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Blanca is a nineteen-year-old undocumented immigrant from Guatemala. Blanca speaks no English and only a little Spanish. She comes from a remote region in Guatemala where the primary language is an indigenous dialect called Xinca. The village Blanca grew up in is incredibly poor. There is no hospital, illiteracy rates are high, sanitation is inadequate, and nutritious food can be scarce. She entered the United States without documentation, hoping to make a better life for herself. Her son Xavier was born a year later. Xavier is now 19 months old and Blanca is being deported. Xavier was removed from Blanca's care shortly before she was detained. At that time, the state welfare agency determined that Blanca's living arrangement, a studio apartment she shared with two other families, constituted neglect. Since her detention, Blanca has had little contact with Xavier, but she wishes to take Xavier with her when she is deported. The family court denied her request finding that returning to Guatemala with Blanca is contrary to Xavier's best interest. The judge then severed Blanca's parental rights and Xavier was adopted by Mark and Sandra, a middle class couple from Encino, California who have been foster parents to Xavier during Blanca's year-long detention.

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In March 2011, Emily Ruiz, a four-year-old American citizen boarded a plane from Guatemala to return home to New York.[1] Her grandfather accompanied her, but when he was denied entry into the United States due to a twenty-year-old immigration violation, Emily's family was faced with a dilemma: should Emily return with her grandfather to Guatemala, should she be allowed to be taken into state custody, or should her parents, both undocumented immigrants, risk deportation by attempting to pick her up from U.S. immigration authorities? Emily's parents chose to have her return with her grandfather. The reaction to the story of Emily Ruiz was immediate. Pro-immigrant supporters expressed outrage at what they termed the "deportation" of an American citizen.[2] Others were furious that Emily had citizenship at all, calling her an "anchor baby" and the perfect example of why birthright citizenship must be eliminated.[3] Emily's story and the passionate reactions it has created highlight the virulent debate raging in this country over the meaning of citizenship. This Article focuses on the most important part of that debate: how birthright citizenship, combined with the massive

1. *Girl, Unable to Enter U.S., Will Try Again*, CNN.COM (Mar. 29, 2011, 11:57 AM), http://www.cnn.com/2011/WORLD/americas/03/29/guatemala.girl.deported/index.html?hpt=T2.

2. Ruben Navarrette Jr., *Why Was A Four Year Old American Girl Deported?*, CNN.COM (Mar. 23, 2011), *http://articles.cnn.com/2011-03-23/opinion/navarrette.child.deported_1_illegal-immigrants-anchor-babies-american-girl?_s=PM:OPINION*.

3. *See* CNN.COM, *supra* note 1 (including comments such as "CNN should show another pic next to this cute 'citizen' of all the resources and fees she will incur because she's the product of illegality!" and "Here is another story of a illegal anchor baby. Booo hooo cnn. Illegal is ILLEGAL and I don't care what age you are. Want to come to this great country of ours, go through the proper channels, assimulate [sic] and speak ENGLISH!").

crackdown on illegal immigration, threatens the future of American democracy.

In my article, *Separation, Deportation, Termination*,[4] I discuss the increasing practice of separating immigrant parents from their American-born children and using the parents' deportation as the justification for terminating their parental rights. I explain how the courts that grant these terminations and the child welfare agencies that seek them do so based on the belief that such terminations are in the child's best interest. I also explain that such considerations violate what has long been (or traditionally) recognized as the constitutional right of parents to make decisions regarding the care and control of their children. My goal in *Separation, Deportation, Termination* is to demonstrate that these legally unjustified terminations are occurring and to explain why.[5] However, I do not address the normative question of whether such terminations *should* occur. This Article attempts to answer that question.

In this Article, I argue that despite a long-established presumption favoring parental rights, a children's rights standard is appropriate in cases concerning deportable immigrant parents with children who are American citizens. Such cases involve very different considerations than typical parental rights termination cases. These are not simply cases about children's rights or parental rights. Rather, these cases raise questions about the very meaning and purpose of citizenship in a liberal state. The state's interest in citizen children far exceeds the state's interest in their noncitizen parents.[6]

4. Marcia Zug, *Separation, Deportation, Termination*, 32 B.C. THIRD WORLD L.J. (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1648999.

5. I explain that in a significant percentage of immigrant parent termination cases, courts and agencies support termination not because the immigrant parents are legally unfit, but because they believe termination allows the children to have better lives. The concerns expressed in these cases focus on the perceived economic, social, educational, and medical inferiority of the parent's country of origin, as well as the parents' parenting abilities, which were already frequently viewed as suboptimal and would arguably become even more so once the parents returned to countries lacking the parenting support and educational services available in the United States.

6. *See infra* Part I (demonstrating that significant state interests are implicated because the children in these cases are primarily American citizens, and consequently, these terminations implicate issues of citizenship and democracy that are of significant interest to the state). *See also* James Dwyer, *A Constitutional Birthright: The State, Parentage, and the Rights of Newborn Persons*, 56 UCLA L. REV. 755, 762–66 (2009) (noting the state's essential involvement in formation of all parent-child relationships).

Consequently, although it is well established in other contexts that fit parents have the right to the care and custody of their children, this presumption is not appropriate when considering the rights of undocumented, noncitizen parents. Once the parent of a child who is an American citizen is facing deportation, the rights of the child should be viewed as superior to those of their noncitizen parent. At this point, the overriding concern must be ensuring that the child's best interests are served. In some instances, this will require terminating the rights of fit immigrant parents.

This Article begins with a discussion of the state's interest in ensuring a strong and meaningful connection between children who are American citizens and the United States. After firmly establishing that it is in the state's interest for children who are American citizens to be raised in the United States, or at least exposed to an American lifestyle, this Article will then argue why a best interest standard is appropriate in deportation cases. It will then compare the pros and cons of both a parental rights and a children's rights standard and explain why many of the assumptions underlying these standards are inapplicable in the immigration context. In particular, this Article argues that once a parent is facing deportation, the benefits of a best interest standard far exceed the benefits of a parental rights standard. Accordingly, I suggest that a shifting standard should apply.

Specifically, I argue that courts should apply a parental rights standard when deportation is an unlikely possibility and that a best interest standard should be used when deportation is probable. I argue that this shifting standard is both desirable and workable as long as the shift between standards is based on a clear triggering event, which in these cases would be the parent(s)' likely deportation. After explaining this framework, I provide two examples demonstrating that this compromise between parental rights and children's rights is neither novel nor overly complicated. Lastly, although I ultimately conclude that a best interest standard should replace the traditional fitness standard when parents are facing deportation, I also suggest that even under this standard, the separation of immigrant children from their biological parents should be rare. In most cases, an examination of the facts will reveal that termination of parental rights is not in the best interest of immigrant children.

I. THE STATE'S INTEREST IN IMMIGRANT CHILDREN

Encarnacion Bail Romero is an undocumented immigrant mother who was arrested in a workplace raid for the use of false identification. While Bail was in prison for a crime that the Supreme Court would later determine is not a criminal offense,[7] her son Carlos was placed in the care of Seth and Melinda Moser.[8] The Mosers soon fell in love with Carlos and wanted to adopt him. Bail vehemently objected to this adoption.[9] Nevertheless, despite her desire to resume custody of Carlos, her two years in prison took their toll on her relationship with Carlos. During her incarceration, Bail had no contact with Carlos and as a result, her son now considers the Mosers his mom and dad. In addition, Carlos is settled in his new home, he speaks only English, and he even goes by a different name, Jamison. These and similar facts convinced the trial court that it was in Carlos/Jamison's best interest to remain with the Mosers, and the court terminated Bail's parental rights.[10]

The trial court's decision was a shocking violation of Bail's parental rights. However, it may have been the right decision for her son. Discussion of this case has tended to focus on this clash between parental rights and children's rights.[11] Under current law, fit parents have a constitutional right to the care and custody of their children.[12]

7. Flores-Figueroa v. United States, 129 S. Ct. 1886 (2009) (striking down the law criminalizing aggravated identity theft because according to the Supreme Court, there must be intent). Consequently, this means Bail Romero was separated from her child for committing a crime that was never a crime.

8. Mariano Castillo, *Heart-Wrenching Fight for Immigrant's Son*, CNN.COM, (Dec. 20, 2010), http://articles.cnn.com/2010-12-20/us/missouri.immigrant.child_1_biological-mother-adoptive-parents-illegal-immigrant?_s=PM:US.

9. *Id.*

10. *Id. See also* S.M. v. E.M.B.R. (*In re* Adoption of C.M.B.R.), 332 S.W.3d 793, 803–04 (Mo. 2011) (discussing the factual background and trial court's decision).

11. *See In re* Adoption of C.M.B.R., 332 S.W.3d at 824 (describing this case as a "travesty in . . . its long duration, and its impact on Mother, Adoptive Parents, and, most importantly, Child"). For similar discussions of pitting parental rights against children's rights, see *Missouri Supreme Court Must Reunite Child with Immigrant Mother*, STLTODAY.COM (Nov. 15, 2010, 9:00 PM), http://www.stltoday.com/news/opinion/ columns/the-platform/article_b0ae81d6-f10c-11df-95d9-00127992bc8b.html? (noting the "curious" lack of discussion of Bail's parental rights, as if she were a nonperson); Stephen Bilkis, *Messy Adoption Could see Child Returned to Mother*, NEW YORK FAMILY LAW BLOG (Feb. 5, 2011), http://www.newyorkfamilylawblog.com/2011/02/messy_adoption_could_see_child.html (describing this as a case about the best interests of the child and lamenting the fact that the mother might have the child returned for "political" reasons).

12. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 65 (2000) (noting that the "interest of

This standard is commonly referred to as the parental rights standard, and it should have been used in the Bail Romero case. Under this standard, the court would have had a very difficult time justifying the termination of Bail's parental rights. But instead of employing a parental rights standard, the court used a best-interest-of-the-child standard.[13] Consequently, the court found termination was appropriate because the court concluded it was in the child's best interest to remain with the Mosers. Similarly, on appeal, the Missouri Supreme Court substantially validated the trial court's decision.[14] The supreme court ignored evidence of the mother's repeated and thwarted attempts to maintain a relationship with her son, which the court determined was not properly in the record, and thus agreed with the trial court's dubious conclusion that Bail had abandoned her child and that adoption was in his best interest.[15]

The fight over Carlos/Jamison sharply illustrates the difference between a parental rights standard and a children's rights standard. However, it is wrong to view this case solely as a conflict between children's and parents' rights. Carlos/Jamison is an American citizen. His mother is not, and she will be deported.[16] Thus, if Bail is permitted to resume custody, Carlos/Jamison will return with her to Guatemala. Allowing such a departure is not in the state's interest.[17] If reunification is not in Carlos/Jamison's interest, then the State has the right and perhaps the obligation to prevent it. In reunification cases involving parents facing deportation, the rights of children who

parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court"); Santosky v. Kramer, 455 U.S. 745, 753 (1982) (describing this right as "a fundamental liberty interest"); Smith v. OFFER, 431 U.S. 816 (1977) (refusing to grant constitutional protections to foster parents that would infringe on the constitutional right of parents to the care and custody of their children).

13. *In re* Adoption of C.M.B.R., 332 S.W.3d at 828 (Stith, J., concurring in part and dissenting in part) (concluding that there was no basis for the finding of abandonment).

14. *Id.* at 816 (majority opinion) (noting that although the Missouri Supreme Court reversed the termination decision it remanded rather than order reunification based on its conclusion that the trial court had offered "clear, cogent and convincing evidence" to support its finding of abandonment).

15. *Id.* at 828 (Stith, J., concurring in part and dissenting in part) (discussing the substantial evidence disproving abandonment).

16. Bail's deportation has been stayed pending her appeal, but there has been no cancellation of removal order entered. Once the case is over, she will be deported. *See id.*

17. *See infra* Part I.A–D (discussing the state's interest in having American citizens raised in America and exposed to the ideas of liberalism).

are American citizens should outweigh the rights of their noncitizen parents.

A. The State's Role as Parens Patriae

Most children involved in immigrant parental rights termination cases are, or have the ability to become, American citizens.[18] Therefore, the state has a particular interest in their well-being.[19] The state's interest in the health and future of American children has often been held to trump parental rights. The Supreme Court clearly articulated this idea in *Prince v. Massachusetts*.[20] *Prince* involved a mother who was a member of the Jehovah's Witnesses and who had permitted her daughter to sell religious pamphlets and proselytize on city streets at night.[21] The mother was charged with violating Massachusetts's child labor laws.[22] The Court articulated two reasons for upholding the State's prosecution. First, the Court found that despite the Court's previous decisions in *Meyer v. Nebraska*[23] and *Pierce v. Society of Sisters*,[24] which recognized the rights of parents to control the care and upbringing of their children, these rights did not include the right to place one's child in danger.[25] Second, the Court explained that even in the absence of potential danger, the family may be regulated when such regulation is in the public interest.[26] The *Prince* Court stated that:

> [T]he family itself is not beyond regulation in the public interest . . . [a]nd neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's

18. *See* Zug, *supra* note 4, at 12 (noting that many of these children are American citizens due to birth in the United States but that others have the ability to become citizens based on their dependent status resulting from the termination of their parents' parental rights).

19. *See, e.g.*, LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 8 (2006) ("[G]overnment properly takes an interest in families in light of the goods associated with families, the functions that families serve and the political values at stake in the institution of the family.").

20. 321 U.S. 158 (1943).

21. *Id.* at 159–60.

22. *Id.* at 160.

23. 262 U.S. 390 (1923).

24. 268 U.S. 510 (1925).

25. *Prince*, 321 U.S. at 165–66.

26. *Id.* at 166–67, 170.

> control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course on religion or conscience. . . . [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and this includes, to some extent, matters of conscience and religious conviction.[27]

As the Court's statement shows, the state's interest in protecting children is much more than simply guarding them from physical harm. The state has a broad and substantial interest in the welfare of its children, and this interest justifies even a significant infringement of parental rights.[28] Some of the clearest examples of such protection are laws guaranteeing access to education and freedom from child labor.[29] These laws are intended to ensure that children are exposed to the ideas deemed essential for their future well-being as well as the well-being of the state.

