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Susan Hazeldean

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ANCHORING MORE THAN BABIES: CHILDREN'S RIGHTS AFTER *OBERGEFELL V. HODGES*

Susan Hazeldean[†]

*"Throughout my childhood I watched my parents try to become legal but to no avail. . . . That meant my childhood was haunted by the fear that they would be deported. If I didn't see anyone when I walked in the door after school, I panicked. And then one day, my fears were realized. I came home from school to an empty house."*¹

*"We're talking about U.S. citizens; their pleas and cries for help are pretty much being ignored at this point."*²

The Supreme Court's recent decision upholding a constitutional right to same-sex marriage in Obergefell v. Hodges was a huge advance not just for LGBT Americans, but also for children. Obergefell suggests children have a fundamental right to be raised by their parents without being demeaned or marginalized by the state. This has important implications for other vulnerable children, including U.S. citizen children with undocumented parents. This Article argues that deporting these children's parents contravenes their fundamental right to be raised by a loving parent, to equal protection of the law, and to remain in the United States as U.S. citizens. It explains the important shift in perspective on children's rights suggested by the Obergefell decision and its implications for children with undocumented parents. It describes the current situation confronting U.S. citizen children whose parents lack

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¹ Diane Guerrero, Opinion, 'Orange Is the New Black' Actress: My Parents Were Deported, *L.A. TIMES* (Nov. 15, 2014, 5:00 AM), <http://www.latimes.com/nation/la-oe-guerrero-immigration-family-separation-20141116-story.html>.

² California Rep. Lucille Roybal-Allard, quoted in Seth Freed Wessler, *Nearly 205K Deportations of Parents of U.S. Citizens in Just over Two Years*, *COLORLINES* (Dec. 17, 2012, 9:45 AM), <http://www.colorlines.com/articles/nearly-205k-deportations-parents-us-citizens-just-over-two-years> [hereinafter Wessler, *Nearly 205K Deportations of Parents of U.S. Citizens in Just over Two Years*].

legal immigration status and the unconstitutional harm they suffer when their parents are deported. It notes that three important constitutional rights are implicated: children's substantive due process right to be raised by their parents, their right to equal protection of the laws, and their right under the Privileges and Immunities Clause to live in the United States. Finally, the Article discusses procedures to protect the rights of U.S. citizen children with undocumented parents. It concludes that executive action to prevent the deportation of parents of U.S. citizen children is clearly warranted. Given the fundamental rights of children that are at stake, the Article contends that mechanisms to prevent the deportation of U.S. citizen children's parents are not only lawful, but perhaps constitutionally required.

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INTRODUCTION

The Supreme Court's decision upholding a constitutional right to same-sex marriage in *Obergefell v. Hodges* was a huge advance not just for LGBT Americans, but also for children. In the past, courts had suggested that children subjected to stigma or denied legal protections because their parents were LGBT should be protected by being separated from their parents. *Obergefell* implies, however, that children have a right to be raised by their parents and maintain a secure family relationship that is not denigrated or undermined by the State. This is critically important because it suggests that children's rights do not exist only in opposition to their parents. Rather, children have a right to be raised by their parents that is reciprocal to the substantive due process right parents have to the care and custody of their children. *Obergefell* indicates that the State cannot attempt to protect children from the legal marginalization their parents experience by separating them from their parents; rather, the State has an obligation to protect the child's relationship with her family.

This has important implications for other children in legally marginalized families, including those whose parents are undocumented. There are 4.5 million U.S. citizen children with an undocumented parent.³ Their numbers are increasing drastically—the number of U.S. citizen children with an undocumented parent more than doubled between 2000 and 2012.⁴ Today, they make up about seven percent of the U.S. population under eighteen years of age.⁵ These children are U.S. citizens, formally entitled to live freely in the United States and access all benefits and opportunities open to any American child. But in reality, thousands of them languish in foster care for no reason other than their parents' unauthorized immigration status.⁶

³ JEFFREY S. PASSEL ET AL., PEW RESEARCH CTR., AS GROWTH STALLS, UNAUTHORIZED IMMIGRANT POPULATION BECOMES MORE SETTLED 7–8 (2014), http://www.pewhispanic.org/files/2014/09/2014-09-03_Unauthorized-Final.pdf.

⁴ *Id.* at 8.

⁵ JEFFREY S. PASSEL & PAUL TAYLOR, PEW RESEARCH CTR., UNAUTHORIZED IMMIGRANTS AND THEIR U.S.-BORN CHILDREN 1 (2010), <http://www.pewhispanic.org/2010/08/11/unauthorized-immigrants-and-their-us-born-children>.

⁶ See generally APPLIED RESEARCH CTR., SHATTERED FAMILIES: THE PERILOUS

Many thousands more are separated from their families or forced to leave the United States when their parents are detained or deported. Even children whose parents are never apprehended must live with the constant fear and anxiety that their caregiver could be arrested and removed from the country at any time.

The Obama administration attempted to offer a temporary reprieve to undocumented parents of U.S. citizen children through executive action. But twenty-six states sued, and won a preliminary injunction that blocked the proposed Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program from going into effect.⁷ A divided Supreme Court affirmed the lower court's ruling, which effectively killed the program because Obama's term ended before it could ever be implemented. The states' challenge to DAPA raised myriad legal and constitutional questions, including when states have standing to challenge federal action (or inaction) with regard to immigrants, the President's obligations under the Take Care clause, and what constitutes a new federal rule requiring prior notice and comment under the Administrative Procedure Act. One issue that received comparatively little attention in discussions of the propriety of the DAPA program, however, was the rights of the U.S. citizen children whose parents might have obtained a temporary reprieve from deportation. Do such children have any legally cognizable interest in preventing their parents' removal from the United States? In the past, constitutional claims made on behalf of children who faced separation from their families or exile from the United States when their parents were deported were summarily dismissed.⁸ Claiming that upholding the child's rights would reward the parents' bad conduct in violating immigration laws, courts refused to recognize them.⁹ Instead, they placed the blame for the children's marginalization squarely at the feet of the parents and suggested that children could be protected by being separated from their parents and raised by someone else. The parallels

INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM (2011), <https://www.raceforward.org/research/reports/shattered-families>.

⁷ A divided panel of the U.S. Court of Appeals for the Fifth Circuit concluded that the program violates both the Administrative Procedure Act and the Immigration and Nationality Act. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd per curiam*, 136 S. Ct. 2271 (2016).

⁸ See, e.g., *Rubio de Cachu v. Immigration & Naturalization Serv.*, 568 F.2d 625, 627 (9th Cir. 1977); *Acosta v. Gaffney*, 558 F.2d 1153, 1158 (3d Cir. 1977); *Gonzalez-Cuevas v. Immigration & Naturalization Serv.*, 515 F.2d 1222, 1224 (5th Cir. 1975); *Perdido v. Immigration & Naturalization Serv.*, 420 F.2d 1179, 1181 (5th Cir. 1969); *Mendez v. Major*, 340 F.2d 128, 131-32 (8th Cir. 1965), *disapproved of by Cheng Fan Kwok v. Immigration & Naturalization Serv.*, 392 U.S. 206 (1968).

⁹ See, e.g., *Acosta*, 558 F.2d at 1158.

to children with same-sex parents are unmistakable: like undocumented immigrants, lesbian and gay people were also once treated as presumptive criminals with few rights to maintain relationships with their children.¹⁰ But the Supreme Court's decisions in the marriage equality context make it clear that children have a right to live with their same-sex parents without being "demean[ed] or humiliate[d]" by government mistreatment.¹¹ *Obergefell* suggests U.S. citizen children have a fundamental constitutional right to be raised by their loving parents that must be reconciled with their right to remain in the United States and enjoy equal protection of the laws.

This Article explains the important shift in perspective on children's rights suggested by the *Obergefell* decision and its implications for children with undocumented parents. It describes the current situation confronting U.S. citizen children whose parents lack legal immigration status and the unconstitutional harm they suffer when their parents are deported. It notes that three important constitutional rights are implicated: children's substantive due process right to be raised by their parents, their right to equal protection of the laws, and their right under the Privileges and Immunities Clause to live in the United States. Finally, the Article discusses procedures to protect the rights of U.S. citizen children with undocumented parents and concludes that executive action to defer removing parents of citizen children from the United States is entirely appropriate. Given the U.S. citizen children's fundamental rights that are at stake, I argue that preventing the deportation of their parents is not only lawful, but may be constitutionally required.

Part I examines the impact of *Obergefell* and the prior same-sex marriage cases on children, and why they suggest that children have a right to be raised by their parents without being marginalized or demeaned by the State. Part II explains the current situation confronting children with undocumented parents. Part III elucidates the fundamental rights at stake for children with undocumented parents, the right to be raised by their parents recognized by *Obergefell*, their right to equal protection, and their right to remain in America. Part IV discusses why courts have previously failed to uphold the rights of children with undocumented parents. Part V describes various

¹⁰ See *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003); see also William N. Eskridge, Jr., *Lawrence's Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1079 (2004) ("[*Bowers*] reaffirmed the power of the state to brand homosexuals as criminals, and did so in an opinion that went out of its way to disrespect gay people. The collateral consequences of presumptive criminality were quite significant in some states." (footnote omitted)).

¹¹ *United States v. Windsor*, 133 S. Ct. 2675, 2708 (2013).

mechanisms that could be used to protect the rights of U.S. citizen children whose parents lack legal immigration status and suggests that executive action to direct enforcement efforts at targets other than the parents of those children is an appropriate way to uphold the fundamental rights of U.S. citizens.

I. *OBERGEFELL* AND THE CHANGING TREATMENT OF CHILDREN WITH SAME-SEX PARENTS

The Supreme Court's recent groundbreaking marriage equality decision, *Obergefell v. Hodges*, found that, rather than protecting children (as the states had claimed), laws excluding same-sex couples from marrying actually stigmatized and demeaned children in LGBT families.¹² This perspective reflected a radical shift from the way courts had viewed LGBT parents just a few years ago. In the past, courts frequently acknowledged that homophobia and institutionalized discrimination against LGBT people harmed their children. But they blamed LGBT parents for the harm, faulting them for exposing their children to opprobrium with their sexuality.¹³ They then attempted to safeguard the children's rights only by removing them from their LGBT parents.¹⁴ The fact that LGBT parents' disfavored legal status had an impact on their children did not suggest that the legal situation for the parents should be improved, only that the parent should play less of a role in the child's life. In this view, the way to protect the rights of children with LGBT parents was to have them raised by someone else. But *Obergefell* and the preceding marriage equality cases found instead that children have a right to protection from hostility *and* a right to remain with their loving parents and take pride in their families. These cases suggest that children's right to participate equally in the community and escape stigma should be addressed by improving the law's treatment of their parents, not by separating children from their disfavored families.

¹² *Obergefell v. Hodges*, 135 S. Ct. 2584, 2606 (2015).

¹³ See, e.g., *Ex parte J.M.F.*, 730 So. 2d 1190, 1196 (Ala. 1998) ("While the evidence shows that the mother loves the child and has provided her with good care, it also shows that she has chosen to expose the child continuously to a lifestyle that is 'neither legal in this state, nor moral in the eyes of most of its citizens.'" (quoting *Ex parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998))).

¹⁴ See, e.g., *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995).

A. *The Historical Approach to Children with Gay and Lesbian Parents*

When the Supreme Court considered whether Georgia violated the Constitution in criminalizing same-sex sexual relationships in 1986, Justice White famously observed that “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated.”¹⁵ He labelled the claim that sodomy laws infringed upon any fundamental constitutional right as “at best, facetious.”¹⁶ Similarly, the first time the Supreme Court considered a same sex couple’s challenge to a law that forbade them from marrying, it dismissed the appeal “for want of a substantial federal question.”¹⁷ Instead, the Court affirmed the Minnesota Supreme Court’s determination that restricting marriage to heterosexual couples did not offend the Due Process or Equal Protection Clauses because procreation and child rearing were central to the constitutional protection given to marriage. The state court had opined that, “[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.”¹⁸ Since gay couples were presumed inimical to having children, it made logical sense to exclude them from marriage.

When courts were confronted with an openly gay or lesbian parent who had children, they frequently worried that social rejection of the parent’s sexuality would have a negative impact on the child. In order to protect the child from homophobia directed at the parent, courts limited the parent’s contact with the child. For example, in the 1995 *Bottoms v. Bottoms* case, a Virginia court removed a child from his lesbian mother’s custody and instead awarded custody to the child’s grandmother.¹⁹ The mother was permitted visitation, but it had to occur outside the presence of her lesbian partner. This may seem rather remarkable given that courts typically do not award custody of a child to a non-parent unless the parent is shown to be unfit. But in this case, the court found “while the legal rights of a parent should be respected in a custody proceeding, those technical rights may be disregarded if demanded by the interests of the child.”²⁰ In this case, although the mother was “devoted” to her son, her refusal to forgo having lesbian

¹⁵ *Bowers*, 478 U.S. at 191.

¹⁶ *Id.* at 194.

¹⁷ *Baker v. Nelson*, 409 U.S. 810, 810 (1972), *overruled by Obergefell*, 135 S. Ct. 2584.

¹⁸ *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971), *aff’d*, 409 U.S. 810.

¹⁹ *Bottoms*, 457 S.E.2d 102.

²⁰ *Id.* at 108.

relationships to protect her child from social opprobrium made her an unfit custodian.²¹ Or, as the court put it: “[L]iving daily under conditions stemming from active lesbianism practiced in the home may impose a burden upon a child by reason of the ‘social condemnation’ attached to such an arrangement, which will inevitably afflict the child’s relationships with its ‘peers and with the community at large.’”²²

Similarly, in the 1998 decision, *Ex Parte J.M.F.*, the Alabama Supreme Court removed a child from the custody of her lesbian mother because “[w]hile the evidence shows that the mother loves the child and has provided her with good care, it also shows that she has chosen to expose the child continuously to a lifestyle that is ‘neither legal in this state, nor moral in the eyes of most of its citizens.’”²³ Given that the State would not recognize an intimate relationship between two women, and many people did not approve of lesbian people, the court found that leaving the child in her mother’s custody would be harmful. The court noted in particular that, “the mother and [her lesbian partner] G.S. have not conducted their relationship with discretion and have not concealed the nature of their union from the child. The mother and G.S. have exchanged rings and have a committed relationship as ‘life partners’ that includes ongoing sexual activity.”²⁴ Noting that the mother’s “choice of lifestyle” might expose her daughter to “ridicule or prejudice,” the court found this was a change in circumstances that warranted a transfer of custody to the child’s father.²⁵

In these cases, the courts considered the homophobia and discrimination the parents suffered a serious detriment to their children. But they viewed this stigma and mistreatment as something the parents had brought upon themselves by choosing a disfavored “lifestyle.” As such, the parents were to blame for any harm the child might suffer as a result of their legally marginalized status. The solution, then, was to limit the child’s contact with the parent so that she would suffer less prejudice and ridicule. Not only did these courts view homosexuality as incompatible with parenting, they legally enforced that alleged incompatibility by preventing gay and lesbian parents from caring for their children. So while legal discrimination against LGBT people in the form of marriage exclusions was justified by courts because of gay people’s alleged inability to procreate, the prejudice LGBT people

²¹ *Id.*

²² *Id.* (quoting *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985)).

²³ *Ex parte J.M.F.*, 730 So. 2d 1190, 1196 (Ala. 1998) (quoting *Ex parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998)).

²⁴ *Id.* at 1192.

²⁵ *Id.* at 1195–96.

experienced was also viewed as an adequate reason to prevent them from raising children.

A perfect example of this is the Eleventh Circuit's 2004 decision upholding a Florida ban on adoptions by gay or lesbian people, finding that, "disallowing adoption into homosexual households, which are necessarily motherless or fatherless and lack the stability that comes with marriage, is a rational means of furthering Florida's interest in promoting adoption by marital families."²⁶ Because gay people were forbidden from marrying by state bans on same-sex marriage, it was rational to forbid them from adopting children as well, since the children would suffer because the parents were excluded from marriage.

