches the age of twenty-one. This way, the parents will be effectively punished for their actions in illegally entering the country without unfairly punishing their innocent U.S. citizen children. This bright-line "cut off" point establishes a limiting principle, removes the constant threat of deportation from families, avoids creating perverse incentives, and ensures that undocumented immigrants will not be permanently rewarded for their efforts.

Congress can also be creative in incentivizing citizenship by carving out exceptions for parents who, for example, make significant economic, intellectual, artistic, or humanitarian investments in their community. This approach acknowledges that immigrants can be important investors into our communities and highlights the fundamental role of parents' care and attention in raising and molding excellent future citizens. In this way, both the family and the nation benefit. This refocused perspective recognizes the child as a rights bearer, preserves a long-term model for good citizenship, achieves national aims, creates space for real judicial discretion, and attempts to strike a balance between competing policies in a lasting and meaningful way.

These modifications should not unmoor immigration law, but rather precisely tailor the Board's discretion in a principled way. The Board and courts should not be backed into considering U.S. citizen children's rights under a nearly impossible standard without meaningful discretion and appropriate procedural safeguards. Courts must acknowledge that the current immigration scheme falls short of constitutional due process

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157 Bolvito v. Mukasey, 527 F.3d 428, 430 (5th Cir. 2008) (internal quotation marks omitted).

158 For further explanation of the Deferred Action for Childhood Arrivals program, see *Deferred Action for Childhood Arrivals*, U.S. DEP'T OF HOMELAND SEC. (July 2, 2013), http://www.dhs.gov/deferred-action-childhood-arrivals.

and fundamental fairness. However, possible solutions are available and not so difficult to put into practice. The largest obstacle to a coherent immigration framework comes down to the Board and courts' conception of the nature of rights.

The Board and courts must understand that U.S. citizen children are rights bearers who should be protected in the removal context. These entities must further recognize that currently accepted de facto deportations are a fundamental breach of the children's constitutional rights to remain in the United States, to family unity, and to achieve under the Equal Protection Clause. By repositioning the child as a central consideration in judicial determinations and national policy, immigration law will reflect the common sense family-centric values that are apparent in every other realm of U.S. law. Immigration law should not be wrought with the back and forth of opposing policies. Instead, it should be an attempt to weave all of the fundamental values and facets of American society and wellbeing into a coherent, well-balanced system. By considering some of these alternatives, maintaining awareness of all of the rights and interests at stake, and thinking creatively, both the government's interests and the citizen children's constitutional rights can be appropriately weighed within the framework of due process.