B. The State's Interest in Teaching Children the Fundamental Values of a Democratic Society

The Supreme Court has repeatedly held that children's education is essential to the future of the state and that it is through education that the state creates a future generation capable of independent, autonomous thinking with the moral capacity for self-government.[30] For example, in *Bethel School District No. 403 v. Fraser*,[31] which concerned a student who was suspended for presenting an innuendo-filled speech before his high school classmates, the Court upheld the suspension based in part on the idea that school is the place where children learn the rules and values essential for "citizenship in the Republic."[32] According to the *Bethel* Court, it is the role of public education to instill in children "the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."[33]

27. *Id.* at 166–67 (citations omitted).

28. It should be noted that children's interests may also be subordinated to the state's *parens patriae* interests. *See* Santosky v. Kramer, 455 U.S. 745, 766 (1982).

29. *See infra* note 118.

30. JOHN RAWLS, POLITICAL LIBERALISM 178–81, 331–34 (1993).

31. 478 U.S. 675 (1986).

32. *Id.* at 681.

33. *Id.* (citing C. BEARD & M. BEARD, NEW BASIC HISTORY OF THE UNITED STATES

In *Ambach v. Norwick*,[34] the Court expressed similar sentiments, describing public schools as an "'assimilative force'" that bring together "diverse and conflicting elements" in our society "on a broad but common ground."[35] Both cases demonstrate the Court's acknowledgement that one of the most important purposes of American education is to ensure that American children receive the values and skills necessary for productive citizenship. Moreover, these cases show that the state's interest in promoting these skills and values outweighs even strong parental objections.[36]

One of the most telling education cases is *Mozert v. Hawkins County Board of Education*.[37] This case forcefully demonstrates that the state's interest in the welfare of its children includes exposing them to the ideas and values necessary to prepare them for their role as future citizens. In *Mozert*, a group of religious parents objected to reading materials assigned to their children and sued the Tennessee School District. The parents objected to readings on secular humanism, pacifism, and magic that the parents felt contradicted their own religious views. They sought to have the readings include statements indicating that the views expressed in the readings were incorrect and that the beliefs held by the plaintiff parents were the correct ones.[38] The Sixth Circuit rejected the parents' claims. The court believed that supporting parental rights in this instance would be harmful, not only to the affected children, but also to the state.[39] It recognized that the claimed parental rights would keep the students from achieving the intellectual and social skills necessary for their future role as productive citizens.[40] Moreover, as Professor

228 (1968)).

34. 441 U.S. 68 (1979).

35. *Id.* at 77.

36. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943) (rejecting a compulsory flag salute but not questioning the appropriateness of the state's authority to foster the ends of "national unity" and patriotism by "persuasion and example"); MCCLAIN, *supra* note 19, at 70 ("[F]amilies and schools are complementary, or compensatory, domains of moral learning: thus, even if families do not cultivate some qualities that enable good citizenship, schools may do so.").

37. 827 F.2d 1058 (6th Cir. 1987).

38. *Id.* at 1060–61.

39. *Id.* at 1071 (Kennedy, J., concurring) ("Teaching students about complex and controversial social and moral issues is just as essential for preparing public school students for citizenship and self-government as inculcating the students to the habits and manners of civility.").

40. *Id.*; *see also* Steven J. Macias, *The Huck Finn Syndrome in History and Theory: The*

Steven Macias has written, the *Mozert* court recognized just how dangerous this could be. According to Macias,

> an increase in parochialism and an increase in diversity of views [such as that desired by the *Mozert* parents] [is] a sure recipe for social, cultural, and political strife as children become full citizens, expected to interact with others to govern a society foreign to them because of their narrow upbringing.[41]

Macias then argues that:

> If liberty is valued and its continuance as a political and moral principle is desired, then the sovereign must be permitted to carry out its prerogative that its future citizens (and future sovereigns where a democracy is concerned) are reared in a liberal tradition. It would be a perverse result if parents were able to thwart future liberty by the exercise of their current liberty.[42]

In short, the *Mozert* court understood that the health and future of the liberal state depends on the exposure of future citizens to the liberal tradition.[43]

Mozert primarily concerned the importance of public education in ensuring children are exposed to the ideas necessary for their effective participation as future citizens. However, *Mozert* also shows how mere presence in the United States ensures one's contact with these ideas. The parents in *Mozert* rejected the value of any views other than their own and wished to prevent their children's exposure to these ideas. However, despite rejecting these liberal ideas, the parents were nevertheless quite skilled at employing them to their benefit. For example, although the parents objected to the tenets of secular humanism, they brought their case on the principles of freedom of religion and parental rights, both of which align with secular humanist views regarding separation of church and state and

Origins of Family Privacy, 12 J.L. & FAM. STUD. 87, 133–35 (2010) (explaining that this is "keeping a segment of its society mentally enslaved from exercising the free and rational choice . . . to one educated in a liberal polity.").

41. Macias, *supra* note 40, at 133.

42. *Id*. at 141.

43. It should be noted that this holding is lessened by the fact that students are permitted to attend religious schools or home schools, neither of which have a State-dictated curriculum. *See Mozert*, 827 F.2d at 1063. This, however, is uncommon because "many states require parents to cover certain material, or to file reports with some state or local agency." LAWRENCE M. FRIEDMAN, PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW 97 (2004).

independence from government control. It is clear, therefore, that regardless of whether the parents agreed with these views, they nevertheless understood these ideas and were able to employ them effectively.[44] Consequently, the irony is that even if the *Mozert* parents had been successful, their very act of opposition would have ensured their children's exposure to the ideas they were rejecting. *Mozert* thus demonstrates that within the United States the ideas of liberalism are pervasive and exposure is all but assured.[45] At the same time, *Mozert* also highlights the problem of citizen children living outside the United States. For these children, the exposure to such fundamental values through either formal or informal training is much less likely.[46] From the State's perspective this is deeply concerning.

C. The State's Interest in Keeping American Children Connected to America

Mozert shows that the state's interest in the welfare of its children includes ensuring that children experience certain fundamental ideas and values. It also shows that residency within the United States practically ensures exposure to these principles. *Mozert* did not

44. *See Mozert*, 827 F.2d at 1062 (noting that the parents won at the district court level).

45. *See* MCCLAIN, *supra* note 19, at 17 ("[D]eliberating with fellow citizens about the common good and helping to shape the central destiny of the political community is a central value within the civic republican strand of the American constitutional and political tradition.") (citations omitted).

46. It is well documented that many of deported parents will be returning to countries highly dissimilar from the United States. In 2008, the top ten countries of origin for undocumented immigrants to the United States were Mexico, El Salvador, Guatemala, Philippines, Honduras, Korea, China, Brazil, Ecuador, and India. U.S. DEP'T OF HOMELAND SECURITY, ESTIMATES OF UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2008 (Feb. 2009), *available at* http://immigration.procon.org/sourcefiles/DHS2008.pdf. Of these, fewer than half are constitutional democracies like the United States (Brazil, Honduras, India, and Mexico). Moreover, even among those countries that are constitutional democracies, the constitutional rights of their citizens are still frequently hampered. For example, in its summary of The State of Democracy in Mexico, IDEA, The International Institute for Democracy and Electoral Assistance, concluded that although "Mexico has taken significant steps towards free elections and political liberties . . . Mexican citizens still face many challenges. Social and economic inequality; high levels of corruption and inadequate governmental responsiveness; insecurity and crime; concentration of media ownership; and low popular participation are some of the issues that must still be dealt with effectively in order to further democracy in Mexico." *SoD Summary—State of Democracy in Mexico*, IDEA, http://www.idea.int/sod/worldwide/summary_sod_mexico.cfm (last visited Aug. 27, 2011).

directly connect this state interest in imparting liberal ideas with questions of citizenship, but other cases have made this connection. In fact, the Supreme Court has specifically upheld laws intended to ensure that future American citizens have a significant connection to the United States.

In *Nguyen v. INS*,[47] the Supreme Court upheld the constitutionality of an immigration statute that automatically conferred citizenship on foreign children born to American mothers, but required additional steps before a biological father's American citizenship could be conferred onto his foreign-born child. The assumption underlying the different treatment is that children are more likely to have contact with their mothers than their fathers. This contact is important for two reasons. First, this contact makes a biological parent-child relationship much easier to verify, and second, this contact ensures that the future citizen has a connection to the United States. The *Nguyen* court explained that contact provides the "real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States."[48] Consequently, the Court recognized the State's right not to confer automatic citizenship on a child that may never have a strong connection with the United States or an American citizen.

Reuniting immigrant children with their deported parents means that many of these children will lack a meaningful connection with the United States. However, unlike in *Nguyen*, these children's citizenship is not an issue. The majority of children in immigrant parent termination cases are already citizens. Consequently, their ability to return to the United States is guaranteed.[49] From the State's perspective this is problematic because as *Nguyen* demonstrated, citizenship without a connection to the United States is not desirable. State interests dictate that future citizens have a significant connection to the United States and that the welfare and autonomy of these future citizens are protected.

Similar ideas are expressed in Professor Vivian Hamilton's essay on the rights of children as immature citizens. In this essay, Hamilton discusses the State's duty to protect the future liberty of its

47. 533 U.S. 53 (2001).

48. *Id.* at 65.

49. The *jus soli* doctrine confers citizenship on those born on American soil. *But see* 2010 Ariz. Sess. Laws 307 (proposing the elimination of *jus soli* in Arizona).

citizens. She argues: "[T]he [S]tate must guard not only [children's] current liberty, but also their future liberty. It thus must deny all others, including parents, the right to deprive the young either of their basic liberty during their immaturity, or their ability to develop the capacity to exercise their future liberty."[50] She further argues that this interest gives the State the right to influence external factors, such as education and environment, that children experience.[51] Applying these arguments in the context of immigrant families leads to the conclusion that the State is justified in keeping citizen children in the United States after their parents' deportation. In cases where reunification with deported parents will harm a child's future liberty, the State has the right, and maybe even the duty, to deny others, including parents, the ability to mandate reunification.[52]

D. The Other Solution

As the above discussion demonstrates, the State has a strong interest in ensuring that future citizens have a significant connection to the United States. As a result, this Article argues that when a parent is facing deportation, reunification decisions should be based on the best interests of the child and may justify terminating the parental rights of even fit parents. I recognize, however, that this is far from a perfect solution. Other solutions exist but seem infeasible given the current political climate. For example, an immigration policy that permits all parents of American citizens to remain in the United States to care for their children would be one solution.[53] If undocumented immigrant parents did not face the possibility of

50. Vivian E. Hamilton, *Immature Citizens and the State*, 2010 BYU L. REV. 1055, 1060.

51. *Id.*

52. *Id.* at 1067 (arguing that the state "must . . . deny others the right to deprive immature citizens of their abilities to develop these future capacities").

53. *Kids Sue Obama Over Parents' Deportations*, CBSNEWS (June 17, 2009), http://www.cbsnews.com/stories/2009/06/17/national/main5093820.shtml. Such an approach was recently pursued by the Court of Justice of the European Union in the case of *Zambrano v. Office national de l'emploi*. The court had to determine whether the fact that a child is a citizen of the European Union confers a right to residence and a right to work upon his or her noncitizen parents. The parents argued that their deportation was a violation of the child's citizenship rights and the court agreed, holding that in order for the child to have "genuine enjoyment of these [citizenship] rights" his parents must be allowed to live and work in the same country as their child. Case C-34/09, Zambrano v. Office National de L'emploi, not yet reported, *available at* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (enter "C-34/09" in "Case number" field, and click on "Submit").

deportation, many of the arguments in favor of the children's rights approach would evaporate. A solution at the other extreme would be to eliminate the *jus soli* doctrine. *Jus soli* confers automatic citizenship on all persons born on United States soil. It is due to *jus soli* that so many immigrant children have citizenship despite their parents' undocumented status. Elimination of *jus soli* would remove these children's ability to remain in the United States and thus eliminate the questions regarding whether they should be reunited with deported parents. Without *jus soli*, in most instances, children of undocumented immigrants would be deported alongside their parents and the State's interest in these children after deportation would terminate.[54]

Both of these suggestions would eliminate the problem of family separations due to deportation but neither is a likely solution. Therefore, the question of how to deal with the citizen children of deported parents remains and requires a different solution than nonimmigrant termination cases. This Article will argue that once a parent has been deported, the question of reunification or termination should be decided under a children's rights standard. In other words, children of deported parents should have the right to prevent reunification.

II. PARENTAL RIGHTS

A. What Are Parental Rights and Where Do They Come From?

Defined simply, parental rights are the rights of parents to control and make decisions for their children; it is well established that parents have this right.[55] What is less clear is whether elevating parental rights over children's rights is correct. Scholars such as Barbara Bennett Woodhouse[56] and James Dwyer[57] have argued against a preference for parental rights. Others such as Martin

54. The doctrine of *jus soli* is currently under attack by anti-immigrant groups who believe it provides an unjustified loophole in America's efforts to stem undocumented immigration. Such fears have been recently exacerbated by recent stories purporting to demonstrate the growth of the maternity tourism industry. *See, e.g.*, Jennifer Medina, *Arriving as Pregnant Tourists, Leaving with American Babies*, N.Y TIMES, March 29, 2011, at A1.

55. *See supra* note 12 (discussing the U.S. Supreme Court cases establishing and upholding this right). *See also* Zug, *supra* note 4, at 20–21.

56. *See infra* notes 965–998 and accompanying text.

57. *See, e.g.*, Dwyer, *supra* note 6.

Guggenheim have defended this preference.[58] However, this "either-or" approach may be unnecessary. Parental rights are preferable in many, maybe even most circumstances, but there is little question that in some circumstances a children's rights standard may be better. Consequently, even if a parental rights standard is appropriate in most situations, this still does not justify its universal application. When considering the interests of citizen children and their noncitizen parents, the benefits of the parental rights standard are outweighed by the benefits of using a children's rights standard. An examination of the origins of parental rights will reveal why the benefits of this standard are diminished in the immigration context.