B. *Recent Cases on Same-Sex Couples' Right to Marry*

Recent decisions regarding challenges to same-sex marriage bans take a very different view. Many courts evaluating whether forbidding gay and lesbian couples from marrying violates the Constitution have also discussed the impact such exclusions might have on the couple's children. But rather than determining whether the children should be "protected" from this discrimination by removing them from their LGBT parents, courts have instead suggested that same-sex marriage bans are unconstitutional because they degrade those children. In *United States v. Windsor*, the U.S. Supreme Court ruled that the federal Defense of Marriage Act (DOMA), which denied federal recognition to same-sex unions validly performed in states that permitted such marriages, was unconstitutional.²⁷ Interestingly, although the plaintiff who brought the challenge had no children, the harm caused to children with same-sex parents by the denial of federal recognition played a significant role in the decision. Justice Kennedy noted that DOMA harmed children in two ways, by stigmatizing their families and imposing a financial burden. He pointed out that DOMA raised the cost of health insurance coverage for parents in same-sex marriages and denied or reduced the survivor's social security benefits available to their children.²⁸ He also found that DOMA, "humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the

²⁶ *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818–19 (11th Cir. 2004).

²⁷ *United States v. Windsor*, 133 S. Ct. 2675 (2013).

²⁸ *Id.* at 2695.

integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”²⁹

Following *Windsor*, a large number of courts heard challenges to state laws excluding same-sex couples from marriage. Many of them considered the harms to children of same-sex couples inflicted by the marriage bans. In *Kitchen v. Herbert*, the Tenth Circuit found that laws outlawing same-sex marriage “deny to the children of same-sex couples the recognition essential to stability, predictability, and dignity. Read literally, they prohibit the grant or recognition of any rights to such a family and discourage those children from being recognized as members of a family by their peers.”³⁰ The Fourth Circuit noted that excluding same-sex couples from marriage harms children by “stigmatizing their families and robbing them of the stability, economic security, and togetherness that marriage fosters.”³¹ In striking down same-sex marriage bans in Indiana and Wisconsin, Judge Posner wrote for the Seventh Circuit that these cases “at a deeper level . . . are about the welfare of American children.”³² He noted that while the states had argued that restricting marriage to opposite-sex couples would discourage “accidental births” and promote child welfare, many abandoned children are adopted by same-sex couples, and allowing those children’s parents to marry would benefit the children emotionally and economically.³³ Conversely, refusing to allow same-sex parents to marry or adopt jointly “harms the children, by telling them they don’t have two parents, like other children, and harms the parent who is not the adoptive parent by depriving him or her of the legal status of a parent.”³⁴ In *Latta v. Otter*, the Ninth Circuit also struck down bans on same-sex marriage, finding that the benefits marriage offers to the children of opposite sex couples apply just as strongly to children of same-sex couples. The court held that:

To allow same-sex couples to adopt children and then to label their families as second-class because the adoptive parents are of the same sex is cruel as well as unconstitutional. Classifying some families, and especially their children, as of lesser value should be repugnant to all those in this nation who profess to believe in “family values.”³⁵

In June 2015, the U.S. struggle for marriage equality finally culminated in the Supreme Court’s decision in *Obergefell v. Hodges*,

²⁹ *Id.* at 2694.

³⁰ *Kitchen v. Herbert*, 755 F.3d 1193, 1215 (10th Cir. 2014).

³¹ *Bostic v. Schaefer*, 760 F.3d 352, 383 (4th Cir. 2014).

³² *Baskin v. Bogan*, 766 F.3d 648, 654 (7th Cir. 2014).

³³ *Id.* at 663–64.

³⁴ *Id.* at 671.

³⁵ *Latta v. Otter*, 771 F.3d 456, 474 (9th Cir. 2014).

which held that three states' laws restricting marriage to opposite-sex couples were unconstitutional because they violated the plaintiffs' fundamental right to marry and denied them equal protection.³⁶ The decision was not explicitly about the rights of children with same-sex parents, but their interests still figured prominently in the Court's opinion. Justice Kennedy noted that marriage offers "recognition, stability, and predictability" to families, and when LGBT people are excluded, "their children suffer the stigma of knowing their families are somehow lesser."³⁷ The Court also asserted that children whose parents are forbidden to marry are "relegated through no fault of their own to a more difficult and uncertain family life."³⁸ It found that the marriage bans "harm and humiliate the children of same-sex couples."³⁹

Obergefell and the other marriage cases that preceded it are remarkable not just because they reflect the profound cultural shift that happened with respect to LGBT rights over a relatively short period of time. As noted above, they also reflect a real change in the way children's rights are framed and discussed. In earlier cases, courts viewed LGBT parents as harmful to their children because they had "chosen" to engage in homosexual relationships, and thus expose themselves and their children to social stigma and diminished legal rights. In that framing, the way to safeguard children's rights was to limit their contact with the LGBT parent, if necessary by removing the child from the parent's custody and limiting their visitation. As such, the children's "rights" were something that existed in opposition to the parent—they had a right to be protected from the parent whose bad behavior had compromised the children's social standing and legal protection. But in the marriage equality cases, courts instead talk about children's right to live with their parents and be protected from anti-gay legal discrimination. Homophobic exclusion is no longer the parents' fault—it is something that must be addressed and remedied in order to protect *both* the child and her parents. *Obergefell* suggests a child's most important right is to live with her parents in families that are legally protected and secure.

³⁶ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

³⁷ *Id.* at 2600.

³⁸ *Id.*

³⁹ *Id.* at 2601.

C. *Prior Jurisprudence on the Rights of Parents and Children*

"[T]he tradition of legal protection of parental rights has deep historical roots."⁴⁰ In early American law, parental rights were understood to be grounded in natural law; fathers had a right to control their wives and children like property.⁴¹ Beginning in the 1920s, the Supreme Court constitutionalized parents' rights with the two *Lochner*-era decisions that remain good law today. In its 1922 decision, *Meyer v. Nebraska*, the Court held that a state law forbidding the teaching of languages other than English to schoolchildren violated the Fourteenth Amendment's due process clause.⁴² It found that the constitutional right to liberty included "not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children."⁴³ Parents have a "right of control" as well as a "natural duty" to educate their children as they see fit.⁴⁴ Similarly, in *Pierce v. Society of Sisters*, the Court struck down an Oregon statute requiring children to attend public school, finding that it "unreasonably interferes with the liberty of parents . . . to direct the upbringing and education of children under their control."⁴⁵

"Today, the proprietary conception of parental rights is roundly condemned."⁴⁶ However a parent's constitutionally protected right to the "companionship, care, custody and management of his or her children" remains.⁴⁷ The reason for this is that protecting the autonomy of parents to raise their children also benefits children.⁴⁸ Given that children cannot make decisions autonomously, some adult surrogate must be found to make important choices on their behalf.⁴⁹ Parents, who love their children and know them intimately, are better positioned than anyone else to determine what is best for them.⁵⁰ As such, "the benefits to children, first acknowledged when parental rights were

⁴⁰ Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2406 (1995).

⁴¹ See *id.* at 2407.

⁴² *Meyer v. Nebraska*, 262 U.S. 390 (1923).

⁴³ *Id.* at 399.

⁴⁴ *Id.* at 400.

⁴⁵ *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925).

⁴⁶ Emily Buss, "Parental" Rights, 88 VA. L. REV. 635, 656 (2002).

⁴⁷ *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

⁴⁸ Buss, *supra* note 46, at 656.

⁴⁹ See *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions.").

⁵⁰ *Id.* ("[H]istorically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children.").

conceived in proprietary terms, now stand as an independent justification for continuing to afford parents a tremendous degree of control.”⁵¹

So it is not surprising that the Supreme Court continued to uphold the rights of parents to raise their children even after the end of the *Lochner* era. In the 1944 *Prince v. Massachusetts* case, the Court found that the State could impose some limits on children in order to protect their wellbeing even if their parents objected.⁵² Thus a child labor law forbidding children from selling merchandise on the street was not unconstitutional even as applied to a Jehovah’s Witness whose guardian wanted her to distribute magazines for religious proselytization purposes. Rejecting the guardian’s First Amendment challenge, the Court upheld the ban on child labor. The Court noted that “the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . . and the rightful boundary of its power has not been crossed in this case.”⁵³ While the Court upheld the State’s authority to restrict children’s work through child labor laws, however, the decision was at pains to restate the conviction that “[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”⁵⁴

In the 1972 *Wisconsin v. Yoder* case, the Court again affirmed the right of parents to raise their children in accordance with their own values and way of life.⁵⁵ Parents who had been prosecuted under Wisconsin’s mandatory school attendance laws for failing to send their children to school argued that the law violated their First Amendment right to religious freedom. The parents, who were members of Old Order Amish communities, argued that sending their children to school beyond eighth grade conflicted with their religious beliefs and would “endanger their own salvation and that of their children”⁵⁶ by “expos[ing] . . . their children to a ‘worldly’ influence.”⁵⁷ The Court acknowledged that the State had the power to “impose reasonable regulations for the control and duration of basic education.”⁵⁸ But it noted that the alternative education system employed by the Amish “has enabled them to function effectively in their day-to-day life . . . and to

⁵¹ Buss, *supra* note 46, at 656.

⁵² *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

⁵³ *Id.* at 170.

⁵⁴ *Id.* at 166.

⁵⁵ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

⁵⁶ *Id.* at 209.

⁵⁷ *Id.* at 211.

⁵⁸ *Id.* at 213.

survive and prosper . . . for more than 200 years in this country.”⁵⁹ Given that there was no evidence that the parents’ decision to withdraw their children from formal schooling after eighth grade would endanger the children’s health and safety, or impose significant social burdens, the Court found that the State had no right to overturn their decision.⁶⁰ On the contrary, the Court noted that parents, rather than the State, have a “fundamental interest . . . to guide the religious future and education of their children.”⁶¹ This was all the more true, the Court noted, because “there is no suggestion whatever in the record that the religious beliefs of the children here concerned differ in any way from those of their parents.”⁶² As such, respecting the parents’ authority to decide what form of education was appropriate also empowered the children to exercise their religious beliefs.

While the Court has asserted in numerous cases that parents have a right to the care and custody of their children,⁶³ however, it was not clear whether children had a reciprocal right to a relationship with their parents. In *Michael H. v. Gerald D.*, the Court addressed the claim of a man who appeared to be the biological father of a child born to a woman who was married to someone else.⁶⁴ Michael H. brought a paternity suit seeking to be named the father of the child, Victoria, and to have visitation with her. The California courts denied his claims on the grounds that since Victoria’s mother was married when she was born, state law presumed Victoria was the child of her mother’s husband.⁶⁵ Only husband or wife could challenge the presumption, so Michael H. could not assert a paternity claim. The Supreme Court upheld the state court’s ruling, noting that under California law it was “irrelevant for paternity purposes whether a child conceived during, and born into, an existing marriage was begotten by someone other than the husband and had a prior relationship with him.”⁶⁶ Since Gerald was Victoria’s father, Michael was not, and he had no right to have a relationship with her. Importantly, the court-appointed guardian ad litem for three-year-old Victoria had also asserted a claim to visitation with Michael H. on her behalf. But the Supreme Court denied Victoria’s

⁵⁹ *Id.* at 225.

⁶⁰ *Id.* at 234.

⁶¹ *Id.* at 232.

⁶² *Id.* at 237 (Stewart, J. and Brennan, J., concurring).

⁶³ See, e.g., *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000) (plurality opinion); *Santosky v. Kramer*, 455 U.S. 745, 760, 769–70 (1982); *Yoder*, 406 U.S. at 235–36; *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

⁶⁴ *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion).

⁶⁵ *Michael H. v. Gerald D.*, 236 Cal. Rptr. 810, 815–17 (Ct. App. 1987), *aff’d*, 491 U.S. 110 (1989).

⁶⁶ *Michael H.*, 491 U.S. at 119.

claim as well. Writing for a plurality, Justice Scalia noted that “[w]e have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship.”⁶⁷ But he determined that there was no need to address that issue, because Victoria had no right to maintain a relationship with two fathers: “[T]he claim that a State must recognize multiple fatherhood has no support in the history or traditions of this country”⁶⁸ so it could not be protected by the Due Process Clause.⁶⁹ Similarly, Victoria could not assert a right to a filial relationship with Michael because he was not her father—Gerald was.

While *Michael H.* seems at first blush to suggest that children have no constitutional right to a relationship with their parents, that is not the basis for the Court’s denial of Victoria’s visitation petition. Victoria’s claim was denied not because she had no right to a relationship with her father, but because, under California law, Michael was not legally her father. Rather, Gerald was Victoria’s father, and so Michael was a legal stranger to her. The Supreme Court thus did not foreclose the idea that a child had a constitutional right to a relationship with her actual parent; rather, the Court concluded that no parent-child relationship existed in that particular case.

The 2000 case *Troxel v. Granville* concerned the question of when third parties could assert a right to visitation with a child over a parent’s objection.⁷⁰ The Supreme Court again issued a divided decision, with a plurality of the Court holding that a Washington visitation statute was unconstitutional as applied.⁷¹ The visitation award at issue had granted the grandparents’ visitation petition over the objection of the children’s mother solely on the basis that the judge thought the children would benefit from spending time with their grandparents.⁷² There was no showing that the children’s mother was an unfit parent,⁷³ or that any harm to the children would result from the denial of the requested visitation.⁷⁴ Indeed, the Court emphasized that the mother had never

⁶⁷ *Id.* at 130.

⁶⁸ *Id.* at 131.

⁶⁹ It is important to note that there was no majority opinion issued in the case and so there is no controlling holding of any kind. *Id.* at 112.

⁷⁰ *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion).

⁷¹ *Id.* at 75.

⁷² *Id.* at 72 (“[T]his case involves nothing more than a simple disagreement between the Washington Superior Court and Granville concerning her children’s best interests.”).

⁷³ *Id.* at 68 (“[T]he Troxels did not allege, and no court has found, that Granville was an unfit parent.”).

⁷⁴ *Id.* at 72 (noting that the Superior Court made only two formal findings of fact in support of the visitation order: that the Troxels are part of a large, loving family who can provide opportunities in the areas of cousins and music; and that the children would benefit from spending quality time with them).

denied the grandparents' visitation, she simply wanted them to visit less frequently than the grandparents preferred.⁷⁵ Noting that "there is a presumption that fit parents act in the best interests of their children," the Court ruled that the statute as applied was unconstitutional.⁷⁶

Two dissenting justices in *Troxel* suggested that in the future, parents' rights to autonomy would have to be balanced against the children's associational rights.⁷⁷ Justice Stevens stated,

While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.⁷⁸

Similarly, Justice Scalia suggested that recognizing parents' substantive due process right to family association implied that other members of the family would have such rights as well.⁷⁹ This seemed to suggest that the Court might find that children have associational rights to relationships with adults, even in situations where their parents object to the relationship.

Of course, as many scholars have pointed out, if the Court were to hold that children have a right to develop and maintain relationships with adults over their parents' objection, this would present a number of difficult issues.⁸⁰ First, the children's right to associate with the third-party adult would have to be balanced against the parent's established right to privacy and autonomy in childrearing. Second, "there is the vexing problem of conferring rights upon persons who may typically be incompetent to assert them."⁸¹ Associational rights for adults preserve their autonomy, because adults can choose who they want to associate with. But young children cannot make those choices for themselves, so a

⁷⁵ *Id.* at 71–72.

⁷⁶ *Id.* at 68, 75.

⁷⁷ See David D. Meyer, *The Modest Promise of Children's Relationship Rights*, 11 WM. & MARY BILL RTS. J. 1117, 1119–20 (2003).

⁷⁸ *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting) (citation omitted).

⁷⁹ *Id.* at 92–93 (Scalia, J., dissenting). Justice Scalia made this observation to suggest that the Court ought not to recognize parents' fundamental right to raise their children. But this contention was rejected by the other eight members of the Court.

⁸⁰ See, e.g., Emily Buss, *Allocating Developmental Control Among Parent, Child and the State*, 2004 U. CHI. LEGAL F. 27, 44; Buss, *supra* note 46, at 666–67; James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845 (2003); Meyer, *supra* note 77, at 1128.