1. The origin of parental rights

Philosophers such as Rousseau and Locke posited that parental rights are natural rights that exist outside of, or presuppose, man-made law. Under this natural law theory, parental rights are God-given and the State has no authority to interfere in the regulation of the family.[59] The natural right of parents to raise their children is a common starting point for the discussion of parental rights. Consequently, it is not surprising that the Supreme Court adopted this reasoning as part of the basis for its decision in *Meyer v. Nebraska*,[60] the first Supreme Court case to articulate the idea of parental rights.[61]

58. *See infra* notes 78–81 and accompanying text.

59. Jean Jacques Rousseau articulated a form of this idea in a work in which he argued that the modern state is created by an implied contract between individuals and the state but that certain aspects of an individual's freedom are not part of this contract and thus remain outside of government regulation. JEAN JACQUES ROUSSEAU, OF THE SOCIAL CONTRACT OR PRINCIPLES OF POLITICAL RIGHT (1979); *see also* John Locke, *The Second Treatise of Government*, *in* POLITICAL WRITINGS OF JOHN LOCKE 294 (1979) (describing the rights of parents to raise children as one of the many natural rights of men and women). *But see* Dwyer, *supra* note 6, at 764 (arguing that it is not obvious that the state must recognize the rights of biological parents and noting that historically certain biological parents such as unwed fathers were not afforded any rights).

60. 262 U.S. 390 (1923).

61. *Meyer* and its companion case *Pierce v. Society of Sisters* have come to stand for the constitutionally protected right to private decision making regarding family concerns. Macias, *supra* note 40, at 92. It should also be noted that these ideas have been repeatedly reaffirmed. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 92 (2000) (finding the rights of parents outweigh the rights of third parties seeking visitation with their children); Smith v. Org. of Foster Families for Equality and Reform, 431 U.S. 816, 845 (1977) (finding that because foster parents were not "parents" they had no right to object to the removal of the foster children in their care).

The *Meyer* case arose as a challenge to a Nebraska state law forbidding children who had not yet entered eighth grade from receiving foreign language instruction.[62] The purpose of the law was to achieve the homogenization of American children by ensuring that they would all speak a common language.[63] Proponents of the bill believed that poor English ability was a serious hindrance to the future success of immigrant children.[64] Consequently, the law's defenders assumed that they were representing the interests of the children. The opponents of the law were the children's parents who claimed the right to make educational decisions for their children. In striking down the state regulation, the *Meyer* Court held that the right of parents to make decisions regarding their children's care was a natural right,[65] and also that it was a right protected by the Fourteenth Amendment of the Constitution.[66] In rejecting the State's position, Justice McReynolds analogized the Nebraska law to Plato's vision of the Ideal Commonwealth in which "no parent is to know his own child, nor any child his parent."[67] In Plato's vision, all children would be children of the State. McReynolds stated that "[a]lthough such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest . . . ."[68] The Court thus rejected the idea that the state should have a significant role in childrearing.[69]

Shortly after *Meyer*, the Supreme Court decided *Pierce v. Society of Sisters*,[70] which reaffirmed and elaborated on the constitutional basis for the *Meyer* Court's decision.[71] In *Pierce*, the Court struck down an Oregon law that required parents to send their children to

62. *Meyer*, 262 U.S. at 397–99.

63. MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 25 (2005).

64. *Meyer*, 262 U.S. at 398.

65. *Id.* at 399.

66. *Id.* at 403.

67. *Id.* at 401–02.

68. *Id.* at 402.

69. *Id.*

70. 268 U.S. 510 (1925).

71. These cases may be viewed as companion cases; the *Meyer* Court was well aware of the fact that they would shortly be deciding *Pierce*. *See* Macias, *supra* note 40, at 117 ("Since McReynolds wrote *Meyer* looking ahead to *Pierce*, it is not surprising that the earlier decision is richer in content, in terms of laying out a foundational view of the parent-child and family-state relationships.").

public school.[72] The Court found that this regulation unconstitutionally and "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[73] Again, as in *Meyer*, the Court emphasized the importance of recognizing and protecting parental rights. The Court explained that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[74]

The *Meyer* and *Pierce* cases provide the foundation for the current parental rights doctrine. These cases were the first to articulate the idea that a right to private decision making concerning family matters is inherent in the concept of liberty.[75] In the decades since these cases were decided, the idea of parental rights has become firmly ensconced in our constitutional jurisprudence.

B. The Case for Parental Rights

The parental rights doctrine gives parents the right to control the care and upbringing of their children, and benefits parents by freeing them from concerns of intrusive State oversight and second-guessing. The doctrine protects parents from the fear that one bad parental decision could deprive them of their children in favor of someone the State believes could perform the parental role better. The doctrine ensures that absent exceptional circumstances, parental decisions, good or bad, will be respected and parental custody protected. For these reasons, the doctrine of parental rights unquestionably benefits parents. However, as the *Meyer* and *Pierce* cases demonstrate, the argument in support of parental rights is not simply that it protects and benefits parents. The parental rights doctrine is also premised on the belief that it also benefits children and the State.

72. 268 U.S. at 530–31.

73. *Id.* at 534–35.

74. *Id.* at 535 ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children. . . .").

75. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 796 (5th ed. 1995).

1. Parental rights benefit children

The argument that parental rights benefit children is based on a number of assumptions.[76] First is the assumption that parents are naturally more inclined than nonparents to act in the best interests of their children.[77] Under this theory, strong parental rights benefit children because biological parents are the individuals most inclined to make decisions benefiting their children. Second, the doctrine benefits children because it assumes that children prefer to be with their biological parents.[78] Lastly, this doctrine is believed to benefit children by making government intrusion into the family difficult and therefore providing children with a stable and secure family unit.[79] Referring to the later two points, Professor Guggenheim explains that the parental rights doctrine benefits children because it lets "[c]hildren know that they always will be connected—emotionally, socially, and through physical custody—to their parents and that their relationship will not lightly be destroyed."[80]

2. Parental rights benefit the state

In addition to benefitting parents and children, there is a compelling argument that a strong parental rights standard benefits the state by protecting the relationship between the child, as a citizen and future contributor to society, and the state. According to parental rights advocates, parental rights are essential to ensuring the freedom from state control necessary for the development of the

76. *See, e.g.*, 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. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.").

77. John Locke wrote that the "affection and tenderness which God hath planted in the breasts of parents towards their children, makes it evident, that this is not intended to be a severe, arbitrary government, but only for the help, instruction, and preservation of their offspring." Locke, *supra* note 59, at 85.

78. As demonstrated by the fact that a significant number of children that were adopted have sought to find their birth parents, it can be assumed that everything else being equal, children would prefer to be raised by their birth parents. GUGGENHEIM, *supra* note 63, at 36.

79. The idea here is that this doctrine frees children from having to worry about the government removing them from their parents' care. *Id.* Although neither of these assumptions has been proven with empirical evidence, parental rights advocates such as Martin Guggenheim conclude that "it remains a reasonable hypothesis that, all things being equal, children are well served by a rule that presumes their birth parents ought to raise them." *Id.*

80. *Id.* at 37.

next generation of independent and freethinking citizens.[81] In his analysis of *Meyer* and *Pierce*, Professor Robert Post exemplifies this idea by positing that these cases safeguarded the democratic state by "extending 'fundamental rights' to the kinds of cultural practices deemed necessary to sustain the individuality presupposed by democracy."[82] According to Professor Eichner, *Meyer* and *Pierce* established the principle of limited State involvement in family matters and, because they created a zone of privacy protected from government intrusion, he views these cases as integral to the protection and continuation of our liberal democracy.[83] Professors Eichner and Post are not alone. The importance of independence from government control has long been considered an integral aspect of a liberal democracy.

One of the foundational beliefs of liberal theory since the writings of John Stuart Mill is the idea of a separate sphere of privacy that must be protected from government interference.[84] Liberal theory views this cordoning off of the physical, personal, and intimate lives of individuals from State intrusion as the best way of promoting personal freedom and autonomy.[85] It proposes that within this sphere of privacy, individuals should be permitted to act as they wish as long as they cause no harm to others.[86] It is this idea that led not only to the doctrine of parental rights but to the recognition of many of the fundamental rights we now take for granted.[87] Without *Meyer* and *Pierce*, there would be no *Griswold* or *Lawrence*.[88]

81. *Id.*

82. Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489, 1534 (1998).

83. Maxine Eichner, *Who Should Control Children's Education?: Parents, Children, and the State*, 75 U. CIN. L. REV. 1339, 1341 (2007) ("[T]he United States is not merely a democracy, it is a *liberal* democracy, whose commitment to majoritarian rule is tempered by the understanding that some personal rights and liberties should not be subject to the majority's preferences.").

84. *See generally* JOHN STUART MILL, ON LIBERTY (W. W. Norton & Co. 1975) (1859) (discussing the broad view of individual autonomy central to libertarian theory).

85. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 750–51 (1989).

86. *See* MILL, *supra* note 84, at 26 (discussing the "no harm" principle).

87. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

88. *Griswold*, 381 U.S. 479, is the first case recognizing a constitutional right to privacy. The *Griswold* court made this ruling within the context of contraceptive use in the marital relationship. However, over time the right has been significantly expanded. *Lawrence*, 539

The parental rights doctrine prevents government intrusion into private family matters and thus requires childrearing decisions to be left in the hands of parents.[89] Consequently, the doctrine denies the government a significant means of shaping and controlling the ideas, interests, and values of its future citizens.[90] By preventing such governmental intrusion, the doctrine of parental rights ensures that the role of the government is to serve the will of the people. As the Supreme Court has stated, values, morality, and religion are things "the [S]tate can neither supply nor hinder."[91] Parental rights supporters hold that the doctrine of parental rights benefits the state by helping to guarantee the independence and free thought of future generations of American citizens.[92]

3. The problems with parental rights

Despite the many benefits of the parental rights doctrine, the doctrine also has significant drawbacks. The most obvious problem with parental rights is that they are almost by definition an infringement on children's rights. At its most basic level, parental rights are the rights of parents to control and make decisions regarding their children.[93] The only significant exception to this otherwise vast power is when parents are so unfit that their actions

U.S. 558, is the most recent case concerning and expanding the right to privacy. The *Lawrence* Court held that this right extends to all private sexual conduct between consenting adults.

89. GUGGENHEIM, *supra* note 63, at 27 (arguing that the legal system's insistence on private ordering of familial life ultimately guards against state control of its citizens).

90. MCCLAIN, *supra* note 19, at 3 ("[F]amilies have a place in the project of forming persons into capable, responsible, self-governing citizens"); RAWLS, *supra* note 30, at 43 (arguing that families are essential in "establishing a social world within which alone we can develop with care, nurture, and education, and no little good fortune, into free and equal citizens").

91. Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925)).

92. Joseph Raz, *Liberty and Trust*, *in* NATURAL LAW, LIBERALISM, AND MORALITY 113 (Robert P. George ed., 1996) (explaining that government should "stand back and let people have the choice as to how to conduct their own lives" but also arguing that the government "must take active steps, where needed, to ensure that people enjoy the basic capacities (physical and mental) and have the resources to avail themselves of an adequate range of options available in their society"); *see also* MCCLAIN, *supra* note 19, at 20 (noting that the family role serves as "a check on governmental power").

93. *Prince*, 321 U.S. at 166 ("It 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.").

endanger the life or health of their children.[94] Outside of that extreme situation, the parental rights doctrine gives parents the freedom to act in ways that are indifferent or even harmful to the interests of their children. It should therefore come as little surprise that the Court that decided *Meyer* and *Pierce* and established the constitutional doctrine of parental rights was the same Court that repeatedly struck down Progressive reforms such as child labor restrictions, mandatory free public schooling, and maternal and infant health programs.[95] The doctrine of parental rights assumes that parental rights benefit children, but it contains no requirement that such benefits actually occur. Similarly, the assumption that parental rights benefit the state by assuring the autonomy and privacy needed to raise independent-thinking future citizens is also not guaranteed. This independence can just as easily allow parents to raise their children with beliefs that undermine and threaten liberal values.

4. Parental rights as a danger to children

In her compelling attack on parental rights, Professor Barbara Bennett Woodhouse describes parental rights as akin to property rights. She notes that through the doctrine of parental rights, courts gave "primacy to the parents' natural rights of possession. The child's 'best interests' served as a tie-breaker in disputes between parents," but was ignored if the dispute was between a parent and a third party, even if that person was "a relative who had raised the child from infancy."[96] Moreover, Woodhouse argued that even when children are not considered property themselves, their best interests

94. Of course, there are specific laws that infringe on this right to an extent, such as mandatory school laws and child labor laws. However, even these give parents significant leeway in how they will be enforced. For example, homeschooling is permissible, as are certain types of employment, most notably work on a family farm. *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. § 213(c)(1) (2006) ("[P]rovisions of section 212 of this title relating to child labor shall not apply to any employee employed in agriculture outside of school hours . . . if such employee—is less than twelve years of age and (i) is employed by his parent, or . . . (ii) is employed, with the consent of his parent . . . .").

95. Barbara Bennett Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, 2 U. PA. J. CONST. L. 1, 27 (1999).

96. Barbara Bennett Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1048 (1992) [hereinafter Woodhouse, *Who Owns the Child*]. In addition, as Woodhouse notes, this "stranger" is often a person or a relative who has raised the child from infancy. *Id.*

are often defined in relation to property.[97] By comparing parental rights to a property right over children, Woodhouse forcefully calls into question the assumption that parental rights benefit children.[98] Even if parental rights may occasionally or even routinely have ancillary benefits for children, the doctrine of parental rights begins to look suspiciously like the right of parents to do what is best for the parents with no more than the hope that such decisions will benefit the children as well.[99] The Supreme Court case of *Wisconsin v. Yoder* highlights this concern.[100]

The issue in *Yoder* was whether Amish parents could exempt their children from Wisconsin's compulsory education statute and remove their children from school after the completion of eighth grade.[101] The parents wanted their children to remain members of the Amish community and feared that additional years of schooling would leave the children inadequately prepared to assume life as part of the Amish community. The Court ruled for the parents based on the doctrine of parental rights.[102] However, as the dissent pointed out, this ruling all but guaranteed that the children would have no choice but to remain part of the Amish community.[103] According to Justice Douglas, the Court's decision allowed Amish parents to keep their children "harnessed to the Amish way of life" and "forever barred from entry into the new and amazing world of diversity we have today."[104] Douglass feared that the impact of such parental decisions could be long lasting, ominously predicting that if a child's "education is truncated, his entire life may be stunted and deformed."[105] It may be that given the choice, most Amish children

97. *Id*. at 1047 (citing Buchard v. Garay, 724 P.2d 486 (Cal. 1986); Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981)) (finding the child's best interests were served by placing him with the more economically advantaged father and ignoring the fact that the father had statutorily raped the child's mother).

98. *See infra* note 121 (comparing parental rights to slavery).

99. *See generally* Dwyer, *supra* note 6 (arguing that placing newborns with parents simply based on a biological connection may violate the newborns' constitutional rights).

100. 406 U.S. 205 (1972).

101. *Id*. at 207.

102. *Id*. at 233–34.

103. *Id*. at 242–45 (Douglas, J., dissenting in part).

104. *Id*. at 245.

105. *Id*. at 246; *see also* JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS 23 (1998) (arguing in the context of religious schooling that favoring the religious interests of parents over the temporal interests of children harms the children in multiple ways. For example, he writes: "Female students in particular appear to internalize the messages of self-

would wish to forgo schooling and remain part of the Amish community; however, the *Yoder* decision did not give this choice to the children, it gave the decision to their parents.

The *Yoder* decision was bad for children, but it did not involve bad parents. There is no reason to assume that the parents in *Yoder* had anything but their children's best interests at heart. Nevertheless, giving this decision making power to the parents was not in their children's best interest. As Justice Douglas noted, the parents' decision eliminated nearly all possible futures for these children save the one the parents desired. It is hard to imagine that a person's best interest can truly be served by having their entire future dictated by another. *Yoder* demonstrates how easily the children of loving parents can be harmed by the parental rights doctrine and thus reveals how this doctrine can have catastrophic consequences for the children of abusive and neglectful parents. In the worst case scenario, the doctrine's policy of noninterference means that even in child abuse and neglect cases, courts and agencies may initially be reluctant to interfere and too willing to return children to unsafe homes after they have been removed.[106]

5. Parental rights as a danger to liberalism

Just as the assumption that parental rights benefit children is questionable, the assumption that parental rights benefit the state is also vulnerable to attack. Parental rights can harm the state by limiting children's exposure to ideas and creating factionalism. The doctrine of parental rights supports the privatization of families, which can injure the state by increasing the number of different and often extreme points of view within a society.[107] Consequently, the doctrine of parental rights can significantly harm the state. As Professor Hamilton notes:

abnegation and the sinfulness of sex . . . . They find themselves unable as adults to act on desires, to take control of their sexual/reproductive lives, or to leave abusive marriages.").

106. *See* Santosky v. Kramer, 455 U.S. 745, 770–91 (1982) (Rehnquist, J., dissenting) (arguing that the child possessed an interest in a "stable, nurturing homelife" that might not be served by reunification with the parents after having experienced abuse and separation); *see also* Deshaney v. Winnebago Cnty., 489 U.S. 189 (1989) (involving facts where the state's failure to remove a child from an abusive home led to permanent and severe brain injury); MURRAY A. STRAUS & RICHARD J. GELLES, PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS TO VIOLENCE IN 8,145 FAMILIES 427 (1990) (documenting that abused children are at a high risk of re-injury).

107. Macias, *supra* note 40, at 133.

> The liberal democratic state *is* its citizens. And citizens are born, but they are also made. How its citizens come to be—whether the educations they receive will expand or constrain their future options, whether the values they assimilate will encourage or dissuade their civic engagement, etc.—fundamentally concerns the state.[108]

Similarly, in her book *Democratic Education*, Professor Amy Gutmann raises related concerns in the context of parental rights versus state control over education. Gutmann acknowledges that significant state regulation over education may conflict with parental rights. Nonetheless, she justifies such infringement by arguing that parental rights do not include "a right of parents to insulate their children from exposure to ways of life or thinking that conflict with their own."[109] She further suggests that a liberal state has an obligation to provide its citizen children with a democratic education stating that the State must teach these "future citizens respect for opposing points of view and ways of life,"[110] and that it is illegitimate for any person "to deprive any child of the capacities necessary for choice among good lives."[111]

Such ideas are also echoed by Professors William Galston and Steven Macedo. In his book *Liberal Purposes*, Galston argues that it is the obligation of the liberal state to teach children the skills and values needed to live in and support our democratic society. Consequently, he argues that "[j]ust as parents are prevented from impeding children's health development, they should not be able to impede their children's acquisition of knowledge and 'habits that support the polity and enable individuals to function completely in public affairs.'"[112] Similarly, Macedo argues it is the state's duty to make sure that all children receive a "liberal civic education,"[113] and that it is reasonable to impose some limits on parents' control over their children "for the sake of reasonable common efforts to insure

108. Hamilton, *supra* note 50, at 1058.

109. AMY GUTMANN, DEMOCRATIC EDUCATION 29 (1987).

110. *Id*. at 30.

111. *Id*. at 40.

112. Courtney Moran, *How to Regulate Homeschooling: Why History Supports the Theory of Parental Choice*, 2011 U. ILL. L. REV. 1061, 1084 (2011) (citing WILLIAM GALSTON, LIBERAL PURPOSES 252 (1991)).

113. Steven Macedo, *Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls?*, 105 ETHICS 468, 473–76 (1995).

that all future citizens learn the minimal prerequisites of citizenship."[114]

The above discussion demonstrates that both the potential benefits and pitfalls of the parental rights doctrine are substantial, but this doctrine cannot be truly examined without a similarly close look at its counterpoint, the doctrine of children's rights. It is only by examining the two that the relative merits can be assessed.

III. CHILDREN'S RIGHTS

A. What Are Children's Rights?

The concept of children's rights does not lend itself to easy definition.[115] Such rights include the protection of children's needs and welfare, but can also include their right to freedoms such as association, expression, and religion.[116] Professor Kathleen Federle has described these two different conceptions of children's rights as "one acknowledging the primacy of self-determination, [and] the other emphasizing nurturance."[117] Although both types of rights are now considered part of the term "children's rights," this was not always true. The concept of children's rights developed in two stages. The first children's rights movement was part of the Progressive movement, which sought to improve the lives and welfare of children through child labor laws, mandatory schooling, and juvenile courts.[118] The Progressives conceived of children's rights as rights to be protected and nurtured. In addition, the Progressive reformers believed such protection was good not only for the children but also for the State. They believed that children's rights

114. *Id*. at 485–86.

115. Annette Appell, *Uneasy Tensions Between Children's Rights and Civil Rights*, 5 NEV. L.J. 141, 151–52 (2004) (noting that "the ideas of 'children' and 'rights' are separately and together extraordinarily complex and variable" and that the term "'children's rights' is used extraordinarily loosely and broadly").

116. *Id*. at 152.

117. Kathleen Federle, *Children, Curfews and the Constitution*, 73 WASH. U. L. Q. 1315, 1315 (1995).

118. There have been two important children's rights movements. GUGGENHEIM, *supra* note 63, at 1. The first was led by the Progressives in the nineteenth century. *Id*. The Progressive movement focused on what was good for children by proposing legislation to help children. *Id*. Legislation such as the Keating-Owen Act was introduced to limit child labor. Keating-Owen Act, 64 P.L. 249, 39 Stat. 675 (1916) (declared unconstitutional by Hammer v. Dagenhart, 247 U.S. 251 (1918)). Other Progressive reforms included common schools and mandatory school attendance. GUGGENHEIM, *supra* note 63, at 2.

benefit the state by ensuring that the basic needs of its future citizens are taken care of and also by making sure that their intellectual and political needs are met. According to Progressives, children's rights included the right to an education that would expose them to the ideas and principles of democratic government.[119]

The second children's rights movement developed in the 1960s and focused on the rights of children as independent and autonomous beings.[120] During this period, parental control began to be viewed as oppression,[121] and treating children differently from adults was seen as discrimination that denied children "their right to full humanity."[122] Children's advocates began to advance claims based on the "child's individual personhood" and sought to separate "children's interests from their parents'."[123] Due to this second children's rights movement, children's rights began to include more than the right to be protected, nurtured, and educated.[124] Children's rights now included the right to be free from adult (usually parental)

119. GUGGENHEIM, *supra* note 63, at 1–2. (Noting that the children's movement spearheaded by the Progressive reformers was one which sought to transfrom the issue of child well-being from "parental responsibility to an issue that government and those who forged official policy had a responsibility to address.").

120. *Id*. at 7–8.

121. Some have even compared such control to slavery. *See, e.g.*, Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to* Deshaney, 105 HARV. L. REV. 1359 (1992) (likening the status of children to that of slaves); James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CALIF. L. REV. 1371, 1412–15 (1994) (comparing children to slaves and property in general); Michael D. A. Freeman, *The Limits of Children's Rights*, *in* THE IDEOLOGIES OF CHILDREN'S RIGHTS 29, 30 (Michael Freeman & Philip Veerman eds., 1992) (describing those who lack rights as slaves); Barbara Bennett Woodhouse, *"Out of Children's Needs, Children's Rights": The Child's Voice in Defining the Family*, 8 BYU J. PUB. L. 321, 326 (1993–1994) (describing the parent child relationship as similar to slavery). *But see* GUGGENHEIM, *supra* note 63, at 9 (describing such comparisons as "overheated nonsense").

122. GUGGENHEIM, *supra* note 63, at 6; *see also* Federle, *supra* note 117, at 1344 (stating that just as "the infantilization of African Americans was nothing more than an attempt to control and oppress an entire race" that "[t]heories which cannot accommodate the rights of children perpetuate these traditions of power and dominance"); Stephen Scales, *Intergenerational Justice and Care in Parenting*, 28 SOC. THEORY & PRAC. 667, 668 (2002) (referring to the status of children in American law as a "moral nightmare" and an "evil and morally hideous" position).

123. GUGGENHEIM, *supra* note 63, at 13.

124. Woodhouse, *Who Owns the Child*, *supra* note 96, at 1002 ("[O]ur attachment to [the] property-based notion of the private child cuts off a more fruitful consideration of the rights of all children to safety, nurture, and stability, to a voice, and to membership in the national family").

control that did not serve their interests or sufficiently consider their wishes.[125]

As a result of these two children's rights movements, the current conception of children's rights includes protection rights,[126] meaning the right to be free from harm, as well as autonomy rights, meaning the right to make choices about one's own life.[127] However, both aspects of children's rights still lack the widespread acceptance enjoyed by parental rights.[128] Current U.S. law recognizes both types of children's rights, but only in particular contexts and to limited degrees. For instance, a child's right to protection can be seen in the laws that exist to prevent child abuse and neglect, to prevent child labor, and to require school attendance. However, there are no laws that protect children from the dangers of selfish or uninterested parents. Similarly, the law recognizes some autonomy rights in children, such as minors' rights to abortion and free expression,[129]

125. *Id.*; Katherine Hunt Federle, *Looking Ahead: An Empowerment Perspective on the Rights of Children*, 68 TEMP. L. REV. 1585 (1995).

126. Protection rights include the rights to be fed and sheltered. *See* Appell, *supra* note 115, at 157 (noting this type of children's rights "predates contemporary notions of children's rights"). They also include the right to be protected from other types of harm such as physical abuse or unsafe working conditions, military service, and unreasonable searches and seizures. *See* Jonathan O. Hafen, *Children's Rights and Legal Representation—The Proper Roles of Children, Parents, and Attorneys*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 423, 437–38 (1993).

127. Autonomy rights include rights such as those of association and expression. *See* Appell, *supra* note 115, at 152; *see also* Gilbert A. Holmes, *The Tie That Binds: The Constitutional Rights of Children To Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 362, 395 (1994) (discussing children's rights in terms of associational rights); Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223 (1999) (discussing children's rights in terms of autonomy). Legal examples of children's autonomy rights include, for example, the right of minors to have abortions without parental consent. *See* Bellotti v. Baird, 443 U.S. 622 (1979) (striking down a mandatory parental notification requirement); Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

128. One example is the United States' long opposition to ratification of the U.N. Convention on the Rights of the Child. The U.S.'s objection to the convention, which protects children from harms such as sexual exploitation and child labor, is the fear that it will impinge on parents' rights to raise their children as they see fit. Among other concerns, opponents fear that the clause banning torture and other cruel and inhuman punishment could be interpreted to ban spankings. *See* Brian Montopoli, *31 Senators Oppose U.N. Children's Rights Convention*, CBS NEWS (Aug. 24, 2010, 6:22 p.m.), http://www.cbsnews.com/8301-503544_162-20014613-503544.html.

129. There are fewer examples of such legally protected rights and even when they exist, they are typically less robust and protected than similar rights of adults. For example, children have many of the same constitutional rights as adults, but to a lesser degree. The Supreme Court has repeatedly upheld these weaker constitutional protections. *See* Appell, *supra* note

but gives children no right to make other decisions such as whether to marry, work, or even see an R-rated movie. Children's rights advocates seek to increase both the protection[130] and autonomy rights[131] of children. These advocates object to the weaker protections afforded to children's rights and reject the idea that parental rights should trump children's rights.

B. The Case for Children's Rights

1. Children's rights benefit children

As the reverend Hastings H. Hart, a well-known Progressive reformer, stated in a 1901 speech, children's rights should be recognized for two reasons: "first, because the child has a natural right to an opportunity for normal and healthy development; second because the care of such children is essential to the preservation of the community."[132] Hart's first argument in favor of children's rights is the proposition that recognizing children's rights is good for the child. Although the definition of children's rights has expanded significantly in the century since Hart made this statement,[133] the idea that children's rights are good for the child is still the essential

115, at 154 ("These rights follow those of adults but are extended only partially, or differently, to children because of their minority status. These rights recognize children as persons under the Constitution and extend due process and equal protection of the law to them, but in limited, or even special, ways because of their minority."); *see also* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (recognizing, for the first time, children as "persons" under the Fourteenth Amendment).