⁸¹ Meyer, *supra* note 77, at 1128 ("Children's dependency on others to articulate and represent their interests poses an obvious and basic dilemma for a program that seeks to empower them independently of their parents, the state, and other holders of power.").

judge must therefore determine whether a relationship is important enough to justify upholding the child's right to it. As such, "[c]hildren's associational rights would protect relationships that courts concluded were good for children, not simply those a child is seeking to maintain."⁸²

It is important to note, however, that neither of these concerns are present when we consider the question of whether children have a due process right to associate *with their parents themselves*. In that case, there is no conflict between the parent's right to her relationship with the child and the child's right to be raised by her parent—the two interests are entirely aligned. And since there is no objection on the part of the parent to the relationship, the parent can also fulfill her traditional role of speaking for the child and determining what is in her best interests—there is no need for a judge or other third party to step in and determine whether the relationship the child seeks to maintain is important. This is significant because “the parent knows herself, her child, and her entire household better than the state knows them, and stands in a position of greater influence than the state over the behavior of all three, [so] the parent is best situated to decide what private relationships should be fostered.”⁸³

To date, the Supreme Court has never explicitly addressed the question of whether children have a due process right to be raised by their parents separate from the parents' right to custody of them.⁸⁴ But lower courts addressing the question have held that such a right exists. In addressing whether a child could bring suit for deprivation of constitutional rights against the police officers who killed his father, the Ninth Circuit held that the

constitutional interest in familial companionship and society logically extends to protect children from unwarranted state interference with their relationships with their parents. The companionship and nurturing interests of parent and child in maintaining a tight familial bond are reciprocal, and we see no

⁸² Emily Buss, *Children's Associational Rights?: Why Less Is More*, 11 WM. & MARY BILL RTS. J. 1101, 1104 (2003).

⁸³ Buss, *supra* note 46, at 649.

⁸⁴ See *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting) (“[T]his Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds”); *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989) (“We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship.”).

reason to accord less constitutional value to the child-parent relationship than we accord to the parent-child relationship.⁸⁵

Similarly, the D.C. Circuit found that both a non-custodial father and his child had “constitutionally protected rights . . . to one another’s companionship.”⁸⁶ Administrators of the federal witness protection program therefore violated the child’s rights as well as the father’s when they placed the child and his mother at an undisclosed location and the father had no way to maintain contact with him.⁸⁷

The Supreme Court’s decisions finding that parents have a substantive due process right to custody and control of their children themselves also suggest that children have a substantive due process right to be raised by their parents. The doctrine is largely grounded on the conviction that parents’ decisions ought to be respected because they will do what is best for their children. The Supreme Court has stated that “there is a presumption that fit parents act in the best interests of their children” because “natural bonds of affection” lead them to do so.⁸⁸ Parents’ right to have custody over and manage their children is therefore not just about the parent’s own happiness and fulfillment, but also about the child’s welfare.⁸⁹ Children develop best when nurtured by loving families.⁹⁰ As the Supreme Court has noted, “until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.”⁹¹ This is because the child also stands to lose from being deprived of the relationship with her parent.⁹² “For a child, the consequences of termination of his natural parents’ rights may well be far-reaching,” including not only material matters such as permanent loss of support, maintenance, inheritance, and other rights, but profound, personal losses such as the loss of the ability to know his parents that “cannot be

⁸⁵ *Smith v. City of Fontana*, 818 F.2d 1411, 1418 (9th Cir. 1987), *overruled on other grounds* by *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1040 n.1 (9th Cir. 1999).

⁸⁶ *Franz v. United States*, 707 F.2d 582, 586 (D.C. Cir.), *supplemented*, 712 F.2d 1428 (D.C. Cir. 1983).

⁸⁷ *Id.* at 586–90 (holding that the administrators of the Witness Protection Program “abrogated the constitutionally protected rights of the plaintiffs to one another’s companionship”).

⁸⁸ *Troxel*, 530 U.S. at 68 (quoting *Parham v. J.R.*, 442 U.S. 584, 602 (1979)).

⁸⁹ See MARTIN GUGGENHEIM, *WHAT’S WRONG WITH CHILDREN’S RIGHTS* 37 (2005) (“[W]hen laws are enacted . . . that protect the child’s relationships with his parent and siblings, the parental rights doctrine can be said to advance the rights and interests of children.”).

⁹⁰ See generally JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

⁹¹ *Santosky v. Kramer*, 455 U.S. 745, 760, 769–70 (1982) (holding that parents were entitled to have the State demonstrate unfitness by clear and convincing evidence before terminating their parental rights).

⁹² *Id.* at 760 n.11.

measured.”⁹³ As Robert Burt has said, a “presumption favoring parents corresponds both to the social reality that state child rearing interventions are inherently difficult enterprises and to the psychological reality that an intensely intimate bonding between parent and child lays the best developmental foundation for this society’s most prized personality attributes.”⁹⁴

As I argued above, *Obergefell* strongly suggests that children have a right to be raised by their parents in families that are legally safeguarded and secure. The Supreme Court noted that children should not be “relegated through no fault of their own to a more difficult and uncertain family life”⁹⁵ simply because of who their parents are. After *Obergefell* it seems clear that children have a right to be nurtured and cared for by their own parents, without being demeaned or marginalized by the State.

This shift toward recognizing such a critical right raises significant questions about the treatment of vulnerable children in other legally marginalized families. U.S. citizen children with undocumented parents, in particular, face significant disadvantages because of their parents’ lack of legal status. In the past, courts and scholars alike have suggested that the best way to protect such children from harm was to remove them from their families.⁹⁶ However, *Obergefell* suggests that in fact children have a right to be raised by their parents that should be protected along with their right to remain in the United States and enjoy equal protection of the laws.

⁹³ *Id.*

⁹⁴ Robert A. Burt, *Developing Constitutional Rights of, in, and for Children*, 39 L. & CONTEMP. PROBS. 118, 127 (1975).

⁹⁵ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

⁹⁶ See, e.g., *Olowo v. Ashcroft*, 368 F.3d 692, 703 (7th Cir. 2004) (ordering that a parent facing deportation be reported to child protective services because she planned to take her children back to her country of origin with her); Marcia Zug, *Should I Stay or Should I Go: Why Immigrant Reunification Decisions Should Be Based on the Best Interest of the Child*, 2011 BYU L. REV. 1139, 1179 n.176 (arguing that Congress could adopt a policy of separating U.S. citizen children from their undocumented parents who were being deported because “Congress could find that the benefits of an American education, English, and other opportunities available to all citizens could justify keeping these children in America regardless of whether their parents were considered unfit”).

II. THE CURRENT SITUATION CONFRONTING CHILDREN WITH UNDOCUMENTED PARENTS

A. *The Impact of a Parent's Apprehension and Removal on Young Children*

Felipe Montes had lived in Sparta, North Carolina for nine years when he was pulled over and arrested for driving without a license in October 2010. Mr. Montes's pregnant wife and two young sons were all U.S. citizens, but he was undocumented. When local police discovered he lacked legal immigration status, they alerted Immigration and Customs Enforcement (ICE), who detained him. Mr. Montes was locked up in immigration detention and placed in removal proceedings. His third son was born while he was in immigration detention hundreds of miles away.⁹⁷ He was deported to Mexico just two months later, in December 2010.⁹⁸ Mr. Montes had been the sole wage-earner in his family.⁹⁹ After his deportation, Mr. Montes's wife, who suffers from mental illness, struggled to manage alone with a newborn and two young sons under the age of three. Just two weeks following Mr. Montes's deportation, child welfare officials removed the couple's three boys from their mother's care after her electricity and heat were turned off.¹⁰⁰ The children were separated and placed with strangers. The two older boys, ages one and three, went to one foster home, while the baby was placed in another.¹⁰¹ The older boys later had to be moved to yet another foster home "due to repeated concerns of corporal punishment being used" against them in the original placement.¹⁰²

Mr. Montes and his wife both asked that the boys be reunited with their father in Mexico, but child welfare authorities refused, noting that

⁹⁷ See Seth Freed Wessler, *A Deported Father Wins a Long, Painful Fight to Keep His Kids*, COLORLINES (Nov. 28, 2012, 9:53 AM), <https://www.colorlines.com/articles/deported-father-wins-long-painful-fight-keep-his-kids>.

⁹⁸ Seth Freed Wessler, *Deported Father Who Returned to U.S. Makes Final Plea to Remain*, COLORLINES (Mar. 21, 2013, 8:57 AM), <https://www.colorlines.com/articles/deported-father-who-returned-us-makes-final-plea-remain>.

⁹⁹ Wessler, *Nearly 205K Deportations of Parents of U.S. Citizens in Just over Two Years*, *supra* note 2.

¹⁰⁰ *Deportation Often Means Losing Custody of US-Born Children*, FOX NEWS (Mar. 12, 2012), <http://www.foxnews.com/politics/2012/03/12/north-carolina-child-welfare-officials-want-deported-father-stripped-parental.html>.

¹⁰¹ *Id.*

¹⁰² Seth Freed Wessler, *Deported Dad Begs North Carolina to Give Him Back His Children*, COLORLINES (Feb. 14, 2012, 10:38 AM), <http://www.colorlines.com/articles/deported-dad-begs-north-carolina-give-him-back-his-children> [hereinafter Wessler, *Deported Dad Begs North Carolina to Give Him Back His Children*].

his home there did not have running water.¹⁰³ Instead, they asked the juvenile court to terminate both parents' rights so the children could be adopted.¹⁰⁴ Mr. Montes did not see his children for twenty-one months, and struggled to keep in contact with them by telephone.¹⁰⁵ Finally, after immigrants' rights activists started an online petition and the Mexican government took up the cause, Mr. Montes was granted temporary permission to return to the United States and was able to see his children in August 2012.¹⁰⁶ After winning full custody of his children in February 2013, Mr. Montes asked the U.S. government for permission to remain in the United States with his wife and children, but he was denied.¹⁰⁷ On March 22, 2013, he returned to Mexico with his three sons, taking them to live with extended family in Tamaulipas, Mexico, a place where they had never been.¹⁰⁸

Because their father was undocumented, the three Montes boys lost contact with him when they were each only a few months old. They watched their mother struggle to survive without her husband, and were then forcibly separated from her by child protective authorities. Following that traumatic separation, they were left stranded in foster care for months, not because their father was unfit or did not want to care for them, but because he was Mexican and child welfare officials did not want to send the children to Mexico. Two of the boys appear to have suffered physical abuse at the hands of their foster parents.¹⁰⁹ Finally, when their family was at last reunited, the boys were forced to depart the United States to live in Mexico because the U.S. government refused to give their father permission to remain in the United States.¹¹⁰

Sadly, the Montes' story is not an anomaly. Every year, the United States deports thousands of parents of U.S. citizen children. Data released by the Department of Homeland Security showed that twenty-

¹⁰³ Seth Freed Wessler, *How the 'Best Interest' Bias of Family Court Threatens Immigrant Parents*, COLORLINES (Aug. 8, 2012, 9:27 AM), <https://www.colorlines.com/articles/how-best-interest-bias-family-court-threatens-immigrant-parents>.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*; Seth Freed Wessler, *Felipe Montes Departs the United States for Mexico, with His Children*, COLORLINES (Mar. 22, 2013, 12:24 PM), <http://www.colorlines.com/articles/felipe-montes-departs-united-states-mexico-his-children> [hereinafter Wessler, *Felipe Montes Departs the United States for Mexico*].

¹⁰⁷ Wessler, *Felipe Montes Departs the United States for Mexico*, *supra* note 106.

¹⁰⁸ *Id.*

¹⁰⁹ Wessler, *Deported Dad Begs North Carolina to Give Him Back His Children*, *supra* note 102 (noting that the boys had to be removed from one foster home "due to repeated concerns of corporal punishment being used" against them).

¹¹⁰ Seth Freed Wessler, *Deported Father's Case Ends as Congress Debates Immigration Changes*, COLORLINES (Feb. 19, 2013, 2:15 PM), <https://www.colorlines.com/articles/deported-fathers-case-ends-congress-debates-immigration-changes>.

three percent of all individuals deported between July 1, 2010 and September 31, 2012 had U.S. citizen children.¹¹¹ During that period, the United States removed 204,810 parents.¹¹² This figure is up dramatically from previous years; for example, in the ten-year-period between 1997 and 2007 only about 108,000 parents of U.S. citizen children were removed.¹¹³ About 5000 children are currently in foster care solely because their parents are in immigration detention or have been removed from the United States.¹¹⁴

While this may seem like a small number compared to the number of parents deported, it is of significant concern given that foster care is an extremely unhealthy environment for children and is supposed to serve only as a last resort when children cannot remain with their parents because of abuse, neglect, or abandonment.¹¹⁵ As Dorothy Roberts points out, “[r]emoving children from their homes is perhaps the most severe government intrusion into the lives of citizens. It is also one of the most terrifying experiences a child can have.”¹¹⁶ Children who grow up in foster care are far more likely to suffer from mental illness,¹¹⁷ to be homeless,¹¹⁸ or to be incarcerated¹¹⁹ as adults than their peers who were never institutionalized. Many children in foster care suffer physical or sexual abuse,¹²⁰ while others endure emotional difficulties caused by multiple placements and the harm of being raised in a temporary, insecure situation.

Many undocumented parents live in fear that they will lose custody of their children to the child welfare system because they lack lawful immigration status. Several high-profile cases in which children taken into State custody after an undocumented parent was apprehended have

¹¹¹ Fact Sheet, Immigration Policy Ctr., *Falling Through the Cracks: The Impact of Immigration Enforcement on Children Caught Up in the Child Welfare System* (Dec. 2012), https://www.americanimmigrationcouncil.org/sites/default/files/research/falling_through_the_cracks_3.pdf [hereinafter Fact Sheet]; see also Wessler, *Nearly 205K Deportations of Parents of U.S. Citizens in Just over Two Years*, *supra* note 2 (describing documents received from the Department of Homeland Security in response to a Freedom of Information Act request by Colorlines.com).

¹¹² Fact Sheet, *supra* note 111.

¹¹³ *Id.*

¹¹⁴ APPLIED RESEARCH CTR., *supra* note 6.

¹¹⁵ See Robert P. Hey, *Keeping Children at Home—And Foster Care a Last Resort*, CHRISTIAN SCI. MONITOR (Apr. 23, 1987), <http://www.csmonitor.com/1987/0423/afost2.html>.

¹¹⁶ DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 17 (2002).

¹¹⁷ Mark E. Courtney, *The Difficult Transition to Adulthood for Foster Youth in the US: Implications for the State as Corporate Parent*, 23 SOC. POL’Y REP. 3, 5 (2009).

¹¹⁸ *Id.* at 6.

¹¹⁹ Mark E. Courtney et al., *Foster Youth Transitions to Adulthood: A Longitudinal View of Youth Leaving Care*, 80 CHILD WELFARE 685, 708–09 (2001).

¹²⁰ See Myrna S. Raeder, *Remember the Family: Seven Myths About Single Parenting Departures*, 13 FED. SENT’G REP. 251, 253 (2001).

produced a wave of fear through immigrant communities.¹²¹ Parents worry that if they are apprehended by ICE, their children will be taken by strangers and adopted, and they will have no chance to fight to regain custody. This is not a baseless concern. In several cases, courts have terminated undocumented parents' rights upon little more than a showing that the child's "best interests" would be served by remaining in the United States with foster parents rather than being reunited with her parents.¹²² In response, immigrants' rights organizations have encouraged parents to take extraordinary measures to ensure they will be able to care for their children if they are detained or deported. For instance, one guide produced by the Florence Immigrant and Refugee Rights Project advises parents to "make[] a family plan," in order to "prepar[e] for the possibility of being detained, deported, and separated from your children."¹²³ The guide suggests immigrant parents identify a substitute caretaker for their children in advance, giving that person power of attorney or temporary guardianship over them, and renewing it every few months to ensure it is valid.¹²⁴ The guide notes that parents must keep the papers in a safe place where they can be accessed on short notice.¹²⁵ Further, parents are advised that the caretaker will need to be able to care for the children for an extended period of time, since immigration proceedings can last months or even years and "many kids

¹²¹ See María Inés Zamudio, *For Undocumented Parents, Child's Future Is Paramount*, CHI. REP. (Feb. 11, 2014), <http://chicagoreporter.com/undocumented-parents-childs-future-paramount>; *What Happens to US-Born Kids of Deported Undocumented Immigrants*, FOX NEWS LATINO (Aug. 25, 2012), <http://latino.foxnews.com/latino/news/2012/08/25/what-happens-to-us-born-kids-deported-undocumented-immigrants/print>; see also Liz Robbins, *Rumors of Immigration Raids Stoke Fear in New York*, N.Y. TIMES (Jan. 6, 2016), http://www.nytimes.com/2016/01/07/nyregion/rumors-of-immigration-raids-stoke-fear-in-new-york.html?_r=0.

¹²² See, e.g., *Angelica L. v. Maria L.*, 767 N.W.2d 74, 87–88 (Neb. 2009) (reviewing a lower court decision to terminate parental rights on the grounds that the mother "either A) embarked on an unauthorized trip to the United States with a newborn premature infant or B) gave birth to a premature infant in the United States" after entering the country without authorization); Lauren Gilger, Brian Ross & Angela M. Hill, *Adoption Battle over 5-Year Old Boy Pits Missouri Couple vs. Illegal Immigrant*, ABC NEWS (Feb. 1, 2012), <http://abcnews.go.com/Blotter/adoption-battle-year-boy-pits-missouri-couple-illegal/story?id=15484447> (discussing the case of Encarnacion Bail Romero, whose parental rights were terminated after she was arrested during an immigration raid because Bail Romero's "lifestyle, that of smuggling herself into a country illegally and committing crimes in this country is not a lifestyle that can provide stability for a child"); see also Marcia Yablon-Zug, *Separation, Deportation, Termination*, 32 B.C. J.L. & SOC. JUST. 63, 82 (2012) (noting that, when deciding whether to terminate the parental rights of an immigrant, "courts and welfare agencies frequently conclude that a parent's undocumented status alone demonstrates unfitness").

¹²³ FLORENCE IMMIGRANT & REFUGEE RTS. PROJECT, *WHAT IF I'M PICKED UP BY I.C.E. IN ARIZONA?: MAKING A FAMILY PLAN* (2014), <http://firrp.org/media/English-Manual-Making-a-Family-Plan-if-Picked-up-by-ICE-in-AZ.pdf>.

¹²⁴ *Id.* at 3–5.

¹²⁵ *Id.* at 6.

end up in [state] custody because a relative or friend only planned to take care of them for a few weeks and couldn't keep them longer."¹²⁶

Even for children who do not end up in foster care when a parent is apprehended by immigration enforcement, a parent's detention and deportation still constitutes a profound crisis that can produce long-term negative effects. Psychological research shows that young children whose undocumented parents are detained or deported are severely impacted:

[T]hey often experience in the short term, frequent crying, withdrawal, disrupted eating and sleeping patterns, anger, anxiety and depression. Over time, these can lead to more severe issues like post-traumatic stress disorder, poor identity formation, difficulty forming relationships, feelings of persecution, distrust of institutions and authority figures, acting out behaviors and difficulties at school.¹²⁷

Of course, not every child whose parent is removed from the U.S. will end up in foster care. Some depart the United States with their parents, as the Montes children ultimately did.¹²⁸ Others will remain in the United States with family, friends, or other informal caretakers. As David Thronson puts it, parents in removal proceedings face "choiceless choices"—either to bring their child back to their country of origin where they may face culture shock and language difficulties at best, and severe deprivation or violent persecution at worst, or to leave the child in the United States for a long (or even permanent) separation.¹²⁹

B. *The Harm of Separation from Parents*

Decades of scientific research demonstrate that separation from parents is traumatic for children and has a profound impact on their functioning. "[T]he importance of a supportive primary caregiver for the adaptive development of social and emotional capabilities is well established."¹³⁰ A child whose primary caregiver is taken away loses a critical social support, suffers enormous stress, and is left to worry about the parent. All this impedes normal development. Children with a

¹²⁶ *Id.* at 4.

¹²⁷ *Undocumented Americans*, AM. PSYCHOL. ASS'N, <http://www.apa.org/topics/immigration/undocumented-video.aspx> (last visited Nov. 21, 2016).

¹²⁸ See *supra* notes 107–10 and accompanying text.

¹²⁹ David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1196–97 (2006).

¹³⁰ Brian Allen, Erica M. Cisneros & Alexandra Tellez, *The Children Left Behind: The Impact of Parental Deportation on Mental Health*, 24 J. CHILD & FAM. STUD. 386, 390 (2015).

deported parent are significantly more likely to suffer from depression, anxiety, aggression, and conduct problems than children whose undocumented parents were never apprehended.¹³¹ It is clear that “los[ing] . . . a parent for immigration law violations, causes a level of stress that can lead to aberrant developmental trajectories in otherwise healthy children.”¹³² Children who depart the United States with their parents after they are deported also suffer emotional difficulties. A recent study of U.S. citizen children living in Mexico with parents who had been deported found that they “displayed more depressive symptoms” than even those children who remained behind in the United States following a parent’s removal.¹³³

C. *Fear of Immigration Enforcement*

Unprecedented rates of detention and removal in recent years have led many hundreds of thousands of children to be impacted by their parents’ deportation.¹³⁴ But a far greater number of young people have parents who are at risk of apprehension and removal, even if it will never actually come to pass. Millions of American children have a parent who lacks lawful immigration status. In 2011, there were 4.5 million U.S. citizen children with at least one undocumented parent.¹³⁵ Indeed, children with an undocumented parent constitute a significant percentage of all children nationwide—about seven percent of the U.S. population under eighteen years of age.¹³⁶ The number of children in this situation has increased dramatically. Between 2000 and 2010, the number of children born in the United States with at least one unauthorized immigrant parent more than doubled.¹³⁷ About five million unauthorized adult immigrants—forty-nine percent—are in families with minor children.¹³⁸ In 2013, 295,000 babies born in the

¹³¹ See *id.* at 387–90.

¹³² Luis H. Zayas et al., *The Distress of Citizen-Children with Detained and Deported Parents*, 24 J. CHILD & FAM. STUD. 3213, 3221 (2015).

¹³³ *Id.* at 3220.

¹³⁴ This trend may accelerate under the Trump administration. One of the President’s first acts in office was to issue an executive order that greatly expanded the number of immigrants who are prioritized for removal. Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017); Jennifer Medina, *Trump’s Immigration Order Expands the Definition of ‘Criminal’*, N.Y. TIMES (Jan. 26, 2017), <http://www.nytimes.com/2017/01/26/us/trump-immigration-deportation.html>.

¹³⁵ PAUL TAYLOR ET AL., PEW RESEARCH CTR., UNAUTHORIZED IMMIGRANTS: LENGTH OF RESIDENCY, PATTERNS OF PARENTHOOD 6 (2011), <http://www.pewhispanic.org/files/2011/12/Unauthorized-Characteristics.pdf>.

¹³⁶ PASSEL & TAYLOR, *supra* 5, at 1.

¹³⁷ TAYLOR, *supra* 135, at 6.

¹³⁸ *Id.*

United States had at least one parent who was an unauthorized immigrant. They represented eight percent of all births during that year.¹³⁹

These children suffer tremendous disadvantages compared to their peers whose parents are not undocumented. One third of the children of unauthorized immigrants live in poverty, compared to eighteen percent of children of U.S.-born parents.¹⁴⁰ A 2010 study found that more than half of Latino parents in mixed-status families struggled to provide for their children because of the threat of detention and removal.¹⁴¹ Twenty-five percent of U.S. citizen children with undocumented parents lack health insurance.¹⁴² “Almost 40% of children of undocumented parents did not see a doctor in the past year; almost three-fourths of the children of documented parents did.”¹⁴³ Undocumented parents are less likely to use healthcare services not only because they lack health insurance, but because they fear medical providers will report them to the immigration authorities.¹⁴⁴ Similarly, U.S. citizen children with unauthorized immigrant parents are less likely to access public programs they are entitled to, such as food stamps or childcare subsidies, because their parents are afraid of being apprehended by immigration authorities.¹⁴⁵ A recent study found that two- to three-year-old children with undocumented parents had lower

¹³⁹ Jeffrey S. Passel & D’Vera Cohn, *Number of Babies Born in U.S. to Unauthorized Immigrants Declines*, PEW RES. CTR. (Sept. 11, 2015), <http://www.pewresearch.org/fact-tank/2015/09/11/number-of-babies-born-in-u-s-to-unauthorized-immigrants-declines>.

¹⁴⁰ JEFFREY S. PASSEL & D’VERA COHN, PEW RESEARCH CTR., *A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES*, at iv (2009), <http://www.pewhispanic.org/files/reports/107.pdf>.

¹⁴¹ Kalina Brabeck & Qingwen Xu, *The Impact of Detention and Deportation on Latino Immigrant Children and Families: A Quantitative Exploration*, 32 HISP. J. BEHAV. SCI. 341, 354 (2010).

¹⁴² PASSEL & COHN, *supra* at 140, at iv–v.

¹⁴³ SARA SATINSKY ET AL., HUMAN IMPACT PARTNERS, FAMILY UNITY, FAMILY HEALTH: HOW FAMILY-FOCUSED IMMIGRATION REFORM WILL MEAN BETTER HEALTH FOR CHILDREN AND FAMILIES, at ii (2013), <http://www.familyunityfamilyhealth.org/uploads/images/FamilyUnityFamilyHealth.pdf>.

¹⁴⁴ Amanda Machado, *Why Many Latinos Dread Going to the Doctor*, ATLANTIC (May 7, 2014), <http://www.theatlantic.com/health/archive/2014/05/why-many-latinos-dread-going-to-the-doctor/361547> (“Even with President Obama emphasizing that information provided when applying for Obamacare would not be transferred to immigration services, the 5.5 million American-born children of undocumented parents may find their families avoiding Obamacare sign-ups out of fear of exposing their status.”).

¹⁴⁵ See HIROKAZU YOSHIKAWA, IMMIGRANTS RAISING CITIZENS: UNDOCUMENTED PARENTS AND THEIR YOUNG CHILDREN 60–64 (2011) (“[C]hildren in the first years of life cannot walk into government offices or community agencies and enroll themselves. Parents are powerful gatekeepers to these resources, and when they are afraid of receiving government help, their children cannot benefit.”); Qingwen Xu & Kalina Brabeck, *Service Utilization for Latino Children in Mixed-Status Families*, 36 SOC. WORK RES. 209 (2012).

cognitive skills than those whose parents were documented.¹⁴⁶ Parents' undocumented status is also associated with more limited exposure to educational opportunities beginning in early childhood. U.S. citizen children with unauthorized parents are less likely to be enrolled in childcare centers, which are associated with improved cognitive skills and readiness for school.¹⁴⁷ School-age children with undocumented parents performed worse in reading and math than their peers, even after accounting for socioeconomic status.¹⁴⁸ Children with undocumented parents fare worse than their peers along almost every axis of development: "[C]hildren of immigrants are substantially more likely than children with U.S.-born parents to be poor, have food-related problems, live in crowded housing, lack health insurance, and be in fair or poor health."¹⁴⁹

D. *Anti-Immigrant Measures at the State and Local Level*

These problems have worsened as state and local governments have adopted punitive anti-immigrant policies designed to encourage unauthorized people to self-deport. Arizona adopted S.B. 1070 in 2010 with the stated purpose of driving undocumented residents out of the state.¹⁵⁰ The law made it a state crime to be in the country without authorization and required law enforcement officers who stopped, detained, or arrested a person to ask about the person's legal status if they had "reasonable suspicion" the person was in the United States illegally.¹⁵¹ Many families feared that these provisions would lead teachers, school administrators, and police officers assigned to patrol

¹⁴⁶ YOSHIKAWA, *supra* note 145, at 55.

¹⁴⁷ *Id.* at 135.

¹⁴⁸ Carola Suárez-Orozco et al., *Growing Up in the Shadows: The Developmental Implications of Unauthorized Status*, 81 HARV. EDUC. REV. 438, 451 (2011).

¹⁴⁹ RANDY CAPPS ET AL., URBAN INST., NEW FEDERALISM NATIONAL SURVEY OF AMERICA'S FAMILIES: A PROFILE OF LOW-INCOME WORKING IMMIGRANT FAMILIES 1 (2005), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/311206-A-Profile-of-Low-Income-Working-Immigrant-Families.PDF>.

¹⁵⁰ See *State Senator Russell Pearce, Author of Arizona's SB 1070, Seeks to Intervene in Federal Lawsuit to Defend Arizona Immigration Law*, PR NEWSWIRE (July 14, 2010, 8:30 PM), <http://www.prnewswire.com/news-releases/state-senator-russell-pearce-author-of-arizonas-sb-1070-seeks-to-intervene-in-federal-lawsuit-to-defend-arizona-immigration-law-98467729.html>.

¹⁵¹ ARIZ. REV. STAT. ANN. § 11-1051(B) (2012). Section 2(B) of S.B. 1070 requires state officers to make "a reasonable attempt . . . to determine the immigration status" of any person they stop, detain, or arrest on some other legitimate basis if "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States." *Id.* The Supreme Court struck down several provisions of S.B. 1070 in *Arizona v. United States* but upheld the validity of section 2(B), leaving that part of the law in effect. 567 U.S. 387 (2012).

schools to verify the immigration status of students and their parents.¹⁵² Following the law's passage, schools anticipated a precipitous drop in Hispanic student enrollment because "illegal-immigrant families with school-age children are fleeing Arizona."¹⁵³ Many school districts did see huge numbers of students leave; Mesa School District, for example, had a drop of over 2000 students compared the previous year's enrollment.¹⁵⁴ Studies conducted following the law's implementation also showed immigrant families were less likely to access other vital services following the law's passage. "[T]he enactment of Arizona's SB 1070 was associated with decreases in the utilization of public assistance and routine, preventive health care" among Latina U.S. citizen mothers as well as non-citizens.¹⁵⁵ There were several reported cases in which victims of serious crimes, such as kidnapping or rape, were reluctant to report it to the police because they were afraid of being arrested for being undocumented.¹⁵⁶

Similarly, Alabama's H.B. 56 was passed in 2011 expressly to "make it difficult for [undocumented immigrants] to live here so they will deport themselves."¹⁵⁷ It included provisions criminalizing giving a ride

¹⁵² See Meena Hartenstein, *Arizona Hispanics Flee State in Droves Before New Immigration Law S.B. 1070 Takes Effect in July*, N.Y. DAILY NEWS (June 11, 2010, 2:07 PM), <http://www.nydailynews.com/news/national/arizona-hispanics-flee-state-droves-new-immigration-law-s-b-1070-takes-effect-july-article-1.180202>; Pat Kossan, *Schools See Immigrant Families Departing*, ARIZ. REPUBLIC, May, 28, 2010, at A1; Sergio Quintana, *Immigrants Might Leave Arizona but Not the Country*, NPR (Aug. 26, 2010, 3:56 PM), <http://www.npr.org/templates/story/story.php?storyId=129400993>; Sadie Jo Smokey, *Residents Demand that District Defy Migrant Law*, ARIZ. REPUBLIC, May 8, 2010, at B1.

¹⁵³ Pat Kossan, *Schools: Immigrant Families Leaving Arizona Because of New Immigration Law*, AZCENTRAL.COM (May 28, 2010, 12:00 AM), <http://archive.azcentral.com/news/articles/2010/05/28/20100528arizona-immigration-law-schools.html>.

¹⁵⁴ Michelle Reese, *Mesa School District Begins Discussion on How to Handle 2,400-Student Loss*, E. VALLEY TRIB. (Sept. 11, 2010), http://www.eastvalleytribune.com/local/article_a25e098c-bdcf-11df-8209-001cc4c03286.html (noting that school superintendent estimated about two-thirds of the student loss was due to S.B. 1070).

¹⁵⁵ Russell B. Toomey et al., *Impact of Arizona's SB 1070 Immigration Law on Utilization of Health Care and Public Assistance Among Mexican-Origin Adolescent Mothers and Their Mother Figures*, 104 AM. J. PUB. HEALTH S28, S31 (2014).

¹⁵⁶ See Rudabeh Shahbazi, *Victims Reluctant to Help in Investigations Due to SB 1070*, ABC15.COM (Sept. 15, 2010), http://www.abc15.com/dpp/news/region_phoenix_metro/central_phoenix/victims-reluctant-to-help-in-investigations-due-to-sb-1070 [https://web.archive.org/web/20100920185754/http://www.abc15.com/dpp/news/region_phoenix_metro/central_phoenix/victims-reluctant-to-help-in-investigations-due-to-sb-1070].