130. For example, many children's rights advocates voice significant opposition to family reunification policies, which they contend fail to sufficiently protect the best interests of children sufficiently. *See, e.g.*, ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 110 (1999) ("The most extreme forms of intervention work best for children. Children placed in foster homes do better than children whose families are kept together, and children placed in adoptive homes do better yet. They would do even better if we moved them on to adoption promptly, rather than subjecting them to the kind of damaging delays that routinely occur in today's system."); James Dwyer, *Children's Interests in a Family Context—A Cautionary Note*, 39 SANTA CLARA L. REV. 1053, 1067 (1999) (suggesting that parental terminations should be governed by a best interests of the child standard).

131. *See, e.g.*, Federle, *supra* note 125, at 1595.

132. Hasting H. Hart, *The Child-Saving Movement*, 58 BIBLIOTHECA SACRA 520 (1901).

133. The definition of children's rights now includes components focused on the autonomy of the child. As Professor James Dwyer has argued, children's rights theorists recognize children as free and equal persons protected by the equal protection clause of the Fourteenth Amendment. DWYER, *supra* note 105, at 122–28.

basis for the children's rights movement. Children's rights advocates, such as Professors Elizabeth Bartholet and James Dwyer, base their arguments in support of children's rights on the idea that children's best interests are served when children's rights are favored over parental rights and that children's best interests should be protected even at the cost of diminished parental rights.

Advocates for children's rights cite numerous instances where children's interests conflict with parental interests.[134] As a result, these advocates conclude that freeing children from parental control is essential to their welfare. They also argue that the benefits of children's rights are more than simply freeing children from parental control and potentially harmful parental decision making. Children's rights also benefit children because this approach includes the imposition of duties on those charged with the care of children.[135] These duties, imposed on caretakers, communities, and the state permit children to achieve their full potential by ensuring children's ability to develop their capacities and talents.[136] Consequently, children's rights benefit children because they protect children from the harm of parental control and because they impose duties on

134. Professor Bartholet has raised such concerns in the context of foster care and termination, arguing that longer periods before termination of parental rights, while arguably good for parents, can be disastrous for their children who must spend longer periods in foster care limbo. *See generally*, BARTHOLET, *supra* note 130. Professor Dwyer discusses this conflict in the context of education arguing that parental control over their children's education can deprive their children of the skills and knowledge that could benefit them in adulthood. *See* James G. Dwyer, *School Vouchers: Inviting the Public Into the Religious Square*, 42 WM. &. MARY L. REV 963, 966 (2001) ("Most arguments about child-rearing issues give little attention to, and often simply ignore, the developmental interests of the children involved. Instead they focus on the interests and rights of parents . . . . For that reason they are deficient.").

135. Given the dependent nature of children, children's rights would mean little without attendant duties to help them effectuate these rights. *See, e.g.*, Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995) (describing the parent as a kind of fiduciary with responsibility for the child's welfare but not as an actual owner of the child). *See also* Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1756–57 (1992) (suggesting that "[a]dults—judges, policy makers, and parents—make wiser, more principled, and more authentic decisions for and about children").

136. Katherine Hunt Federle, *Rights Flow Downhill*, 2 INT'L J. CHILD. RTS. 343, 356 (1994) (discussing the goal of children's rights as "someday, lead[ing] to a better life for children through the articulation of ideal relationships between children and adults in the larger community"); Woodhouse, *Who Owns the Child*, *supra* note 96, at 1056 (noting that children's rights "were paired with duties and existed so that children might grow and learn to *do* right").

parents and other caregivers to provide children with the help they need to realize their potential.

2. Children's rights benefit the state

Defenders of parental rights argue that a strong deference to parental rights is necessary for the health and welfare of the state, but children's rights advocates can make a similarly compelling argument. Such arguments were first articulated by the Progressive reformers who argued that children should not to be treated as property of their parents. According to the Progressives, "the child's highest duty was no longer obedience to parents, but preparation for citizenship."[137] Progressive reformers believed that children required and had the right to a certain level of exposure to ideas and education that would enable them to become the type of independent, autonomous citizens necessary to the continuation of the liberal state. They believed that through mandatory public school the State would be able "to train citizens to exercise their rights in a democracy; to imbue immigrants and the poor with 'American' ideals and culture; and to equalize opportunity for advancement in an egalitarian society."[138] Consequently, because this training was considered essential for the health of the state, cases such as *Meyer* and *Pierce* and the doctrine of parental rights, which permitted parents to remove children from the common school, were considered a serious threat.

The idea that the survival of our constitutional democracy rests on the proper training of our future citizens was not limited to the Progressive Movement and has been repeatedly reaffirmed. In *Brown v. Board of Education*,[139] the Supreme Court struck down segregated schools as unconstitutional and explained that such schools harm African American children in a manner that undermines "the very foundation of good citizenship."[140] According to the *Brown* Court, a denial of educational opportunities denies children the tools necessary for their role as future citizens. The Court reiterated this idea more recently in *Grutter v. Bollinger*, stating, "We have

137. Woodhouse, *Who Owns the Child*, *supra* note 96, at 1051.

138. *Id*. at 1006.

139. 347 U.S. 483 (1954).

140. *Id*. at 493.

repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society."[141]

C. The Problem with Children's Rights

Discussing children's rights as separate from parental rights can be difficult. Children are by definition dependent. One cannot consider the rights of children without also considering the rights of the people on whom they are dependent, most often their parents.[142] Consequently, greater children's rights will often mean greater governmental oversight of parental decision making, which can be problematic. It is highly questionable whether the government will make better decisions regarding children than parents. As Professor Guggenheim has noted, "[a] best interests inquiry is not a neutral investigation that leads to an obvious result. It is an intensely value-laden inquiry."[143] Given this difficulty, Guggenheim concludes that permitting childrearing decisions to be made by parents, the people who know the child best, rather than state officials who may never have even met the child, is the best means of achieving a desirable result.[144]

The Iowa Supreme Court case of *Painter v. Bannister*[145] provides a compelling example of how a concern with children's rights and best interests may be no more likely to effectuate a child's best interests than cases decided according to a doctrine of parental rights. In *Painter*, a fit father lost custody of his son to the child's maternal grandparents because of the court's distaste for the father's unconventional, arty lifestyle.[146] The court's evidence to support its determination that paternal custody was not in the child's best interest were facts such as the father's wearing of a "sport shirt and sweater" to his wife's funeral, his failure to paint the outside of his house, and his preference for "uncut weeds and wild oats" rather than a neatly trimmed lawn.[147] The custody decision was a clear

141. 539 U.S. 306, 331 (2003) (citing Plyer v. Doe, 457 U.S. 202, 221 (1982)).
142. GUGGENHEIM, *supra* note 63, at 13.
143. *Id.* at 38–39.
144. *Id.*
145. 140 N.W.2d 152 (Iowa 1966).
146. *Id.* at 156.
147. *Id.* at 155.

reflection of the judges' distaste of the father's lifestyle and the judges' personal perception of the child's best interest. The decision was made according to a best-interest-of-the-child standard, but it is far from clear that the court's decision actually served the child's best interest.[148]

An additional problem with children's rights is that too much State involvement may actually thwart the increased autonomy that children's rights advocates seek to create. One of the most compelling reasons behind the parental rights doctrine is the idea that protecting family privacy helps foster independent, autonomous adults who will be capable of exercising the type of free will necessary to the continuation of the liberal state. Too much State involvement in childrearing decisions runs the danger of homogenizing families and preventing the necessary liberal independence.[149]

IV. PARENTAL RIGHTS, CHILDREN'S RIGHTS, AND IMMIGRANT CHILDREN

The strongest argument favoring parental rights is that parental rights do not just benefit parents, but they also benefit children. This supposition is based on the premise that biological parents are best suited to act in their children's best interests, that children would prefer to remain with their parents, and that parental rights ensure stability and security for children. As discussed above, the well-established criticisms of a parental rights standard cast significant doubt on these assumptions in general. However, in the context of immigrant family reunification, the problems with the assumption that parental rights benefit children are magnified exponentially.

148. The Iowa Supreme Court certainly felt that the trial judge's decision granting custody to the father had been in error and reversed. GUGGENHEIM, *supra* note 63, at 41 ("However alluring and child-friendly the 'best interests' test appears, in truth it is a formula for unleashing state power, without any meaningful reassurance of advancing children's interests."). *See also* Zug, *supra* note 4, at 16–20 (describing the personal biases that often accompany termination decisions in the immigration context).

149. It should be noted, however, that similar concerns regarding state intrusion into childrearing were voiced against many of the Progressive reforms that are now accepted as correct and beneficial, such as mandatory school attendance and child labor bans. For example, in 1924, the president of Columbia University spoke out against the child labor bills pending in Congress, warning that they "would empower Congress to invade the rights of parents and to shape family life to its liking." GUGGENHEIM, *supra* note 63, at 3.

A. Parental Rights Assumptions and Separations Due to Abuse and Neglect

Immigrant reunification cases concern the issue of whether to reunite children with their deportable or deported parents. These cases involve children who have already been separated from their parents. Such separations can occur for a number of reasons. Immigrant children may be separated from their parents due to allegations of abuse or neglect, or simply because of their parents' undocumented status.[150] As discussed above, the parental rights presumption that reunification is in the children's best interest has been subject to significant criticism. Opponents of this standard have argued that, particularly in the context of abuse and neglect cases, presumptions that parents act in their children's best interest, that children prefer to remain with their biological parents, and that keeping biological families together provides stability and security, are highly questionable.[151] Reuniting a child with a formerly abusive or neglectful parent is concerning in the typical case. However, in the immigration context such concerns are amplified. Once a child is reunited with a deported parent, there is no longer any U.S. oversight of these families and, in fact there may be no oversight whatsoever. Many of the countries the parents are returning to lack institutions and services similar to American child protective services. As a result, the dangers of unwise reunification are significantly magnified after a parent's deportation. Any abuse that occurs after deportation is unlikely to ever be discovered.[152]

A related concern involves the limited facilities available in the deported parents' country of origin. Within the United States, parents seeking reunification have the opportunity to take classes, attend counseling, and have their children looked after by others while they attempt to remedy the conditions that resulted in the removal of their children. Children's rights advocates often argue

150. In a minority of these cases, children were separated from their parents when the parents were detained in workplace raids for other immigration violations.

151. *See* Dwyer, *supra* note 6, at 791–92 (arguing it violated the constitutional right of newborns to be placed with parents who have a history of abusing or neglecting their children).

152. In addition, the assumption that children would prefer to return to abusive and neglectful parents and that a policy of reunification provides the greatest degree of stability and security for these children is also highly suspect.

that hopelessly unfit parents are given too many chances,[153] but the underlying idea is that with the proper help and resources, many, if not most, of these parents can become fit. However, the glaring problem with such assumptions in the immigration context is that many of the parents' countries' of origin lack these services. Therefore, even if a domestic violence class could solve the parents' problems, the lack of such classes in the parents' home countries means that parents' abilities to remedy the conditions that led to the removal of their children in the first instance is non-existent. This unfortunate reality counsels against the parental rights doctrine's assumption that children's interests are protected by recognizing parental rights. Such an assumption may make sense in countries like the United States that have the resources and procedures in place to catch cases of abuse and neglect, but this assumption is far too dangerous to apply in the immigration context.[154]

B. Parental Rights Assumptions and Separations Due to Status

Although many immigrant children are separated from their parents due to abuse and neglect, many other cases concern parents who were separated from their children solely due to their immigration status.[155] These are fit parents who have been separated from their children simply because they have the wrong immigration status.[156] However, even in these cases, which concern fit parents,

153. *See, e.g.*, BARTHOLET, *supra* note 130.

154. Even in the United States, far too many of these cases go undetected. *See* ANDREA J. SEDLAK & DIANE D. BROADHURST, EXECUTIVE SUMMARY OF THE THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT 13, 15–16 (1996), *available at* http://www.law.uh.edu/hjhlp/Issues/Vol_81/Kelly.pdf (estimating that there are 1,553,800 incidences of child abuse and neglect annually but child protection agencies intervened in or investigated only 872,000 of these incidences). The likelihood that these statistics would be far worse in many foreign countries is high.

155. In this group, I am including parents accused of abuse and neglect based simply on their immigration status or bias against immigrants. As demonstrated in my previous article, the bias against immigrants is significant and immigrant parents have been declared unfit based on little more than the language they speak or their immigration status. Accordingly, a best interest standard offers parents even less protection, making them more susceptible to anti-immigrant biases. Zug, *supra* note 4, at 21–24.

156. It should be noted, however, that immigration raid separations are likely to decrease. During the Bush administration, there were a number of highly publicized workplace raids in which parents were separated from their children due to Immigration and Customs Enforcement (ICE) detention. However, under the Obama administration, large-scale workplace raids have diminished and ICE has instituted humanitarian release guidelines to identify and release parents such as sole caregivers, nursing mothers, pregnant women and

when a parent is facing deportation it weakens the parental rights presumption that parental rights benefit children.

In the immigration context, parental and children's interests can easily clash.[157] As Professor Bridget Carr has noted, harsh immigration laws put parents in "impossibly difficult positions" and, under such circumstances, it is unwise to assume that parents act in their children's best interest.[158] However, it is important to note that this clash is unlikely to arise prior to deportation proceedings. It is only at the point of deportation that immigration status becomes an issue likely to cause a rift between the parents' interests and the children's. Before deportation is at issue there is no justification for applying a different standard for immigrant families. Removing a child based on best-interest considerations before the parent is facing deportation is wrong.