¹⁵⁷ HUMAN RIGHTS WATCH, NO WAY TO LIVE: ALABAMA'S IMMIGRANT LAW 1 (2011), https://www.hrw.org/sites/default/files/reports/us1211ForUpload_2.pdf (quoting Alabama State Representative Mickey Hammon). During debate before H.B. 56 passed the Alabama House of Representatives, the bill's co-sponsor, Mickey Hammon, explained that the proposed law "attacks every aspect of an illegal alien's life. . . . This bill is designed to make it difficult for them to live here so they will deport themselves." *Id.*

or renting to someone who is undocumented,¹⁵⁸ making the solicitation of work by unauthorized immigrants a crime,¹⁵⁹ and requiring schools to verify the immigration status of newly enrolled K-12 students,¹⁶⁰ among others. Following the law's implementation, the *New York Times* reported that "scores of immigrant families have withdrawn their children or kept them home this week, afraid that sending them to school would draw attention from the authorities."¹⁶¹ Following the law's implementation, Latino residents reported facing intense hostility and difficulty accessing essential services. One family lost water service to their home for forty days because the water authority refused to allow the father to open an account with Mexican identification documents.¹⁶² Another was turned away from a health clinic by workers who claimed they were no longer permitted to treat undocumented immigrants.¹⁶³ A day laborer's employer brandished a gun and refused to pay her for her work.¹⁶⁴ Latino residents endured taunts like "Go back to Mexico."¹⁶⁵

The implementation of anti-immigrant laws generated a climate of fear in which immigrant residents and their children struggled to access basic necessities like education, healthcare, and water service.¹⁶⁶ These laws also increase the fear of apprehension and removal from the United States by making every encounter with local police an occasion for immigration enforcement. Not only does this impede undocumented parents and their children from going about their lives, it makes it difficult to access police assistance when they are victims of crimes, leaving such families vulnerable to violence and abuse. As the Southern Poverty Law Center put it, following the passage of Alabama's H.R. 56, "[t]housands of children—many of them U.S. citizens who have every

¹⁵⁸ ALA. CODE §§ 31-13-13, -33 (2011), *invalidated by* United States v. Alabama, No. 2:11-CV-2746-SLB, 2013 WL 10799535 (N.D. Ala. Nov. 25, 2013).

¹⁵⁹ *Id.* § 31-13-11, *invalidated by Alabama*, 2013 WL 10799535.

¹⁶⁰ *Id.* § 31-13-27, *invalidated by* United States v. Alabama, 691 F.3d 1269 (11th Cir. 2012).

¹⁶¹ *Alabama: Many Immigrants Pull Children from Schools*, N.Y. TIMES (Sept. 30, 2011), http://www.nytimes.com/2011/10/01/us/alabama-many-immigrants-pull-children-from-schools.html?_r=0.

¹⁶² MARY BAUER, S. POVERTY LAW CTR., ALABAMA'S SHAME: HB 56 AND THE WAR ON IMMIGRANTS 25–26 (2012), http://www.splcenter.org/sites/default/files/downloads/publication/SPLC_HB56_AlabamasShame.pdf.

¹⁶³ *Id.* at 13.

¹⁶⁴ *Id.* at 11–12.

¹⁶⁵ *Id.* at 7.

¹⁶⁶ Georgia, Indiana, South Carolina, and Utah all adopted similar statutes. South Carolina's S.B. 20, for example, required police to demand "papers" demonstrating citizenship or immigration status during traffic stops when they have "reasonable suspicion" that a person lacked immigration status. It also criminalized interactions with undocumented individuals, such as giving undocumented people rides, or renting them accommodation. S.B. 20, 119th Gen. Assemb., 1st Reg. Sess. (S.C. 2011).

right to be here—are now living in fear of losing their parents and are afraid to go to school.”¹⁶⁷

Living with the ever-present worry that a parent could be deported has a negative effect on children. “There is the constant sense of vulnerability to losing a parent and a home if parents are arrested, detained, and deported.”¹⁶⁸ Studies have consistently found high levels of anxiety among children of undocumented parents, even those who have never been apprehended or placed in removal proceedings.¹⁶⁹ The emotional toll these children face, as well as the practical barriers to success, such as impeded access to education, healthcare, government entitlements, and basic services, constitute an enormous burden borne by these children on account of their parents’ legal status. Despite being U.S. citizens, these children do not enjoy an equal opportunity to participate in American society. “The children of unauthorized immigrants often fail to receive the full promise of their citizenship. They find themselves effectively stateless because they face barriers not encountered by children in nonimmigrant families.”¹⁷⁰

E. *How We Got Here: Evolving Immigration Law and the Rise of Mixed-Status Families*

A few points are necessary to understand how we reached a point where seven percent of U.S. citizen children under eighteen have an undocumented parent.¹⁷¹ A full discussion of how the immigrant population in the United States developed in recent history is beyond the scope of this Article, but the unauthorized immigrant population has grown dramatically since the mid-1960s, in large part because the opportunities for migrants to enter the United States with permission became more limited.¹⁷² The Bracero program, which had previously admitted thousands of Mexican workers to work in the United States on a temporary basis, was ended.¹⁷³ Employment-based immigration categories were also made more restrictive, and family-based immigration from countries in the Western Hemisphere was subjected

¹⁶⁷ See BAUER, *supra* note 162, at 4.

¹⁶⁸ Zayas et al., *supra* note 132, at 3221.

¹⁶⁹ *Id.*

¹⁷⁰ 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, 245 (2010).

¹⁷¹ See PASSEL & TAYLOR, *supra* 5, at 1.

¹⁷² See Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595, 1606 (2005).

¹⁷³ See *id.* at 1605.

to numerical limits,¹⁷⁴ resulting in long backlogs for visas. At the same time, economic and political turmoil in Latin America created new incentives for people to come to the United States. All these factors led to a “sharp increase in the number of unauthorized migrants in the United States.”¹⁷⁵

Despite repeated efforts to pass a comprehensive immigration reform law that would address the large undocumented population in the United States, there has not been a large-scale legalization program since 1986, over thirty years ago. As a result, the United States is now home to an estimated eleven million unauthorized immigrants, most of whom have no way of regularizing their immigration status. Studies show that a large proportion of these immigrants have lived in the United States for many years¹⁷⁶ and so, not surprisingly, have built their lives here, including by establishing families and having children. Efforts to tighten immigration enforcement and make it more difficult to enter the United States or remain without authorization may have ironically increased the undocumented population by making entry to the United States more difficult. Where in the past, immigrants could enter the United States to work, return home, and then re-enter to work again, increased border enforcement has made unauthorized entry to the United States far more difficult and dangerous. This has led more immigrants to remain in the United States on a long-term basis, rather than coming here to work temporarily and returning home.¹⁷⁷ As a result, more immigrants have remained here to start and raise families, rather than going back to their countries of origin to do so.

Another factor that has led to an increase in mixed status families was the elimination of legal options for parents of U.S. citizens to regularize their immigration status. Between 1965 and 1976, parents of U.S. citizens of any age could apply for permanent residency in the United States if they were from a country in the Western Hemisphere.¹⁷⁸

¹⁷⁴ See HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 221 (2014) (“Before 1965, immigrants from the Western Hemisphere had to meet financial self-sufficiency and other . . . requirements, but their overall number was not capped.”).

¹⁷⁵ *Id.* at 102.

¹⁷⁶ PASSEL ET AL., *supra* note 3, at 7 (stating that the median length of residence in the United States for all unauthorized immigrants is twelve years).

¹⁷⁷ See MOTOMURA, *supra* note 174, at 51.

¹⁷⁸ The Western Hemisphere consisted of “Canada, the Republic of Mexico, the Republic of Cuba, the Republic of Haiti, the Dominican Republic, the Canal Zone, [and the] independent countr[ies] of Central [and] South America.” Immigration and Nationality Act, Pub. L. No. 82-414, § 101(a)(27)(C), 66 Stat. 163, 169 (1952), *superseded by* 22 C.F.R. § 42.1 (1965). When Congress enacted the Immigration and Nationality Act (INA) in 1952, it imposed no limit on the number of Western Hemisphere immigrants who could obtain permanent residence visas. See *id.* In 1965, Congress amended the INA and provided that unless contrary legislation were enacted in the intervening time period, Western Hemisphere immigrants would be subject to a

Undocumented parents whose babies were born in the United States could therefore apply for immigrant visas to become permanent residents based on their relationship to their newborn U.S. citizen child.¹⁷⁹ The majority of beneficiaries under the program were Mexican, but Haitians and others also qualified as Western Hemisphere immigrants, and were able to gain permanent residency in the United States if they had a U.S. citizen child. But in 1976, Congress amended the law to put all Western Hemisphere countries under the same quota/cap that applied to other countries (a cap of 25,000 immigrant visas per country) and ended the so-called “baby cases.”¹⁸⁰ Under current law, only U.S. citizens at least twenty-one years of age can sponsor their parents for permanent residency in the United States.¹⁸¹ So while an adult citizen can petition for her parent to obtain lawful permanent residency in this country, a status that leads to U.S. citizenship, minor U.S. citizen children have no means to even stop their parents’ deportation from the country.

III. THE CONSTITUTIONAL RIGHTS OF CHILDREN WITH UNDOCUMENTED PARENTS

All children born within the United States are citizens by birth. The Fourteenth Amendment to the U.S. Constitution provides that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.”¹⁸² Birthright citizenship for the children of undocumented immigrants has been

120,000 per fiscal year limitation effective July 1, 1968. Pub. L. No. 89-236, § 21(e), 79 Stat. 911, 921 (1965).

¹⁷⁹ Some well-known individuals benefited from the provision. Writer Edwidge Danticat’s parents came to America as undocumented immigrants from Haiti but were able to legalize their immigration status after her brother was born in the United States. See EDWIDGE DANTICAT, *BROTHER, I’M DYING* 89 (2007). After becoming legal permanent residents, they brought Danticat from Haiti to join them. See *id.* at 96–97. Similarly, Republican Utah Congresswoman Mia Love’s parents obtained permanent residency in the United States after she was born a U.S. citizen. Stuart Anderson, *Mia Love May Be Right About Her Family’s Immigration History*, FORBES (Sept. 28, 2012, 9:46 AM), <http://www.forbes.com/sites/stuartanderson/2012/09/28/mia-love-may-be-right-about-her-familys-immigration-history/#30ebf1c2d73e>.

¹⁸⁰ See Immigration and Nationality Act, Pub. L. No. 94-571, § 203, 90 Stat. 2703, 2705 (1976) (“SEC. 4. Section 203 of the Immigration and Nationality Act (8 U.S.C. 1153) is amended . . . (3) by striking out the period at the end of paragraph (5) of subsection (a) and inserting in lieu thereof a comma and the following: ‘provided such citizens are at least twenty-one years of age.’”).

¹⁸¹ See 8 U.S.C. § 1151(b)(2)(A)(i) (2012) (“[T]he term ‘immediate relatives’ means the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age.”).

¹⁸² U.S. CONST. amend. XIV, § 1.

under attack for at least thirty years.¹⁸³ Academics and politicians have argued vociferously to exclude people whose parents had no lawful status from U.S. citizenship, either by reading the Fourteenth Amendment so as to exclude them,¹⁸⁴ or by amending the Constitution to the same end.¹⁸⁵ Some commentators have argued that children of undocumented parents do not fall within this clause because they are not “subject to the jurisdiction” of the United States. Schuck and Smith famously argued in 1985 that:

[I]t is difficult to defend a practice that extends birthright citizenship to the native-born children of illegal aliens. The parents of such children are, by definition, individuals whose presence within the jurisdiction of the United States is prohibited by law. They are manifestly individuals, therefore, to whom the society has explicitly and self-consciously decided to deny membership. And if the society has refused to consent to their membership, it can hardly be said to have consented to that of their children who happen to be born while their parents are here in clear violation of American law.¹⁸⁶

The consensus among legal scholars, however, is that a constitutional amendment would be needed to end birthright citizenship for children born in the United States to immigrant families.¹⁸⁷

¹⁸³ See, e.g., PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLICY* 94 (1985). Schuck and Smith’s book stimulated the contemporary movement to limit birthright citizenship, but there were calls to eliminate it in earlier eras as well. See Rachel E. Rosenbloom, *Policing the Borders of Birthright Citizenship: Some Thoughts on the New (and Old) Restrictionism*, 51 *WASHBURN L.J.* 311, 312 (2012).

¹⁸⁴ See, for example, John C. Eastman, Commentary, *Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11*, 42 *U. RICH. L. REV.* 955 (2008), or Rep. Steve King’s introduction of H.R. 140, the Birthright Citizenship Act of 2015, which would amend the INA to limit birthright citizenship to those born in the United States of parents, one of whom is: (1) a U.S. citizen or national, (2) a lawful permanent resident alien whose residence is in the United States, or (3) an alien performing active service in the U.S. Armed Forces. Birthright Citizenship Act of 2015, H.R. 140, 114th Cong. § 2 (2015). During his campaign for president, Donald Trump also argued that U.S.-born children with undocumented parents could be excluded from citizenship through an “act of Congress” without need for a constitutional amendment. See Robert Farley, *Trump Challenges Birthright Citizenship*, [FACTCHECK.ORG](http://www.factcheck.org/2015/11/trump-challenges-birthright-citizenship) (Nov. 13, 2015), <http://www.factcheck.org/2015/11/trump-challenges-birthright-citizenship>.

¹⁸⁵ For example, Republican U.S. Senator Lindsey Graham has called birthright citizenship for children of unauthorized immigrants a “mistake” and called for passage of a constitutional amendment to end it. See Andy Barr, *Graham Eyes ‘Birthright Citizenship’*, *POLITICO* (July 29, 2010, 5:14 PM), <http://www.politico.com/news/stories/0710/40395.html>.

¹⁸⁶ SCHUCK & SMITH, *supra* note 183, at 94.

¹⁸⁷ See, e.g., Garrett Epps, *The Citizenship Clause: A “Legislative History”*, 60 *AM. U. L. REV.* 331, 339 (2010) (“[T]he history of the Amendment’s framing lends no support to the idea that native-born American children should be divided into citizen and non-citizen classes depending on the immigration status of their parents.”); Cristina M. Rodriguez, *The Citizenship Clause, Original Meaning, and the Egalitarian Unity of the Fourteenth Amendment*, 11 *U. PA. J.*

In the 1898 case *United States v. Wong Kim Ark*, the Supreme Court held that the phrase “subject to the jurisdiction thereof” simply meant that the children of foreign ambassadors or occupying enemies were excluded from birthright citizenship.¹⁸⁸ The Court therefore held that Wong Kim Ark was a citizen because he was born in the United States, even though his parents were non-citizens who had immigrated from China and were barred from becoming citizens or even re-entering the United States if they left.¹⁸⁹ The Court was clear that the legal impediments placed on the parents did not extend to their children born in the United States. More recently, in *Plyler v. Doe*, the Court found that undocumented children had a right to equal protection of the laws because they were “persons within the jurisdiction” of the state, and therefore had rights under the Fourteenth Amendment’s Equal Protection Clause.¹⁹⁰

As Hiroshi Motomura points out: “Birthright citizenship under the Fourteenth Amendment is a backstop against the marginalization of temporary workers’ families.”¹⁹¹ It ensures that the underclass status of undocumented workers does not persist from generation to generation.¹⁹² Without it, there would be a class of “American untouchables” who were born and lived their whole lives in the country without ever having equal legal rights here.¹⁹³ But birthright citizenship means that no person is “born a slave, a serf or a criminal.”¹⁹⁴

While children born in the United States to undocumented parents are U.S. citizens as a formal legal matter, they do not enjoy full rights as citizens. As Edith Z. Friedler observed over twenty years ago, “the rights

CONST. L. 1363 (2009); Gerald L. Neuman, *Back to Dred Scott?*, 24 SAN DIEGO L. REV. 485 (1987) (reviewing SCHUCK & SMITH, *supra* note 183).

¹⁸⁸ 169 U.S. 649, 704–05 (1898).

¹⁸⁹ *Id.* The Chinese Exclusion Act of 1882 barred Chinese immigrants from naturalization and required them to obtain certifications for reentry. Act of May 6, 1882, ch. 126, § 1, 22 Stat. 58, 59. Chinese people who were not present in the United States by November 17, 1880 were excluded altogether. *Id.* § 3.

¹⁹⁰ *Plyler v. Doe*, 457 U.S. 202, 210, 211 n.10 (1982) (“[N]o plausible distinction with respect to Fourteenth Amendment ‘jurisdiction’ can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful.”).

¹⁹¹ MOTOMURA, *supra* note 174, at 225.

¹⁹² Indeed, the constitutional guarantee of birthright citizenship has played an important role in blunting discrimination against disfavored immigrant communities in earlier eras of nativism. See Rosenbloom, *supra* note 183, at 322 (“It is the Equal Protection Clause that bears the more obvious relevance to laws that discriminate against immigrants, but the Citizenship Clause has also played an important role in imposing practical limits on such discrimination.” (footnote omitted)).

¹⁹³ Garrett Epps, Opinion, *Denying Citizenship Un-American*, ARIZ. REPUBLIC (Jan 8, 2011, 12:00 AM), <http://www.azcentral.com/arizonarepublic/opinions/articles/2011/01/08/20110108epps08.html>.

¹⁹⁴ *Id.*

of citizen children born to illegal aliens are, at best, illusory.”¹⁹⁵ Such children are frequently separated from their parents or forced to leave the country when their parents are apprehended and deported. Even if their parents are never actually removed from the United States, they suffer from the fear and anxiety that results from concerns about being placed in deportation proceedings. In states and localities where anti-immigrant legislation has been enacted with a goal of encouraging immigrants to “self-deport,” their citizen children have been excluded from basic community resources like medical care and water service. In addition to granting citizenship to all people born within the country, the Fourteenth Amendment also guarantees Americans “due process of law.”¹⁹⁶ U.S. citizen children with undocumented parents have three fundamental rights that must be upheld: the right to be raised by their parents, the right to remain in the United States, and the right to equal protection under the law.

A. *A Child’s Fundamental Right to Be Raised by Her Parents*

As laid out above, the Supreme Court’s decision in *Obergefell* suggests that children have a right to live with their parents, just as parents have the right to the care and custody of their children. The Supreme Court has often noted that a parent’s right to care for her children is “far more precious . . . than property rights.”¹⁹⁷ This is because the child is not mere chattel to whom the parent has an ownership interest. Rather the child is a vulnerable human being who needs the support, guidance, and love of the parent to survive, learn, and develop into a functioning adult. It is for this reason that, “[o]f all the rights of the child, the child’s right to be raised by a loving parent is surely the linchpin.”¹⁹⁸ While parents derive deep fulfillment and joy from caring for and guiding their children, arguably the parent-child relationship is actually more important for the child, who relies on the parent for all of her basic needs: food, shelter, protection, education, guidance, and representation in her relationships with the outside world. As such, it is logical that “to the extent parents and families have

¹⁹⁵ Edith Z. Friedler, *From Extreme Hardship to Extreme Deference: United States Deportation of Its Own Children*, 22 HASTINGS CONST. L.Q. 491, 492 (1995).

¹⁹⁶ U.S. CONST. amend. XIV, § 1.

¹⁹⁷ *May v. Anderson*, 345 U.S. 528, 533 (1953).

¹⁹⁸ Barbara Bennett Woodhouse, Address, *From Property to Personhood: A Child-Centered Perspective on Parents’ Rights*, 5 GEO. J. ON FIGHTING POVERTY 313, 316 (1998).

fundamental liberty interests in preserving [their] intimate relationships [with their children], so, too, do children have these interests.”¹⁹⁹

B. *A Citizen Child's Right to Reside in the United States*

It is axiomatic that U.S. citizens have a right to reside in the United States. Citizens cannot be exiled, even if they commit heinous crimes.²⁰⁰ Minor U.S. citizen children whose parents are deported are not formally banished from the United States; legally, they retain their right to remain. But in reality, it is frequently impossible for a young child whose parents are removed to stay in the country. To do so, they have to give up their right to live with their parents, upon whom they depend for love, sustenance, and support. Given that a strong, stable relationship with her parents is crucial to a child's development, and separation from her parents can cause lasting psychological trauma, the reality is that young children have no choice but to depart the United States with their parents.²⁰¹ So, while a deportation order for a citizen child's parents may not technically banish her from the country, in reality it has that effect.

Of course, children subject to such “de facto deportations” still retain their U.S. citizenship, and so theoretically have the option to return to the United States when they reach the age of majority, or are old enough to live without their parents. But this does not mean that they suffer no harm as a result of being forced to grow up outside the United States. The youngest Montes child was four years old when the U.S. government refused to permit him to remain in the United States with his father. He could theoretically return to America after he becomes an adult at age eighteen. By then, he will have been excluded from the United States for fourteen years. As an initial matter, we might note that a fourteen-year exile imposed on an adult U.S. citizen as a punishment for a crime would likely be deemed unconstitutionally cruel and unusual.

¹⁹⁹ *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting).

²⁰⁰ *See Trop v. Dulles*, 356 U.S. 86, 92 (1958) (holding that a citizen could not be stripped of his citizenship merely because he was convicted of desertion during wartime and that “[c]itizenship is not a license that expires upon misbehavior”); *Klapprott v. United States*, 335 U.S. 601, 616–17 (1949) (“To lay upon the citizen the punishment of exile for committing murder, or even treason, is a penalty thus far unknown to our law and at most but doubtfully within Congress’ power.”).

²⁰¹ *See* Jacqueline Bhabha, *The “Mere Fortuity of Birth”? Children, Mothers, Borders, and the Meaning of Citizenship*, in *MIGRATIONS AND MOBILITIES: CITIZENSHIP, BORDERS, AND GENDER* 187, 192 (Seyla Benhabib & Judith Resnik eds., 2009).

In the case of the youngest Mr. Montes, being forced to spend those fourteen years outside the United States means his entire childhood schooling will take place in another country, and likely in a different language, assuming he has the opportunity to attend school at all. When he returns to the United States as an adult, he will not have the background in American culture, or the social capital that he could have developed as a child growing up in the United States.²⁰² As Jacqueline Bhabha points out, a child's place of residence "has pervasive impacts and lifelong consequences: it affects children's life expectancy, their physical and psychological development, their material prospects, their general standard of living."²⁰³ U.S. citizen children forced to live outside the United States may receive less or poorer quality education than they would have if allowed to remain; they may have to shoulder more burdensome familial obligations, conform to more confining gender roles and social expectations, or face discrimination, persecution, disease, or war. Their access to kinship networks and other social support may be severely diminished.

What country a child lives in fundamentally affects his life, not just in childhood, but beyond. The fact that Mr. Montes's four-year-old son is forced to leave the United States and spend his formative years in Mexico will have a profound impact on his ability to succeed in America as an adult. "Yet children, particularly young children, are often considered parcels that are easily moveable across borders with their parents and without particular cost to the children."²⁰⁴

In evaluating whether parents' deportations bear on a fundamental right of their U.S. citizen children, it is important to look at the reality of how children are affected. To look again at the example of Mr. Montes, it is clear that his deportation had a profound impact on his children, who had to suffer both prolonged separation from their father and then were forced to leave the United States upon finally being reunited with him.²⁰⁵ The fact that as a formal legal matter, they remained U.S. citizens who could not be subject to a deportation order made no difference; when their parent was deported, they were forced to leave as well.

An interesting historical parallel lies in the fate of Japanese-American children and their parents subject to internment and other mistreatment during World War II. In 1948, the Supreme Court considered the case of seventeen-year-old Fred Oyama, who had been imprisoned in an internment camp.²⁰⁶ While incarcerated, he had lost

²⁰² See *supra* notes 97–10 and accompanying text.

²⁰³ *Id.* at 193.

²⁰⁴ *Id.*

²⁰⁵ See *supra* notes 100–10 and accompanying text.

²⁰⁶ *Oyama v. California*, 332 U.S. 633, 637–38 (1948).

title to eight acres of land his father had purchased and transferred to him.²⁰⁷ Under California's Alien Land Law, Fred's father was barred from owning agricultural land because he was a "citizen not eligible for naturalization" on account of being Japanese.²⁰⁸ The State of California brought an escheat action and took title to the land, claiming it had been illegally transferred to Fred Oyama in order to evade the Alien Land Law.²⁰⁹ Fred's father brought suit on his behalf in order to recover title.²¹⁰ The State argued that the land had never really belonged to Fred—his father had only nominally transferred title to him in order to evade the restrictions on his own ownership, but he remained the true owner.²¹¹

The Supreme Court, however, declared that, "[i]n approaching cases, such as this one, in which federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect."²¹² So while the Alien Land Law did not target Fred explicitly as a U.S. citizen, it had the effect of denying him property rights in the land he owned because it automatically invalidated the transfer of land from his father to him. As the Court pointed out, "[t]he only basis for this discrimination against an American citizen, moreover, was the fact that his father was Japanese and not American, Russian, Chinese, or English. But for that fact alone, Fred Oyama . . . would be the undisputed owner of the eight acres in question."²¹³

C. *Children's Right to Equal Protection of the Law*

The fact that a child's parents have engaged in wrongdoing does not justify singling her out for negative treatment under the law. Indeed, penalizing children for the actions of their parents goes against essential values of our legal system. In a series of cases dealing with children born to unmarried parents, the Supreme Court made it clear that the government cannot attempt to deter parents' bad conduct by burdening their children.

²⁰⁷ *Id.* at 637.

²⁰⁸ *Id.* at 635–36.

²⁰⁹ *Id.* at 637.

²¹⁰ *Id.* at 642.

²¹¹ *Id.* at 637.

²¹² *Id.* at 636.

²¹³ *Id.* at 644.

[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual—as well as an unjust—way of deterring the parent.²¹⁴

In *Plyler v. Doe* the Supreme Court addressed the rights of undocumented children who had been denied entry to public schools in Texas because they lacked lawful immigration status.²¹⁵ The State argued that educating undocumented children imposed a financial burden on the school system and encouraged unauthorized immigration. But the Supreme Court noted that those excluded under the policy were “innocent children” who did not choose to come to the United States but were brought to the country by their parents, and struck down the laws as unconstitutional.²¹⁶ The Court concluded that “[e]ven if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice.”²¹⁷ Finding that the policy would have to further some “substantial goal” of the State in order to be considered rational, the Court struck down the laws excluding the children from school.²¹⁸

Writing for the majority, Justice Brennan noted that ineffective immigration enforcement, combined with employment opportunities for undocumented immigrants, had resulted in a “substantial ‘shadow population’ of illegal migrants—numbering in the millions” who are encouraged to stay in the United States as a source of cheap labor, but excluded from the benefits of citizenship.²¹⁹ He further said that while the children’s parents had the ability to follow the law and leave the country, the children had no such choice. The Texas law therefore singled out the children based on a “legal characteristic” they could not control.²²⁰ As such, Justice Brennan concluded, it was difficult to imagine any rational reason for penalizing these children for their unauthorized presence in the United States. The Court also pointed out the profound impact that excluding children from educational opportunity has, not just on the children themselves, but also on their community, “by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the

²¹⁴ *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972).

²¹⁵ *Plyler v. Doe*, 457 U.S. 202 (1982).

²¹⁶ *Id.* at 223–24.

²¹⁷ *Id.* at 220.

²¹⁸ *Id.* at 224.

²¹⁹ *Id.* at 218–19.

²²⁰ *Id.* at 220.

level of esteem in which it is held by the majority.”²²¹ In his concurring opinion, Justice Blackmun noted that the exclusion from education guaranteed that these children would form a “discrete underclass” at a “permanent and insurmountable competitive disadvantage, . . . denied even the opportunity to achieve.”²²² While Justice Powell observed that a state law creating “an underclass of future citizens and residents cannot be reconciled with one of the fundamental purposes of the Fourteenth Amendment.”²²³

More recent cases have similarly held that legislation targeting undocumented parents is unconstitutional if it deprives their U.S. citizen children of equal protection of the laws. In considering the claims of undocumented women whose newborn U.S. citizen babies were not automatically eligible for Medicaid benefits to pay for healthcare because of their mothers’ unauthorized status, the Second Circuit found the federal law excluding the infants unconstitutional.²²⁴ The court noted that the children were U.S. citizens who had been denied a benefit solely because their parents were undocumented.²²⁵ Accordingly, the court found that the intermediate level of scrutiny applied in *Plyler* was, therefore, appropriate because, “citizen claimants with an equal protection claim deserving of heightened scrutiny do not lose that favorable form of review simply because the case arises in the context of immigration.”²²⁶ The court struck down the provision as a violation of the children’s right to equal protection, and ruled that the defendants would have to implement a system whereby undocumented pregnant women could apply for Medicaid benefits on behalf of their unborn babies prior to their birth, so that the citizen newborns could be immediately eligible for benefits upon delivery.²²⁷

Challenges to state and local laws penalizing U.S. citizen children with undocumented parents have resulted in similar outcomes. For example, in cases concerning state laws that treated citizen children as “non-residents” for the purposes of determining whether they are entitled to attend state colleges and universities at in-state tuition rates, courts have rejected the notion that a young person can be treated as a “non-resident” based solely on her parents’ immigration status.²²⁸ *Ruiz*

²²¹ *Id.* at 222.

²²² *Id.* at 234 (Blackmun, J., concurring).

²²³ *Id.* at 239 (Powell, J., concurring).

²²⁴ *Lewis v. Thompson*, 252 F.3d 567, 569 (2d Cir. 2001).

²²⁵ *Id.* at 591.

²²⁶ *Id.*

²²⁷ *Id.* at 592.

²²⁸ See, e.g., *Ruiz v. Robinson*, 892 F. Supp. 2d 1321, 1328–30 (S.D. Fla. 2012); *A.Z. ex rel. B.Z. v. Higher Educ. Student Assistance Auth.*, 48 A.3d 1151, 1159 (N.J. Super. Ct. App. Div. 2012).

v. Robinson struck down Florida regulations that treated U.S. citizen students with undocumented parents as non-residents even if they had graduated from a Florida high school and maintained a lengthy residence in the state.²²⁹ The State had argued that this complied with federal law because Florida did not provide tuition benefits to non-resident U.S. citizens, and the federal statute provided: “[A]n alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State . . . for any postsecondary education benefit unless a [non-resident] citizen or national of the United States is eligible for such a benefit.”²³⁰ In rejecting this contention, the district court asserted that the defendants had treated the U.S. citizen plaintiffs as “aliens” based solely on their parents’ alienage. The district court observed, “the State regulations deny a benefit to Plaintiffs and impinge Plaintiffs’ ability to attain post-secondary education at the State’s public institutions solely by virtue of their parents’ undocumented status, and in a very real way the regulations punish the citizen children for the acts of their parents.”²³¹

In 2010, two U.S. citizen children with undocumented parents brought suit challenging an Indiana Department of Health policy that forbade fathers from submitting paternity affidavits to establish legal parentage unless they had a social security number.²³² The court found that under the policy, “children born to a parent without a social security number—typically because of the parent’s immigration status—cannot be legitimized through the procedure contemplated by the Statute.”²³³ The court asserted that strict scrutiny should be applied where a U.S. citizen child was excluded from benefits based on his parents’ undocumented immigration status, but determined that

²²⁹ *Ruiz*, 892 F. Supp. 2d 1321.

²³⁰ 8 U.S.C. § 1623 (2012).

²³¹ *Ruiz*, 892 F. Supp. 2d at 1330.

²³² *L.P. v. Comm’r of Ind. State Dep’t of Health*, No. 1:10-CV-1309-TWP-TAB, 2011 WL 255807, at *1 (S.D. Ind. Jan. 27, 2011). Such policies are less uncommon than one might imagine. In May 2015, four women filed a lawsuit against the Texas Department of State Health Services for allegedly refusing to issue birth certificates for their Texas-born children because the women were undocumented and could not produce an acceptable form of identification. *Serna v. Tex. Dep’t of State Health Servs.*, No. 1-15-CV-446 RP, 2015 WL 6118623, at *1 (W.D. Tex. Oct. 16, 2015); Melissa del Bosque, *Children of Immigrants Denied Citizenship*, TEX. OBSERVER (July 13, 2015, 2:08 PM), <http://www.texasobserver.org/children-of-immigrants-denied-citizenship>. The case subsequently settled, with Texas agreeing to accept identification cards issued by the consulates of Mexico and other countries even in the absence of U.S. visas. See Julia Preston, *Lawsuit Forces Texas to Make It Easier for Immigrants to Get Birth Certificates for Children*, N.Y. TIMES (July 24, 2016), http://www.nytimes.com/2016/07/25/us/lawsuit-texas-immigrants-birth-certificates.html?_r=0.