In *Separation, Deportation, Termination*, I discussed numerous instances in which child welfare services removed children from their parents simply because their parents were undocumented immigrants.[159] Then, after this unjustified removal, the agency would

others. *See Guidelines for Identifying Humanitarian Concerns among Administrative Arrestees*, NATIONAL IMMIGRATION LAW CENTER, http://www.nilc.org/immsemplymnt/wkplce_enfrcmnt/ice-hum-guidelines.pdf (last visited Aug. 24, 2011). Further, in 2009, these guidelines were expanded to include workplaces of twenty-five or more employees. Previously, they had only applied to workplaces with 150 employees or more. *See* Daphne Eviatar, *Immigration Raid Rules Echo Bush Era*, THE WASH. INDEP. (May 6, 2009), http://washingtonindependent.com/ 41963/immigration-raid-rules-echo-bush-era. In addition, other reforms, providing further protections may also become standard. *See* AJAY CHAUDRY ET AL., THE URBAN INSTITUTE, FACING OUR FUTURE: CHILDREN IN THE AFTERMATH OF IMMIGRATION ENFORCEMENT (Feb. 2010), *available at* http://www.urban.org/uploadedpdf/412020_FacingOurFuture_ final.pdf (suggesting additional immigration reforms such as, detaining parents closer to home in order to facilitate visitation with children when detention is mandatory).

157. *See* Bridget A. Carr, *Incorporating a "Best Interests of the Child" Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120 (2009). Professor Carr focuses specifically on the situation where children have a different immigration status from their parents, meaning they are eligible to remain in the United States when their parents are not. In such circumstances, Carr notes that their interests may be far from aligned, and that recognizing only the parents' interests can have disastrous consequences for the child. *See id*. at 130–40.

158. *Id*. at 120 (noting that, in certain cases, parents may have to "choose between abandoning their children in a foreign land and risking the torture of their children").

159. *See, e.g.*, Anita C. v. Superior Court, No. B213283, 2009 WL 2859068 (Cal. App. Sept. 8, 2009); *In re* V.S., 548 S.E.2d 490, 493 (Ga. App. 2001); *In re* Angelica L., 767 N.W.2d 74 (Neb. 2009). *See generally* Zug, *supra* note 4, at 21–27 (describing how these termination cases were based upon the parents undocumented status).

claim it was in the child's interest to have their parents' rights terminated because the children had become attached to their foster parents. In such cases, the welfare agencies created the conditions that led to the court's conclusion that termination was in the children's best interest. This Article is in no way endorsing such actions. Nevertheless, once a parent is facing deportation, the possibility of divergent interests increases significantly, and this fact cannot be ignored.

A stark example of this potential conflict is demonstrated in the case of *Olowo v. Ashcroft*.[160] *Olowo* involved an undocumented immigrant mother who sought derivative asylum based on the claim that if she were deported she would have no choice but to allow her young daughters to undergo female genital mutilation back in Nigeria.[161] The daughters, however, were legal permanent residents and had the right to stay in the United States. Given the children's right to remain, the court was highly disturbed by the mother's intention to return to Nigeria with her daughters. The court recognized that in this case, the mother's interest in reunification strongly conflicted with the best interests of her children.[162] As a result, the court contacted the Illinois department of Family Services and the Illinois State's Attorney for Cook County in order to prevent reunification.[163]

Olowo vividly demonstrates how parents' and children's interests can conflict in the immigration context and also how vulnerable children are once they are reunited with their deported parents. As long as the daughters remained in the United States, any attempts to circumcise them would have been meet with criminal sanctions and loss of custody. Within the United States, we can afford the luxury of

160. 368 F.3d 692 (7th Cir. 2004).

161. *Id*. at 697.

162. *Id*. at 704 n.9. Professor Carr notes how easily the children's interests could have been ignored in this case. She notes that the mother's mistake was alerting the judge to the threat of female genital mutilation (FGM). If the mother had not raised the issue then the daughters would not have been removed and could have returned to Nigeria with her when she was deported, where they might have been subject to FGM. This demonstrates, particularly in the immigration context, a significant problem with the parental rights doctrine's assumption that parents act in their children's best interest. Carr, *supra* note 157, at 133–34.

163. *Olowo*, 368 F.3d at 704 (noting that it was alerting those "whose duty it is to represent the people of the State of Illinois in proceedings under the Juvenile Court Act of 1987 . . . which protects minors from parents who allow acts of torture to be committed on minors").

assuming parents act in their children's best interest because instances in which this assumption is incorrect will hopefully be revealed and remedied through channels such as doctors, teachers, and social workers.[164] There is no such safety net when children leave with deported parents. Although immigrant parents are no more likely to act against their children's interests than American parents, the repercussions of bad parental decisions may be far greater. Consequently, when parents facing deportation have already lost custody of their child due to a finding of unfitness the concern that they may act against their child's best interests in the future is increased. Ms. Olowo may never have truly intended to take her daughters to Nigeria with her if deported. Perhaps she was simply making the best case she could to gain asylum. However, there is no way to know.

Once deported parents leave with their children, U.S. oversight terminates. Ms. Olowo was never judged unfit prior to her asylum application. Had she forgone her asylum application and agreed to deportation, no one would have questioned her right to take her daughters. What this reveals is that even in the context of "fit" parents, the clash between parent and child interests can be significant. Thus, when courts are considering the reunification of children with previously judged unfit parents facing deportation, there are particularly compelling reasons to employ a "best interests of the child" standard.[165]

C. Presuming Children Want to Be with Their Biological Parents

In the immigration context, there are also strong reasons to question the parental rights assumption that children prefer to remain with their parents.[166] Many of the immigrant parents' countries of origin are substantially poorer and less developed than

164. See, for example, state laws such as S.C. CODE ANN. § 63-7-610 (requiring certain persons to report child abuse).

165. According to John Rawls, the basic rights of children "as future citizens are inalienable" and it is the government's responsibility to "protect them wherever they are." RAWLS, *supra* note 30, at 471.

166. The case of Walter Polovchak, *Polovchak v. Meese*, 774 F.2d 731, 732 (7th Cir. 1985), is a famous example of a child resisting return. Walter was the child of Ukrainian immigrants who refused to return to the Soviet Union with his parents and sought political asylum in the United States in order to remain in the United States. Walter's parents were not being deported. Rather, they were returning voluntarily based on their belief that the move was in their family's best interest. Walter, however, adamantly disagreed with this assessment.

the United States.[167] As a result, for many of these children, reunification means being sent to a country where they will be poorer, where they may receive little or no education, where medical facilities are inadequate, and where sufficient food and clean water are sporadic or unavailable. It may also mean reunification in countries with fewer freedoms and significantly more violence.[168]

For example, in her work documenting indigenous Guatemalan women detained in immigration raids, Professor Karla McKanders describes the conditions that lead many women to leave Guatemala and the conditions they and their children would face if returned. She notes that in addition to extreme poverty, limited educational opportunities, and pervasive discrimination, there is also a well-documented and deeply rooted tradition of domestic violence which frequently ends in death.[169] In such circumstances, it is not hard to imagine that given the choice, many children would prefer to remain in the United States without their parents.[170] Forcing children to leave with their deported parents may not be what many children want and could substantially undermine their future prospects. Because it may undermine children's future prospects, mandatory reunification may be unconstitutional, and it is certainly not in the children's best interests.[171]

167. *See, e.g.*, Karla McKanders, *The Unspoken Voices of Indigenous Women in Immigration Raids*, 14 J. GENDER RACE & JUST. 1 (2010) (describing the conditions that lead many indigenous Guatemalan women to leave).

168. Many of the mothers involved in deportation proceedings "allege that they migrated to the United States to escape some type of domestic abuse or gendered violence that the government was unable to control." *Id.* at 33.

169. *Id.* at 24 (noting that "since 2000 more than 4,000 women and girls have been murdered in Guatemala" and that few of these murders result in convictions).

170. *In re* Polovchak, 432 N.E.2d 873, 877 (Ill. App. 1981) (involving a child that ran away from home because he did not want to return to Ukraine with his parents).

171. *See* Dwyer, *supra* note 6, at 811 (quoting Gonzales v. Carhart, 550 U.S. 124, 171 (2007)) (arguing that state decisions that hinder a child's "ability to realize to realize their full potential" may be unconstitutional); *see also Polovchak*, 432 N.E.2d at 877; CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER (2004); William E. Forbath, *Caste, Class and Equal Citizenship*, 98 MICH. L. REV. 1 (1999); T.H. Marshall, *Class, Citizenship and Social Development*, *in* DEMOCRACY: A READER 211 (Ricardo Blaug & John Schwarzmantel eds., 2001) (describing citizenship as entailing "the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society").

D. Parental Rights Assumption Regarding Stability and Security

The doctrine of parental rights also assumes reunification benefits children because it fosters stability and security. However, this is often not true. Many immigrant reunification cases involve children who have lived with foster parents for years, have little memory of their biological parents, speak only English, and have become accustomed to an American way of life.[172] For children in these circumstances, it is reunification that will cause significant disruption to the stability and security of their life. For these children, reunification would mean leaving the only home and family they have ever known in order to go to a foreign country to live with parents they do not remember and where they may not even speak the language. It is not clear that reunification under such circumstances is in a child's best interest. The parental rights doctrine assumes that children achieve stability and security by remaining with their parents. However, for immigrant children who may already have been separated from their parents for significant amounts of time, it is their attachment to a place that may have been providing this sense of stability and security.[173] In such cases, it is life in America that has been the only constant for these children. Forcing them to leave to reunite with a deported parent may do more harm than good. A children's rights standard allows such considerations to be taken into account.

A children's rights approach focuses on the best interests of the child and whether the child desires reunification. Given this focus, it is clear that a children's rights standard has significant benefits for immigrant children. However, it is not obvious that children's interests outweigh the equally substantial interests of fit parents in the care and custody of their children. Thus, the decisive factor should be the state's interests. When children's interests are considered in tandem with the state's interest, this calculus changes.

172. Many of these foster parents also wish to adopt the children. *See, e.g.*, *supra* notes 7–16 and accompanying text (discussing the case of Carlos Romero).

173. In fact, a recent study published in the British Journal of Social Work indicates that the importance of children's attachment to a place may be just as important as their attachment to relatives or caregivers. The article examines "the significance of children's place attachments for the development of their identity, security and sense of belonging" and concludes that stability in location is of significant importance. *See* Gordon Jack, *Place Matters: The Significance of Place Attachments for Children's Well-Being*, 40 BRIT. J. SOC. WORK 755 (2010).

V. IMMIGRANT REUNIFICATION DECISIONS SHOULD BE MADE UNDER A BEST INTEREST STANDARD

A. State's and Children's Interests Align

The state has a significant interest in keeping American immigrant children in the United States. This interest, combined with the children's best interest, weighs in favor of applying a children's rights approach to immigrant family reunification decisions. As the above analysis demonstrates, both the State's and children's interests indicate that immigrant reunification and termination decisions should be decided according to a best-interest-of-the-child analysis. As Professor Emily Buss has written, "Where the child's views align with either the parents' or the state's, the child's position should have special developmental force."[174] It should also be noted that regardless of the state's specific interest in raising future American citizens, the state should be inclined to favor children's interests over the parents' simply because the children are citizens and the parents are not. Between the interests of citizens and noncitizens, the state's interests, in most instances, should favor the citizen.[175]

Congress's plenary power over immigration means that Congress has the power to treat noncitizens differently than citizens.[176]

174. Emily Buss, *Allocating Developmental Control Among Parent, Child and the State*, 2004 U. CHI. LEGAL F. 27, 44 (2004) [hereinafter Buss, *Allocating Developmental Control*] ("A state's interest in having a child receive a certain form or extent of education, however strong in the abstract, becomes stronger when aligned with the expressed interest of the child in pursuing that education. Conversely, a parent's interest in avoiding that education becomes stronger if aligned with the child's interest in avoiding it. This is not simple math and tie-breaking. Rather, it recognizes that the interests at stake, and related expertise, in fact change with the alignments. The state is in a far better position to assess, and meet, the educational needs of a child aspiring to leave her parent's community and join mainstream society and the national economy, than to assess and meet the needs of a child who aspires to live apart. Similarly, the child's common interest in a certain form of upbringing can serve to legitimize the parents' authority as the best (and most competent) assessor of the child's developing needs.").

175. *But see* Hague Convention on International Child Abduction, 25 October 1980, Hague XXVIII at 13 (requiring US courts to cede custody jurisdiction over US citizen children to a foreign court if the child was wrongly removed).

176. In practice, what this plenary power means is that noncitizens denied entry at the border have virtually no due process rights. *See* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process . . . ."). Even long-term residents have fewer constitutional protections. "Scholars and courts alike have long noted, and often decried, the constitutional exceptionalism of the immigration power within

Noncitizens have constitutional rights, but they have repeatedly been found to be more limited than the rights of citizens.[177] Consequently, preferring state interests and citizen children's interests over that of their foreign parents is justified even if this choice would not be supportable with regard to citizen parents.[178] When considering the reunification of citizen children with deported or deportable parents, a best interest standard must apply.

B. A Best Interest Standard Does Not Automatically Require Separation

In addition to the arguments presented above, a best-interest-of-the-child approach is desirable because in most cases it will not result in the termination of parental rights. In the majority of cases, an evaluation of the child's best interest will demonstrate that the child would be best served by reunification with his or her parents. As the Supreme Court recognized in *Santosky v. Kramer*, "Even when a child's natural home is imperfect, permanent removal from that home will not necessarily improve his welfare."[179] The *Santosky* Court recognized that "termination of parental rights [does not] necessarily ensure adoption," and "even when a child eventually finds an adoptive family, he may spend years moving between State

American public law." PETER H. SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP 19 (1998) (using the terms legal "maverick" and "wild card" to characterize immigration law); Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1, 4 (2010); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1704 (1992) (remarking on the "singularity" of immigration).Given the fact that Congress is not significantly constrained by the Constitution with regard to immigration policy, it is possible that an intentional congressional policy of separation could be constitutional. For example, since many of these cases involve American citizens, 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.

177. *See, e.g.*, Plyer v. Doe, 457 U.S. 202 (1982).

178. As the 11th Circuit stated in *United States v. Ferreira*, 275 F.3d 1020, 1025 (11th Cir. 2001), "Congress can pass laws regulating the conduct of noncitizens within the United States, and those laws do not violate equal protection so long as they are rationally related to a legitimate government interest." The health and welfare of children and future citizens would certainly meet this low standard. *See also* Mathews v. Diaz, 426 U.S. 67, 82 (1976) (noting that decisions made by Congress or the President in the area of immigration and naturalization are subject to "a narrow standard of review" equivalent to rational-basis scrutiny).

179. 455 U.S. 745, 765 n.15 (1982).

institutions and 'temporary' foster placements after his ties to his natural parents have been severed."[180]

For many children, termination will not result in a better life. Instead, it will lead to a childhood in foster care and all its attendant problems. A best-interest-of-the-child standard does not require this result. It ensures that the children's interests are truly considered. It means that children old enough to express their desire to remain in the United States will likely be able to do so.[181] It also means that children too young to make such an evaluation will still have their best interests, rather than their parents' interests, considered. In addition, it means that the State's interest in the welfare of its citizens does not end at the borders. At the same time, it does not mean that immigrant parents will automatically or even routinely lose custody of their children upon deportation. Under this approach, immigrant parents will only have their rights terminated when termination is in their child's best interests, and most of the time termination will not be. Rarely will better resources or opportunities be enough, by themselves, to overcome the benefits of remaining with a loving and caring parent.

VI. A WORKABLE FRAMEWORK

Children's rights and parental rights are traditionally viewed in opposition to one another,[182] and the debate between the two

180. *Id.*

181. *See generally* Leslie A. Fithian, *Forcible Repatriation of Minors: The Competing Rights of Parents and Child*, 37 STAN. L. REV. 187 (discussing cases in which children wished to remain in the United States against their parents' wishes).

182. *See* DWYER, *supra* note 105 (discussing the conflict between parental rights and children's rights in the context of religious schooling); Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63, 66 (discussing this either-or dichotomy in the context of adoption and stating that "the replacement of traditional parent-focused standards for court intervention by a purportedly child-focused standard would represent a disturbing erosion of critical due process protections that serve the interests of both parents and children"); David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. PITT. L. REV. 139 (1992); Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 638–40 (2006) ("[T]he debate between advocates of parents' rights and children's rights is charged and polarized."); Orly Rachmilovitz, *Achieving Due Process Through Comprehensive Care for Mentally Disabled Parents: A Less Restrictive Alternative to Family Separation*, 12 U. PA. J. CONST. L. 785, 824 (2010) (noting that traditionally, at least on the context of abuse and neglect, "parents' rights and children's rights were considered in opposition to each other").

positions does not lend itself to an easy resolution.[183] Both children's and parental rights advocates have spent decades debating which is the preferable position.[184] Moreover, these "either-or" arguments tend to reject the possibility of a middle ground and the possibility that both doctrines can coexist.[185] However, parental rights and children's rights can and must coexist. As the long fight between children's rights and parental rights advocates has shown, both standards have their place but neither one is right for all circumstances. In the context of undocumented immigrant families, a parental rights approach is appropriate before deportation, but once a child's parents have been deported, reunification and termination decisions must be made under a best-interest-of-the-child standard.

183. Huntington, *supra* note 182, at 640 ("Preservationists contend that a misconstrued articulation of children's rights and de-emphasis of parents' rights results in too much intervention in the home in the form of removal (or threatened removal). Child protectionists claim that too much emphasis on parents' rights and a misconstrued articulation of children's rights results in too little intervention in the home.").

184. *See, e.g.*, GUGGENHEIM, *supra* note 63, at 38–43 (arguing that the best interests doctrine is "intensely value-laden" and that the parental rights doctrine is preferable); Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN'S L.J. 323, 337 (2004) (noting that the law "generally lets adult interests trump children's" and that it must be adjusted to "place greater emphasis on parental responsibilities and children's rights"); Dwyer, *supra* note 121, at 1439 (arguing that children's rights should trump parental rights); John Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1 (1987) (discussing the tension between children's rights and parental rights and concluding that children's rights should not trump those of the parents); Alfred A. Mamo, *Early Identification and Prevention of Parent-Child Alienation: A Framework for Balancing Risks and Benefits of Intervention*, 48 FAM. CT. REV. 136, 145 (2010) ("[P]arental rights may need to be trumped by the children's rights."); Christopher Tollefsen, *John Paul II and Children's Education*, 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 159, 177 (2007) (describing children's rights advocate James Dwyer as claiming that "children's rights should entirely trump any claim to parental rights"); Erik M. Zimmerman, Note, *Defending the Parental Right to Direct Education:* Meyer *and* Pierce *as Bulwarks Against State Indoctrination*, 17 REGENT U. L. REV. 311, 332 (2004–2005) (noting that Barbara Bennett Woodhouse and other children's rights advocates "would like to replace parental rights with 'Children's Rights'").

185. An example of such consideration is Professor Emily Buss's thoughtful proposal in which she suggests allocating parental rights versus children's rights based on independent rights asserting conduct of the child. Buss would preference children's rights over parental rights in when the rights were sought first by the child. Thus, Buss would rarely, if ever, consider the rights of minor children to trump parental rights but would be very inclined to permit this in the cases of older children. Buss, *Allocating Developmental Control*, *supra* note 174, at 44. *See also* Troxel v. Granville, 530 U.S. 57 (2000) (articulating the idea of a flexible, but perhaps unworkable, standard for parental rights); Rachmilovitz, *supra* note 182, at 824 (arguing for an aggregation of parental and children's rights, suggesting that that can be viewed as "different aspects of the same right").

A. The Adoption and Safe Families Act

The idea of a triggering event that justifies a switch from parental rights to children's rights may seem novel, but it is not. The Adoption and Safe Families Act of 1997 (ASFA) demonstrates a similar compromise between children's rights and parental rights. ASFA supports the traditional parental rights framework during the initial months after a child is removed from his or her parents. However, after a child has been out of her parents' care for fifteen out of the last twenty-two months, the emphasis shifts to a children's rights standard.[186] After this triggering event, the Act no longer seeks the traditional parental rights goal of reunification. Instead, the focus shifts to the best interest of the child and the goal of adoption. Thus, after this point, the parents' rights will be terminated unless it is in the children's best interest not to have them terminated.

The purpose of ASFA was to give increased consideration to children's rights.[187] Whereas previous child welfare policy focused on reunification, and thus on the rights of parents, ASFA's focus shifted to termination and the best interest of the child.[188] ASFA increased

186. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.).

187. During the ASFA testimony, Rep. Deborah Pryce of Ohio stated that ASFA would "elevate children's rights so that a child's health and safety will be of paramount concern under the law . . . . Let us do it for the children." 143 CONG. REC. H10,776–05, H10,789 (daily ed. Nov. 13, 1997) (statement of Rep. Pryce). *See also* GUGGENHEIM, *supra* note 63, at 208 (noting that ASFA "was widely heralded as a children's rights victory"); Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871, 928 (2009) ("ASFA is, in my view, a good law because it shifts the balance in child welfare law and policy somewhat in the direction of valuing children's rights more, and parents' rights less.").

188. ASFA was passed in response to the Adoption Assistance and Child Welfare Act (AACWA), which focused on parental rights and required states to make "reasonable efforts" at reunification even in cases of child abuse and murder. 42 U.S.C. § 671(a)(15) (2006) (assuring "that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to safely return to the child's home"). The Congressional testimony surrounding the passage of ASFA reveals the disagreement with this former policy. *See, e.g.*, 143 CONG. REC. S12668 (daily ed. Nov. 13, 1997) (statement of Sen. Jeffords) ("[I]f a parent has been found to have murdered another child in the family, or has subjected a child to chronic abuse, it is unreasonable—and irrational—to insist that the state return that child to the family."); 143 CONG. REC. S12,198 (daily ed. Nov. 8, 1997) (statement of Sen. Helms) ("Foster care children should not be returned to unfit, abusive parents . . . . Because the current Federal law requires States to make reasonable efforts to reunite children with their biological parents, children have tragically been returned to their abusive and sometimes murderous parents."); 143 CONG. REC. H2012 (daily ed. Apr. 30,

federal incentives for adoptions and permitted parental rights terminations for most children who had been in foster care for more than a year. Although the Act has been the subject of significant criticism,[189] such criticisms are primarily based on the premise that ASFA terminations do not actually achieve the best interest of the child.[190] The criticism that ASFA violates the parent's rights is rare.[191] Even ASFA's critics appear to accept ASFA's premise that there needs to be increased consideration of children's best interests in

1997) (statement of Rep. Pryce) ("[T]he most important change we can make is to elevate the rights of children because too often a foster child's best interests are abandoned while courts and welfare agencies drag their feet. To correct this injustice, H.R. 867 [ASFA] places the safety and well-being of children above efforts by the State to reunite them with biological parents who have abused or neglected them.").

189. *See, e.g.*, Naomi Kahn, *Children's Interest in a Familial Context*, 60 OHIO ST. L.J. 1189, 1204 (1999) (noting for example that the emphasis on termination may be harmful in instances where adoption prospects are unlikely); Jane Murphy, *Protecting Children by Preserving Parenthood*, 14 WM. & MARY BILL RTS. J. 969, 981 (2006) (arguing that even if one "considers ASFA strictly from a child's perspective, its harm to children as a form of parentage disestablishment law is apparent"); Deborah Parach, *The Orphaning of Underprivileged Children: America's Failed Child Welfare Law & Policy*, 8 J.L. & FAM. STUD. 119, 158 (2006) (suggesting that courts should always consider the "best interests of the child" before terminating parental rights and that such a consideration would often counsel against termination); Dorothy Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112 (1999).

190. Courts have also criticized ASFA for its harm to children. *See, e.g.*, *In re* Adoption of Corey, 707 N.Y.S.2d 767, 773 (Fam. Ct. 1999) (finding that § 378–a(2)(e)(1) of ASFA violates the procedural due process rights of foster children because it fails to protect them from "arbitrary State decisions which significantly impact their custody and welfare").

191. *See* Ann Laquer Estin, *Sharing Governance in Congress and the States*, 18 CORNELL J.L. & PUB. POL'Y 267 (2009) (noting that "the expedited timelines of ASFA may conflict" with parental rights); Catherine J. Ross, *Legal Constraints on Child-Saving: The Strange Case of the Fundamentalist Latter-day Saints at Yearning for Zion Ranch*, 37 CAP. U. L. REV. 361 (2008) (criticizing an article on ASFA for its implication that parental rights are no longer relevant to ASFA terminations). Interestingly, such arguments are often made by law students. *See, e.g.*, Ian Vandewalker, Note, *Taking the Baby Before it is Born*, 32 N.Y.U. REV. L. & SOC. CHANGE 423, 442 (2008) (arguing that the ASFA timeline violates the due process rights of drug addicted mothers because it is well documented that effective drug treatment programs often take at least two years, more than the time permitted under ASFA); Amy Wilkinson-Hagen, Note, *The Adoption and Safe Families Act of 1997: A Collision of* Parens Patriae *and Parents' Constitutional Rights*, 11 GEO. J. ON POVERTY L. & POL'Y 137, 141 (2004) (arguing that ASFA "harms some parents because its broad language, arbitrary time requirements and anti-reunification funding schemes apply unfairly to certain parents, therefore violating both substantive and procedural due process requirements under the Fourteenth Amendment"). At the same time, however, Hagen states that ASFA's purpose of acting in children's best interests is "noble and attractive" and "should be a matter of serious concern, even when weighed against the interests of parents who wish to maintain relationships with their children." *Id.* at 140.

parental termination decisions and that there is a point at which children's interests outweigh those of their parents.[192] This agreement regarding the appropriateness of increased attention to children's rights is significant and was certainly not a given. Consequently, it is important to examine why, for the most part, ASFA's compromise has been accepted.[193]

From a parental rights standpoint, ASFA is a threat. The Act infringes on parents' rights to the care and custody of their children. Many of the parents whose rights are terminated under ASFA are not abusive, but have lost custody of their children due to neglect resulting from poverty or other circumstances beyond their control.[194] In addition, even in cases of abuse, many of these parents could become fit parents if provided with the resources and time needed to correct their behavior. Therefore, because many, or at least some, of these parents have the potential to remedy the conditions the led to their child's removal, termination arguably violates their parental rights.[195]

Similarly, from the children's rights standpoint ASFA does not go nearly far enough. If parental rights terminations were truly evaluated according to best interests of the child, the question would not be whether the parents have the potential to one day become fit and regain custody but whether having children wait for this

192. Scholarly criticisms of ASFA are primarily that it does not actually achieve the best interests of children. *See supra* note 189. It is courts, rather than scholars, who are the most likely to make the argument that ASFA is unfair to parents. That this position is more likely to be taken by courts makes sense considering the decades of legal precedent elevating parental rights over children's rights. *See, e.g.*, *In re* H.G., 757 N.E.2d 864, 872 (Ill. 2001) (finding it unfair and unconstitutional to find parents unfit just because they did not achieve reunification in the required time period and focusing on parental rights and the unfairness of terminating their rights when the child had been in foster care for "circumstances beyond the parent's control"); *In re* Adoption of Jonee, 695 N.Y.S.2d 920, 925 (Fam. Ct. 1999) (recognizing that ASFA violated both the children's and the guardian aunt's due process rights).

193. Again, I am referring to the acceptance of the increased attention to children's rights under ASFA. As previously mentioned, other aspects of ASFA have been the subject of numerous criticisms, particularly with respect to the idea that it does not effectively protect children's best interests.

194. The *In re H.G.* court used the example of substance abusers who had to wait long periods before they could gain admission into substance abuse recovery programs. 757 N.E.2d at 872–73.

195. For examples of such challenges, see *In re* H.G., 757 N.E.2d at 866–67 (finding that a section of state law presuming parental unfitness where a child was in foster care for fifteen out of the last twenty-two months was unconstitutional); *In re* K.R., No. 99–2009, 2000 WL 854325 (Iowa Ct. App. June 28, 2000) (rejecting parents claim that they have a constitutional right to reunification services).

speculative possibility is in the children's best interest. Under a children's rights approach, terminations should occur as soon as it is in the child's best interest. This could mean immediate termination in any case in which the harms of foster care outweighed the potential benefits of reunification A children's rights approach does not give parents many "chances." However, the protection it affords children is believed to outweigh the harm it inflicts on parents.