²³³ *L.P.*, 2011 WL 255807, at *1.

“[r]egardless of the level of scrutiny employed, Plaintiffs stand to prevail on their Equal Protection Clause claim.”²³⁴

It is important to note that in each of these cases the children prevailed despite the fact that the state entities claimed the disputed policies were directed at the undocumented parents, rather than their children. The Indiana paternity policy, for example, made it more difficult for parents to establish paternity, which had the effect of burdening the children but was not aimed at them directly. Similarly, the Medicaid policy denying automatic enrollment to newborns arguably only made the application process more burdensome for their mothers, who would have had an obligation to ensure their children received adequate medical care in any event.²³⁵ Of course, while these policies were aimed at the parents, they also imposed great costs on the children. The courts reviewing them looked at the reality of how children were affected and concluded that although the burdens were supposed to fall on the parents, in fact they also denied the children their fundamental rights. Importantly, the children’s challenges did not fail simply because the parents also stood to benefit from a decision striking down the provisions. In *Ruiz v. Robinson*, the children’s parents presumably obtained some financial benefit from the increased financial aid for college their children received.²³⁶ The undocumented mothers in *Lewis v. Thompson* were given a more streamlined process for obtaining government benefits to pay for their children’s medical care, for which they would otherwise have been financially responsible.²³⁷ And the Indiana parents were able to establish paternity rights over their children without having to file a paternity suit.²³⁸ The courts granted the children relief despite the fact that their undocumented parents would also receive a benefit. The fact that this might arguably “reward” the

²³⁴ *Id.* at *4.

²³⁵ Under New York law, a parent failing to provide a child with adequate medical care, although financially able to do so, is guilty of neglect. See N.Y. FAM. CT. ACT § 1012(f)(A) (McKinney 2010).

²³⁶ *Ruiz*, 892 F. Supp. 2d 1321. For federal financial aid purposes, a student is generally not considered independent from her parents until she is twenty-four years of age. See 20 U.S.C. § 1087vv(d)(1) (2012). Indeed, “the higher education financing system, constrained by limited federal-aid dollars, is structured to rely on families as the foremost funders of a student’s education.” Justin Draeger & Mark Kantrowitz, *Opinion: Who Should Pay for a College Education?*, BANKRATE (May 29, 2015), <http://www.bankrate.com/finance/college-finance/who-should-pay-for-a-college-education.aspx#ixzz4WKTsL6We>.

²³⁷ *Lewis v. Thompson*, 252 F.3d 567 (2d Cir. 2001); cf. FAM. CT. § 1012(f)(A) (defining a “neglected child” as one whose parent has failed to provide adequate medical care, although financially able to do so).

²³⁸ *L.P.*, 2011 WL 255807, at *4 (“[T]he Commissioner emphasizes that in lieu of paternity affidavits, Plaintiffs could be legitimized through the Indiana court system. However, as the Court well knows, the process of navigating this sometimes maddening world is, to put it charitably, burdensome.”).

parents' behavior of remaining in the United States without authorization and having children here did not negate the children's claim.

D. *Courts' Failure to Recognize the Rights of U.S. Citizen Children*

Despite the significant risk of harm faced by a U.S. citizen child when her parents are deported, courts have refused to recognize such children's constitutional claims. Only one court considering the right of a young U.S. citizen child whose parents were ordered deported found that the deportation would violate the child's rights, and that decision was reversed on appeal.²³⁹ In *Acosta v. Gaffney*, Carlos and Beatriz Acosta brought suit on behalf of themselves and Lina Acosta, their five-month-old U.S. citizen daughter.²⁴⁰ The Acostas sought review of the immigration authorities' denial of their request for a stay of deportation based on the hardship that would result to their daughter if they were removed from the country.²⁴¹ The federal district court held that because the Acostas' daughter was only five months old, "there is and could be no doubt that the simultaneous deportation of both parents will result in the deportation of this young citizen of the United States."²⁴² The court deemed this result "repugnant to the Constitution," and declared "no act of any branch of government may deny to any citizen the full scope of privileges and immunities inherent in United States citizenship. Central to all of those rights, of course, is the right to remain."²⁴³ The court further noted that "Plaintiffs' only alternative if the government prevails here would be simply to abandon their five-month-old child to the care of the American public, virtually at the boarding gate, and to depart alone. The law will not recognize that to be any alternative at all."²⁴⁴

On appeal, the Third Circuit reversed. The appeals court conceded that "[i]t is the fundamental right of an American citizen to reside wherever he wishes, whether in the United States or abroad, and to engage in the consequent travel."²⁴⁵ However it found that "[i]n the case of an infant below the age of discretion the right is purely theoretical, however, since the infant is incapable of exercising it."²⁴⁶ Rather,

²³⁹ *Acosta v. Gaffney*, 413 F. Supp. 827 (D.N.J. 1976), *rev'd*, 558 F.2d 1153 (3d Cir. 1977).

²⁴⁰ *Id.* at 828–29.

²⁴¹ *Id.* at 829.

²⁴² *Id.* at 832.

²⁴³ *Id.*

²⁴⁴ *Id.* at 833.

²⁴⁵ *Acosta v. Gaffney*, 558 F.2d 1153, 1157 (3d Cir. 1977).

²⁴⁶ *Id.*

because Lina Acosta was only a baby, she simply desired to be with her parents. It was her parents who would decide whether to take her with them to Colombia when they were deported, or have her "remain in the United States with foster parents, if such arrangements could be made."²⁴⁷ Since Lina was incapable of making an autonomous choice about where to live, the court held that the deportation of her parents would not interfere with her fundamental right to remain in the United States.²⁴⁸ Further, the court noted that Lina would retain the right to return to America when she reached adulthood. Thus, "her return to Colombia with her parents, if they decide to take her with them as doubtless they will, will merely postpone, but not bar, her residence in the United States if she should ultimately choose to live here."²⁴⁹

Similarly, in ruling against minor U.S. citizen children who sought to prevent their parents' deportation in another case, the Fifth Circuit simply pointed out that "[i]t is undisputed that the Perdido children have every right to remain in this country. The parents, however, enjoy no such right."²⁵⁰ There was no constitutional infirmity in a legal regime that permitted adult U.S. citizens to petition for their parents but denied minor children the same right, the court found. Adult citizens have "their homes and roots in this country . . . [and] had exercised their own volition" in becoming U.S. residents.²⁵¹ By contrast, a child was "fortuitously born here due to his parents' decision to reside in this country [and] has not exercised a deliberate decision to make this country his home . . . [because] parents make the real choice of family residence."²⁵²

It is certainly true that young children are not capable of making major life decisions on their own. But this does not mean that where they live does not matter or has no effect on their future life chances. Indeed, as noted above, where a child resides profoundly affects her health, education, and wellbeing in childhood. It shapes the adult she will become. The law is also quite clear about who should make important decisions on behalf of a child. Absent a finding of unfitness, parents make such decisions for their children, because they are presumed to act in the child's best interests. It does not follow that a U.S. citizen loses her right to remain in the country simply because she is unable to articulate a desire to remain on her own behalf or relies on a guardian to make decisions about where she should reside. As noted

²⁴⁷ *Id.* at 1158.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Perdido v. Immigration & Naturalization Serv.*, 420 F.2d 1179, 1181 (5th Cir. 1969).

²⁵¹ *Id.*

²⁵² *Id.*

above, the ability to remain in America is likely more significant for a young child who would otherwise be deprived of educational opportunities, healthcare, economic support, social support, or basic physical security at a critical time in her formative development, than for an adult who is more resilient to change and deprivation.

A child born and raised in the United States might in fact have deeper “roots” in the country than someone who came here as an adult. She certainly would likely consider the country her “home,” even if she was too young to articulate that clearly. Also, while there may be situations in which a child’s birth in the United States is merely “fortuitous,” a child whose parents fight to be able to raise her here do so because they believe living here is in her best interests. The child’s residence here is not happenstance; her parents have made a deliberate decision about where she should reside *on her behalf*, as all parents do for their young children.

To hold that a child may be deprived of a constitutional right simply because she is too young to independently assert it would leave her vulnerable to all kinds of invidious mistreatment. The plaintiffs in *Brown v. Board of Education* sued on behalf of their children who had been denied entry to their schools because of their race;²⁵³ clearly the parents were the ones who had decided that attending an integrated school was in the children’s best interests. Nine-year-old Linda Brown’s right not to be excluded on the basis of race did not depend on her being able to independently decide which school she wanted to attend. Rather, the Supreme Court was alert to the particular impact that government mistreatment would have on a young, impressionable child. As the Court famously said, “[t]o separate [the plaintiffs’ children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”²⁵⁴ Clearly, U.S. citizen children have substantive constitutional rights, even if they need a parent’s help to exercise them.²⁵⁵

The larger concern motivating courts to reject constitutional challenges by citizen children to their parents’ deportation, however, is the fact that the parents will also benefit from a ruling in the children’s favor. Courts are reluctant to “reward” the parents’ action of living in

²⁵³ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), *supplemented by* *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

²⁵⁴ *Id.* at 494.

²⁵⁵ Cf. Barbara Bennett Woodhouse, “Who Owns the Child?”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1052 & n.274 (1992) (noting that many scholars identify *Brown v. Board of Education* as the first Supreme Court case directly recognizing children’s substantive rights).

the United States without authorization. The Fifth Circuit, for example, held that “Petitioners, who illegally remained in the United States for the occasion of the birth of their citizen children, cannot thus gain favored status over those aliens who comply with the immigration laws of this nation.”²⁵⁶ Similarly, the Ninth Circuit ruled against a child trying to prevent the deportation of his parents because “it would permit a wholesale avoidance of immigration laws if an alien were to be able to enter the country, have a child shortly thereafter, and prevent deportation.”²⁵⁷ The Third Circuit was also reluctant to “open a loophole in the immigration laws for the benefit of those deportable aliens who have had a child born while they were here.”²⁵⁸

The concrete harm the U.S. citizen children would experience as a result of being separated from their parents or forced to leave the United States was barely considered. Courts simply dismissed the claim without much consideration: “There can be no doubt that Congress has the power to determine the conditions under which an alien may enter and remain in the United States, even though the conditions may impose a certain amount of hardship upon an alien’s wife or children.”²⁵⁹

But the discussion of children’s interests in *Obergefell, Windsor*, and their progeny, as well as the more recent decisions concerning the equal protection rights of U.S. citizen children with undocumented parents, all suggest that these cases finding that children have no constitutional right to prevent their parents’ deportation should be re-examined. A citizen child’s fundamental rights to remain in the United States and to be raised by her parents cannot be disregarded merely because staying deportation will also benefit her parents. Nor should a child be “relegated through no fault of their own to a more difficult and uncertain family life” simply because of who her parents are.²⁶⁰ The 4.5

²⁵⁶ *Gonzalez-Cuevas v. Immigration & Naturalization Serv.*, 515 F.2d 1222, 1224 (5th Cir. 1975) (per curiam).

²⁵⁷ *Urbano de Malaluan v. Immigration & Naturalization Serv.*, 577 F.2d 589, 594 (9th Cir. 1978).

²⁵⁸ *Acosta v. Gaffney*, 558 F.2d 1153, 1158 (3d Cir. 1977).

²⁵⁹ *Mendez v. Major*, 340 F.2d 128, 131–32 (8th Cir. 1965), *disapproved of by* *Cheng Fan Kwok v. Immigration & Naturalization Serv.*, 392 U.S. 206 (1968) (citations omitted).

²⁶⁰ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015). Children whose parents are incarcerated after being convicted of a crime are also forcibly separated from their caretaker and may face serious harm as a result. But the situation confronting children with undocumented parents is distinguishable for a number of reasons. First, and most obviously, the child whose parent is incarcerated for a criminal offense does not face constructive deportation from the United States. Most children with an imprisoned parent live with their other parent or another family member; a small minority enter the foster care system. See LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEP’T OF JUSTICE, SPECIAL REPORT: PARENTS IN PRISON AND THEIR MINOR CHILDREN 5 tbl.8 (2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/pptmc.pdf>. These children remain in the United States; they are not compelled to leave the country. Second, a child whose parent is imprisoned can visit far more readily than one whose

million American children who currently face an uncertain future because of the constant threat that their parents could be deported at any time deserve legal protection against being constructively removed from the United States or separated from their parents. In Part V, I consider what form such legal protection could take.

V. TOWARDS PROTECTING CHILDREN: HOW CHILDREN'S INTERESTS IN PREVENTING PARENTS' DEPORTATION SHOULD BE UPHELD

A. *Constitutional Challenges to Parents' Removal Orders*

In the past, children's efforts to challenge removal orders issued against their parents on constitutional grounds were unsuccessful. As I argue in Part III, however, the time has come for courts to revisit those rulings. Windsor, Obergefell, and the other marriage equality decisions support a child's right to be raised by her parents without being demeaned by the State because of who they are. This strongly amplifies the claim that U.S. citizen children have a right to live in the United States and to be raised by their parents, even if those parents are undocumented. A child who would be forced to leave the United States

mother or father was deported. Almost all prisons offer visitation programs, and some actively foster relationships between incarcerated parents and their children. See Chesa Boudin, Article, *Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77, 98-100 (2011). Third, the State has a compelling interest in incarcerating people convicted of many crimes. As the Supreme Court has stated, the State, "pursuant to its police power, may of course imprison convicted criminals for the purposes of deterrence and retribution." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Even though a parent's imprisonment infringes on a child's fundamental right to be raised by that parent, "incarceration of a dangerous and violent criminal would not . . . be subject to serious challenge because restraint of a dangerous person is necessary to the community's security." Sherry F. Colb, *Freedom from Incarceration: Why Is this Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781, 819 (1994). Similarly, the State has a compelling interest in protecting private property and therefore in punishing crimes that threaten private property. *Id.* at 824. Immigration proceedings, by contrast, are purely civil and not criminal. The Supreme Court has repeatedly held that they are not intended to punish or deter wrongful conduct, but only to remove persons present in the United States without authorization. See, e.g., *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) ("While the consequences of deportation may assuredly be grave, they are not imposed as a punishment."); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893). It is difficult to see how the United States could show a compelling interest in deporting the parent of a dependent minor U.S. citizen child when there are approximately eleven million undocumented people in the country and only a fraction of them are ever apprehended. See Encarnacion Pyle, *Booting All Undocumented Immigrants Could Cost at Least \$400 Billion, Conservative Group Says*, COLUMBUS DISPATCH (Mar. 20, 2016, 12:33 PM), <http://www.dispatch.com/content/stories/local/2016/03/20/conservatives-report-booting-all-undocumented-immigrants-could-cost-at-least-400-billion.html> (noting that in fiscal year 2014, the Department of Homeland Security deported only 414,481 out of 11.3 million undocumented immigrants in the United States).

or grow up without her parents if they were deported should therefore be able to bring suit to enjoin the removal on constitutional grounds. Courts hearing such cases ought to order the government not to deport the child's parents until she reaches adulthood. That would safeguard the child's fundamental constitutional right to grow up in America with her parents. Such an outcome may be unlikely given the negative precedent decisions on this issue, however, so the remainder of this Article discusses other potentially promising means to safeguard these children's interests.