The ASFA compromise infringes on parental rights and does not fully protect children's rights, but it was accepted because, by and large, it still manages to effectuate many of the benefits of both standards. A parental rights approach to terminations benefits parents by giving them more time and opportunities to regain custody of their children; it may benefit children by helping them return home and avoid a childhood in foster care; and it benefits the state because, if successful, reunification services are cheaper than years of foster care. The benefits of a children's rights approach are that it protects children from unsafe reunifications,[196] frees children from years of foster care by making them available for adoption sooner,[197] and benefits the State by protecting the health and welfare of its future adult citizens.[198] ASFA largely manages to retain the benefits of both approaches by switching between the two standards when the benefits of using children's rights begin to clearly outweigh

196. Richard P. Barth et al., *From Anticipation to Evidence: Research on the Adoption and Safe Families Act*, 12 VA. J. SOC. POL'Y & L. 371, 372–74 (2005) (citing foster care drift, efforts "to reunify children with even the most difficult families," and research showing that even infants were experiencing multiple foster care placements); Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 646–48 (1999) (noting that ASFA was passed in response to concerns that local CPS agencies were undertaking excessive efforts to rehabilitate parents and were trying to return children to parents in whose care children could never be safe).

197. As ASFA's critics note, many of these children have few adoption prospects and thus receive no benefit from termination. In such circumstances, best interests indicate that parental rights should not be terminated. To the extent that ASFA mandates terminations even in such instances indicates a problem with how the Act is applied not with the use of a best interest standard. *See also* Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, "Bad" Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL'Y & L. 176, 179 (2004) (arguing that in some of these cases at the margins, a child would be better served by a more flexible approach that would consider the child's interest in reunification and not be bound by the ridged 15/22 requirement). My analysis accepts the stated benefits of ASFA but could change based on the conclusion that termination does not achieve the stability and permanence alleged.

198. By enabling children to be part of a family, their own or a new one, the children's rights approach helps to create independent and autonomous citizens, free from state control and quick adoptions, and also help the state avoid the expense of long term foster care.

the benefits of using the parental rights standard. The fifteen- to twenty-two month cutoff represents the point at which the benefits of parental rights and reunification attempts are outweighed by the child's interest in stability and permanence.[199]

B. Third Party Visitation Cases

Third-party visitation cases are also cases in which, after a triggering event occurs, the parental rights standard should be replaced with a children's rights standard. However, although this is another example of a compromise between children's and parental rights, it is one which I believe is far less effective than both the ASFA compromise and the immigration reunification compromise I propose. In these cases, the consideration of the child's best interest is likely to cause more harm than good, and thus it is not surprising that these cases have garnered much criticism.[200] An examination of the third-party visitation cases demonstrates why there has been so much criticism of these decisions and why such criticism is not applicable to my proposed immigrant reunification compromise.

The role of children's best interests in third party visitation cases gained national attention when the Supreme Court decided *Troxel v. Granville*.[201] In *Troxel*, the Court struck down a Washington state statute that would have permitted any third party to seek visitation at anytime, regardless of the parent's objections, so long as the visitation was deemed to be in the child's best interest. Although the Supreme Court found the Washington statute overbroad, the opinion left open the possibility that less broad visitation statutes

199. The idea behind the "15 of 22" provision stems from the definitive 1973 book, BEYOND THE BEST INTERESTS OF THE CHILD. See JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1973), in which the authors argued that a child's normal psychological development depends on a secure and uninterrupted relationship with one caregiver and that the impermanency of foster care was detrimental to children's emotional well-being. *See also* Jennifer Ayres Hand, Note, *Preventing Undue Terminations: A Critical Evaluation of the Length-of-Time-Out-of-Custody Ground for Termination of Parental Rights*, 71 N.Y.U. L. REV. 1251 (1996) (noting this work as the driving idea behind the AFSA permanency provision).

200. Unlike termination cases, there is significant scholarly writing arguing that third-party visitation should be decided under a parental rights standard. *See, e.g.*, Lawrence Schlam, *Third-Party "Standing" and Child Custody Disputes in Washington: Non-Parents Rights—Past, Present, and . . . Future?*, 43 GONZ. L. REV. 391, 459 (2007–08) (arguing in favor of a best interest standard for third party visitation cases).

201. 530 U.S. 57 (2000).

would pass constitutional muster.[202] *Troxel* thus indicated that parental rights to determine who could visit their child were not absolute[203] and that increased consideration of the child's best interest in these cases was permissible.[204] Post-*Troxel*, many courts embraced the idea that best interest considerations are appropriate in third-party visitation cases[205] and that third-party visitation claims should be evaluated in terms of children's rights and interests rather than parental rights.

For example, in *Downs v. Sheffler*,[206] the Arizona Court of Appeals recently held that "in instances where a fit parent's right to rear her child may conflict with the child's best interests, the extent of a parent's constitutional right . . . can only be determined by weighing that right against countervailing factors, if any, pertaining to the best interests of the child."[207] Such conclusions are

202. *Id.* at 73; *see also* Emily Buss, *Adrift in the Middle: Parental Rights After* Troxel v. Granville, 2000 SUP. CT. REV. 279, 311 (2000) [hereinafter Buss, *Adrift in the Middle*] ("Taken together, the Court's refusal to embrace any specific parent-protective standard and its apparent openness to visitation statutes that require courts to make best interests assessments reveal how far the *Troxel* Court drifted from its fundamental rights course.").

203. *See* Ellen Marrus, *Over the Hills and Through the Woods to Grandparents' House We Go: Or Do We, Post-*Troxel*?*, 43 ARIZ. L. REV. 751, 793 (2001) (describing the assertion that "parental rights are not absolute" as a "glittering generality" throughout the opinion); Lawrence Schlam, *Standing in Third-Party Custody Disputes in Arizona: Best Interests to Parental Rights—And Shifting the Balance Back Again*, 47 ARIZ. L. REV. 719, 733 (2005) (describing the *Troxel* decision as the finding that court "must perform a balancing of the fundamental rights of the parents with those of the child and state").

204. *See, e.g.*, *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting) ("A parent's rights with respect to her child have thus never been regarded as absolute . . . a parent's interest in a child must be balanced against the State's long-recognized interests as *parens patriae* . . . . [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."); *id.* at 93 (Scalia, J., dissenting) ("[N]o one believes the parental rights are to be absolute.").

205. However, it should be noted that scholarly support for best interests is mixed. *Compare* Sonya Garza, *The* Troxel *Aftermath*, 69 LA. L. REV. 927 (2009) ("Post-*Troxel*, many jurisdictions continue to allow third-party visitation petitions to be filed at any time and should continue to do so."), *with* Buss, *Allocating Developmental Control*, *supra* note 174 (arguing that by affording parents only a weak parental right, the *Troxel* court opened children up to harm through increased litigation).

206. 80 P.3d 775, 781 (Ariz. App. 2003).

207. *Id. See also In re* Adoption of C.A., 137 P.3d 318 (Colo. 2006); Vibbert v. Vibbert, 144 S.W.3d 292 (Ky. Ct. App. 2004); Rideout v. Riendeau, 761 A.2d 291 (Me. 2000); Blakely v. Blakely, 83 S.W.3d 537 (Mo. 2002); Polasek v. Omura, 136 P.3d 519, 521–22 (Mont. 2006); *In re* Marriage of O'Donnell-Lamont, 91 P.3d 721 (Or. 2004); Hiller v. Fausey, 904 A.2d 875 (Pa. 2006).

questionable. A comparison of the pros and cons of using a best interests test in visitation cases demonstrates that a parent's decision not to allow third-party visitation with his or her child does not support switching from a parental rights standard to a children's rights standard.

The triggering event in third-party visitation cases is the parent's decision to reduce or eliminate contact with a third party. However, unlike the triggering event in ASFA and immigrant termination cases, this trigger does not shift the benefit analysis in favor of applying a children's rights standard. Thus, it is not surprising that the decision has been the subject of significant criticism.[208] In third-party visitation cases, a parental rights standard benefits parents because it protects their right to make decisions regarding their children, guards against outside intrusions into their home and family, and indicates respect for their authority and judgment. Similarly, a parental rights approach benefits the state by ensuring the independence and autonomy of the family, which, as discussed above, is crucial for the development of future citizens. A parental rights approach to visitation cases also benefits children. This standard ensures that decisions about whom the child visits are made by a fit custodial parent, the person most knowledgeable about the child's life and needs and the person most likely to make decisions in the child's best interest.[209] Lastly, a parental rights standard protects

208. *See* Buss, *Adrift in the Middle*, *supra* note 202, at 313 (expressing worry that *Troxel*'s "in-between approach" gave too little guidance "to state and federal courts, charged with resolving the host of cases that *Troxel* [would] inspire"); Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337, 377 (2002) (ascribing significant social and legal confusion to *Troxel* and similar decisions); Marrus, *supra* note 203, at 793 (observing that *Troxel* disappointed and "raised expectations that the Justices would provide clear guidance on how and when states could or could not interfere with the parent's decisions regarding visitation between the child and third parties"); David D. Meyer, *Constitutional Pragmatism for a Changing American Family*, 32 RUTGERS L.J. 711, 712 (2001) (arguing that *Troxel* signals the emergence of a flexible standard for parental rights, but that it is itself incoherent, "emerg[ing] finally from a meandering tour of hoary platitudes too general to be helpful and factual details so case-specific as to give little guidance for the future"); Christina M. Alderfer, Note, Troxel v. Granville*: A Missed Opportunity to Elucidate Children's Rights*, 32 LOY. U. CHI. L.J. 963, 1005 (2001) ("The Court took a middle ground in this case, thereby offending no one. Unfortunately, the standard for governmental interference with parental rights remains extremely vague.").

209. As stated by Professor Emily Buss, "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, the parent is best situated to decide what private relationships should be fostered." *"Parental" Rights*, 88 VA. L. REV. 635, 649 (2002). In addition, Buss argues that parental rights benefit children because parents perform better as

children by promoting the stability and security that come from the knowledge that parental decisions will be followed and are not subject to interference by third parties or the state,[210] and by protecting them from the hostility and invective that often accompanies forced visitation.[211] These are significant benefits and benefits that largely remain even after a parent has unjustly denied a third party visitation.

Examining these cases from a children's rights approach reveals that children's rights arguments are not particularly compelling and that this conclusion does not change even after the triggering event—the denial of third-party visitation—has occurred. A children's rights approach to third-party visitation means that visitation decisions would be made according to a child's best interest. Thus, a parent could not deny a child visitation with a third party if such visitation was in the child's best interest.

The benefit of such a standard is that a child could not be forced by a parental whim to lose contact with a person with whom the child wished to have a relationship. While it is likely that maintaining such relationships will often benefit children, it is not at all clear that

parents if they have "near absolute control over the upbringing of their children." However, Buss notes that "[t]his is not to say that depriving children of particular relationships will never be harmful, but rather that we simply cannot expect the state to have any comparative advantage over parents in assessing that harm." Buss, *Adrift in the Middle*, *supra* note 202, at 287, 290. Moreover, most of these third party visitation cases involve very young children, making it extremely difficult to know whether such visitation truly represents their preference. Buss, *Allocating Developmental Control*, *supra* note 174, at 38 ("Associational rights claims, now commonly asserted by interested adults such as grandparents on behalf of young children, would be rare if limited to instances in which children took some form of affirmative action to express their associational choices.").

210. Children's fears of being taken away are well documented. Children will often not talk about violence in their homes out of fear they will be taken away from their parents. *See* Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 FAM. & CONCILIATION CTS. REV. 273, 285 (1999) ("Some children fear, legitimately, that if they talk about violence in their homes they will be taken away from both their parents"). Further, the stress children feel when visitation occurs against a custodial parent's wishes is well documented in the context of divorce. *See generally* Benjamin Garber, *Conceptualizing Visitation Resistance and Refusal in the Context of Parental Conflict, Separation and Divorce*, 45 FAM. CT. REV. 588 (2007).

211. Michele A. Adams, *Framing Contests in Child Custody Cases: Parental Alienation Syndrome, Child Abuse, Gender, and Father's Rights*, 40 FAM. L.Q. 315, 324–327 (2006); James H. Bray, *Psychosocial Factors Affecting Custodial and Visitation Arrangements*, 9 BEHAV. SCI. & L. 419 (1991); Douglas Darnell, *Parental Alienation: Not in the Best Interest of the Children*, 75 N.D. L. REV. 323, 323 (1999) ("Ideally, parents deliberately work on comforting and reassuring the children that no harm will come to them.").

the price of maintaining these relationships, namely the significant infringement on parental control and decision making, is justified by this benefit. The potential harm to family stability and security is significant, whereas the harm caused by a parent's unjustified decision to prohibit visitation is arguably minimal.[212] Typically, the worst case scenario in third party visitation cases is that the denial of visitation will prevent a child from developing or maintaining close relationship with a third party, such as a grandparent, that would have been beneficial for the child. While there is little question that such a denial may not be in the child's best interest and may even harm the child, this possible harm is not on par with the potential harms discussed in connection with ASFA and undocumented immigrant termination decisions.

The above analysis demonstrates that the benefits of a parental rights approach to these visitation cases far outweigh the benefits of a children's rights approach. Nevertheless, post-*Troxel* courts are increasingly receptive to best interest considerations. These best interest considerations are far less compelling than those present in the case of undocumented immigrant parental rights terminations, yet they are increasingly accepted. Consequently, if applying a children's rights standard in third party visitation cases is increasingly permissible, it seems axiomatic that such a standard is appropriate in undocumented immigrant parental rights termination cases.

VII. CONCLUSION

Terminating the rights of fit parents is an enormous violation of a person's parental rights. However, the best interests of the child justify this violation when those interests align with the best interests of the state. Allowing undocumented immigrant parental termination decisions to be made according to a best-interest-of-the-child standard does not mean that children will automatically be barred from reunification with their deported parents, but it does mean that these decisions will be made according to the child's best interest. As a result, in some cases fit immigrant parents will lose custody of their children, and this should be allowed to happen.

212. A possible exception could be a case such as *Middleton v. Johnson*, 633 S.E.2d 162 (S.C. Ct. App. 2006), where the third party was denied visitation after he began suspecting the mother of physically abusing the child. However even in that type of situation, the parents' denial of visitation rights does not prevent the third party from reporting suspicions of abuse.