B. *The Current Statutory Framework: Cancellation of Removal*

Current immigration law offers only one program where the impact an undocumented immigrant's deportation would have on her U.S. citizen children can be considered in determining whether to remove her from the country. Under the Immigration and Nationality Act (INA), "Cancellation of Removal"²⁶¹ is a form of relief from deportation—immigrants can only apply for it if they are in removal proceedings before an immigration judge. In order to qualify, the immigrant must have been physically present in the United States for ten years prior to being placed in removal proceedings.²⁶² She must demonstrate that she had "good moral character" for that ten-year period, and that she has not been convicted of a criminal offense that would disqualify her from relief.²⁶³ Finally, and most importantly, she must show that her removal would impose "exceptional and extremely unusual hardship" to a spouse, parent, or child who is a U.S. citizen or lawful permanent resident.²⁶⁴ If the immigrant is found to qualify for cancellation of removal, she is granted adjustment of status and becomes a lawful permanent resident of the United States. Only 4000 immigrants can be granted relief under this program in any given year.²⁶⁵

The "exceptional and extremely unusual hardship" standard is very difficult to meet.²⁶⁶ To demonstrate eligibility, an applicant must show

²⁶¹ 8 U.S.C. § 1229b (2012). The Immigration and Nationality Act (INA) § 240A(b)(1) applies to aliens who are not lawful permanent residents.

²⁶² § 1229b(b)(1)(A).

²⁶³ § 1229b(b)(1)(B)–(C). Immigrants cannot qualify for Cancellation of Removal if they have been convicted of an offense listed in INA §§ 1182(a)(2), 1227(a)(2), or 1227(a)(3). § 1229b(b)(1)(C).

²⁶⁴ § 1229b(b)(1)(D).

²⁶⁵ § 1229b(e)(1).

²⁶⁶ See Presentation, Judge Alan Vomacka, Varick Immigration Court, New York, NY, Cancellation or Removal, Suspension of Deportation 212(c) Waiver, and Voluntary Departure

her spouse, parent, or child would suffer hardship “substantially beyond that which would ordinarily be expected to result from the person’s departure.”²⁶⁷ The fact that an undocumented parent’s U.S. citizen minor child would either be separated from her mother upon her deportation, or alternatively have to leave the United States and live in another country in order to maintain their relationship is not sufficient to qualify because this consequence would be expected anytime the parent of a young child was deported. While being forced to leave one’s home and take up residence in a different country or losing one’s parent might be “exceptional” and “extremely unusual” incidents in the life of a typical American child, the Board of Immigration Appeals deems them ordinary consequences of a parent’s deportation and so insufficient under the statute.²⁶⁸

Instead, immigration judges are supposed to consider “the ages, health, and circumstances” of the qualifying lawful permanent resident and U.S. citizen relatives.²⁶⁹ If the U.S. citizen child has “very serious health issues, or compelling special needs in school” then those unusual circumstances might mean his undocumented parent will qualify for relief.²⁷⁰ The fact that the U.S. citizen child will have a “lower standard of living or [face] adverse country conditions in the country of return are factors to consider . . . but generally will be insufficient in themselves to support a finding of exceptional and extremely unusual hardship.”²⁷¹

Clearly, the current Cancellation of Removal program is insufficient to protect the constitutional rights of the vast majority of U.S. citizen children whose undocumented parents face deportation. Unless a child faces “exceptional and extremely unusual hardship” upon her parent’s deportation, the parent will not qualify for relief. Even if the potential harm to the child did rise to that level, the program still would not prevent deportation if her parent had been in the United States less than ten years before being placed in removal proceedings.

In order to safeguard U.S. citizen children’s fundamental right to remain in the United States and be raised by their parents, courts ought to interpret the INA’s requirement that applicants show the hardship to their child will be “exceptional and extremely unusual” in the context of the typical American child’s experience. Rather than requiring exceptional and extremely unusual hardship *compared to the*

9, http://trac.syr.edu/immigration/reports/211/include/III-17-training_course_cancellation_of_removal.pdf (“The degree of hardship required by the statute is extremely difficult to meet.”).

²⁶⁷ Gonzalez Recinas, 23 I. & N. Dec. 467, 468 (B.I.A. 2002).

²⁶⁸ See Monreal-Aguinaga, 23 I. & N. Dec. 56, 63–64 (B.I.A. 2001).

²⁶⁹ *Id.* at 63.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 63–64.

consequences of other deportations, courts should instead consider whether the child will face hardship that is “exceptional and extremely unusual” for American children in general.

The canon of constitutional avoidance suggests courts should read the statute to offer such relief.²⁷² U.S. citizen children have a constitutional right to remain in the United States. As laid out above, they also have a due process right to be raised by their parents. Given the weighty constitutional rights at stake, the statute as currently interpreted is arguably unconstitutional because it fails to protect these children’s rights. To avoid finding the statute unconstitutional, courts should interpret it to offer relief to children whose parents’ deportation would cause exceptional and extremely unusual hardship in the context of the typical American child’s experience. Since most U.S. citizens are not deprived of their constitutional right to remain in the United States or be raised by their loving, fit parents, that change in the standard of eligibility would enable many more parents facing deportation to qualify for relief and prevent harm to their children.

C. *Proposed Legislation: The Child Citizen Protection Act*

Congress has also considered new legislation to safeguard the interests of U.S. citizen children with undocumented parents. The Child Citizen Protection Act (CCPA), first proposed in 2009, would grant immigration judges discretionary authority to determine whether the immigrant parent of a citizen child should not be ordered removed, deported, or excluded from the United States.²⁷³ It provides that an immigration judge “may exercise discretion to decline to order the alien removed . . . if the judge determines that such removal . . . is clearly against the best interests of the [U.S. citizen] child.”²⁷⁴ Parents would not be eligible for relief under the proposed law if they had been convicted of a criminal offense.²⁷⁵

The proposed bill would give U.S. citizen children a right to be heard in their parents’ deportation proceedings and an opportunity to present evidence that deportation would not be in their best interests.²⁷⁶

²⁷² Long-standing case law holds that courts should “avoid” interpreting statutes so as to raise difficult questions of constitutional law. “It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.” *Gomez v. United States*, 490 U.S. 858, 864 (1989).

²⁷³ The Child Citizen Protection Act, H.R. 182, 111th Cong. (2009).

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

If the immigration judge agreed, she could choose not to deport the parent.²⁷⁷ Obviously, this would be a huge improvement over the current situation where children have no right to even be heard, and immigration judges have no discretion to decline to remove a parent who does not qualify for cancellation or removal or other relief. The CCPA also does not impose any continuous residency requirement for parents to qualify for relief under the bill.²⁷⁸ As such, it would offer protection to any U.S. citizen child whose parent's deportation would be detrimental to her best interests, regardless of how long the parent had been in the country. Unfortunately, however, the bill appears unlikely to advance in the current political climate and has made little progress toward enactment in the eight years since its original introduction.

Congress should move swiftly to enact this bill into law. Given the important constitutional and policy interests at stake, this proposal is a sensible step to protect American children. It is not a complete solution; it would not afford parents legal permission to work in the United States. But it would give immigration judges the ability to decline to deport the parent of a U.S. citizen when removal would not be in the child's best interests. Granting judges the discretion to consider American children's best interests when making decisions that will have a profound impact on their lives is a critical step toward protecting their fundamental rights.

D. *Executive Action to Exercise Prosecutorial Discretion on Behalf of Parents of Americans*

If Congress does not act to protect U.S. citizen children whose parents are at risk of deportation, the President should take executive action to do so. The administration has the power to exempt parents of U.S. citizen children from deportation as a matter of prosecutorial discretion. Such a program would uphold the fundamental rights of vulnerable American citizens while preserving limited law enforcement resources.²⁷⁹ President Trump has not indicated that he will shield any

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ As a practical matter, there is no way the government can deport all eleven million undocumented immigrants currently in the United States. See *Donald Trump's Administration Could Deport Millions of Undocumented Immigrants, Using a System Perfected Under Barack Obama*, *ECONOMIST* (Dec. 10, 2016), <http://www.economist.com/news/united-states/21711336-if-he-wins-second-term-president-elect-could-realistically-expel-around-4m-people>.

unauthorized immigrants from removal,²⁸⁰ but he would be well-advised to spare those with American children.

During his second term in office, President Obama attempted to exercise his executive authority to grant deferred action to undocumented parents of U.S. citizen children.²⁸¹ The program, called Deferred Action for Parents of Americans (DAPA), would have provided temporary relief from deportation to qualifying parents. Those granted relief would not have obtained lawful immigration status, permanent residency, or a “pathway to citizenship.”²⁸² But the government would have agreed not to deport them for three years.²⁸³ During that period, the parents would have been eligible for employment authorization enabling them to work legally.²⁸⁴

But DAPA never took effect. A lawsuit filed by twenty-six states blocked its implementation.²⁸⁵ The states sought an injunction forbidding the rollout of the program on the grounds that it was unconstitutional, an abuse of executive power, and was not legally adopted.²⁸⁶ The District Court for the Southern District of Texas entered a nationwide preliminary injunction against implementing the DAPA program.²⁸⁷ A divided panel of the Fifth Circuit Court of Appeals

²⁸⁰ To the contrary, during his first few days in office President Trump issued an executive order that greatly expanded the number of immigrants who are prioritized for removal. See Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017); Medina, *supra* note 134.

²⁸¹ See Jim Acosta & Stephen Collinson, *Obama: ‘You Can Come out of the Shadows’*, CNN (Nov. 21, 2014, 10:50 AM), <http://www.cnn.com/2014/11/20/politics/obama-immigration-speech>.

²⁸² See Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf’t, R. Gil Kerlikowske, Comm’r, U.S. Customs & Border Prot. 5 (Nov. 20, 2014) [hereinafter DHS Memorandum], http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

²⁸³ *Id.*

²⁸⁴ *Id.* at 4. To qualify, applicants had to have a U.S. citizen or lawful permanent resident child and to have been continuously present in the United States since before January 1, 2010. *Id.* No one who entered the country after that date would be eligible, even if they had a U.S. citizen child. *Id.* Applicants would have been disqualified if they had criminal convictions. *Id.* at 3.

²⁸⁵ See *Texas v. United States*, 86 F. Supp. 3d 591, 604 (S.D. Tex.), *aff’d*, 809 F.3d 134 (5th Cir. 2015), *aff’d per curiam*, 136 S. Ct. 2271 (2016).

²⁸⁶ *Id.* at 606–07.

²⁸⁷ *Id.* at 677. The court held that the twenty-six states were likely to succeed in establishing that they had standing and a cause of action under the Administrative Procedure Act (APA), and that the Secretary was required to conduct notice-and-comment rulemaking before issuing the Guidance. The court did not reach respondents’ substantive APA and constitutional claims. See *id.*

affirmed.²⁸⁸ The court held that the DAPA program was arbitrary and capricious because it was “manifestly contrary” to the INA.²⁸⁹

The government appealed to the U.S. Supreme Court, but with only eight sitting justices, the Court was unable to reach a majority decision and merely issued a one-line order stating: “The judgment is affirmed by an equally divided Court.”²⁹⁰ As a result, the preliminary injunction preventing DAPA’s implementation remained in place for the rest of Obama’s presidency.

The decisions of the district court and the Fifth Circuit Court of Appeals have been widely criticized.²⁹¹ Importantly, the Supreme Court neither rebuked nor affirmed the President’s authority to exercise executive action to spare parents of U.S. citizens from deportation.

Executive action could offer relief to millions of U.S. citizen children and their undocumented parents. President Obama’s proposed DAPA program was an important effort to avoid violating the constitutional rights of vulnerable U.S. citizen children. President Trump should implement a similar policy if Congress fails to amend the INA to address this problem. The Administration could do so through notice and comment rulemaking to avoid any potential violation of the Administrative Procedure Act.

Granting parents “deferred action” would not confer lawful immigration status, but it would give them and their children temporary reprieve from the threat of removal. Parents granted deferred action would also be eligible for employment authorization, giving them legal permission to work. And the deferred action could be renewed indefinitely, unless the President terminated it. Such a program would offer many significant advantages over the existing cancellation of removal program. First, parents would not need to be in removal proceedings to qualify; millions of undocumented parents who currently live under the threat of deportation, but have never been apprehended, would have been eligible for President Obama’s DAPA

²⁸⁸ *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015), *aff’d per curiam*, 136 S. Ct. 2271 (2016).

²⁸⁹ *Id.* at 182. The court also found that the states were likely to prevail because the federal government was required to go through a formal notice and comment process before issuing DAPA as a final rule. As such, the court ruled that the government had violated the APA. *Id.* at 177–78.

²⁹⁰ *Texas v. United States*, 136 S. Ct. 2271, 2271 (2016).

²⁹¹ See, e.g., Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 893–95 (2016); Anne Egeler, *Symposium: Unable to Show Harm, Can Texas Employ the Court as a Political Referee?*, SCOTUSBLOG (Feb. 8, 2016, 1:06 PM), <http://www.scotusblog.com/2016/02/symposium-unable-to-show-harm-can-texas-employ-the-court-as-a-political-referee/>; Brianne Gorod, *Symposium: Why It’s Time to Unfreeze DAPA*, SCOTUSBLOG (Feb. 9, 2016, 1:06 PM), <http://www.scotusblog.com/2016/02/symposium-why-its-time-to-unfreeze-dapa/>.

program. Second, only five years of continuous presence in the United States was required for DAPA, as opposed to the ten years needed for cancellation of removal.²⁹² Third, parents could qualify simply on the basis of being the parent of a U.S. citizen or legal permanent resident child; they were not required to show their child faced “exceptional or extremely unusual hardship” in order to be eligible.²⁹³ Finally, only 4000 people can be granted cancellation of removal each year, but there is no limit to the number of applicants who can be granted deferred action relief. The Obama administration had estimated that approximately four million people would be eligible for the DAPA program.

Executive action to grant parents of U.S. citizen children deferred action would give millions of undocumented people temporary relief from the threat of deportation and permission to work legally, which would allow them to obtain social security numbers and apply for drivers’ licenses.²⁹⁴ Obviously, this would have an enormous impact on the undocumented people themselves, but it would also have protected the fundamental rights of their U.S. citizen children, who currently must endure enormous disadvantage because of their parents’ lack of lawful status. With executive action like DAPA, those children would be able to live without the threat that their parents could be deported at any time. The ability to work legally would likely improve their parents’ job prospects, perhaps raising the families’ standard of living.²⁹⁵ And access to U.S. government issued identification would prevent state and local governments from denying undocumented parents and their citizen children basic services because of their lack of immigration status. In short, executive action would go a long way toward remedying the social exclusion experienced by many citizen children with undocumented parents.

With limited enforcement resources, it makes sense to decline to deport the parents of U.S. citizen children. Exercising executive power to grant these parents deferred action not only serves significant humanitarian concerns, but it also protects the children’s basic

²⁹² DAPA as proposed had a five-year continuous residency requirement; only parents who had entered the country before January 10, 2010 were to be eligible to apply. DHS Memorandum, *supra* note 282, at 3. That was a serious deficiency because the needs of citizen children do not depend on the date their parents arrived in the country. A two-year-old American whose parents came to the United States in 2011 is just as vulnerable to losing his parents or his home if his parents are deported as one whose parents arrived the year before. An executive action program that made all parents of U.S. citizens eligible, however, would resolve many of the problems that are the subject of this Article.

²⁹³ Parents would also have to pass a background check, but criminal convictions barring DAPA relief would also bar cancellation of removal. DHS Memorandum, *supra* note 282, at 4.

²⁹⁴ See *Texas*, 809 F.3d at 149.

²⁹⁵ See YOSHIKAWA, *supra* note 145, at 116–18.

constitutional rights to be raised by their parents and to live in their country of citizenship without facing exile or parental abandonment. Far from violating the Take Care Clause, by implementing a program of executive action like DAPA the President would fulfill his obligation to follow America's highest law, the U.S. Constitution.²⁹⁶

CONCLUSION

A U.S. citizen child may technically have a legal right to remain in the United States when her parents are deported, but she cannot do so without being separated from them. The Supreme Court's decision in *Obergefell* suggests that children have a right to be raised by their parents without being demeaned or denigrated by the State. The deportation of an American child's parent thus jeopardizes two of her fundamental due process rights: the right to be raised by her own parents, and the right to remain in the United States. Courts should therefore uphold children's right to prevent their parents' deportation, and Congress should pass legislation to the same end. Finally, the President should shield parents of U.S. citizens from deportation using executive action to protect vulnerable children's constitutional rights.

²⁹⁶ Cf. *Dickerson v. United States*, 530 U.S. 428, 431–32 (2000) (striking down a federal statute that seven presidential administrations had declined to follow because they considered it unconstitutional).

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