From Extreme Hardship to Extreme Deference: United States Deportation of Its Own Children

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I. Introduction

In the wake of an unprecedented period of economic malaise and political cynicism in the "Golden State," California politicians have come upon one issue that is uniting people from diverse social, economic, and political backgrounds. From all indications, the snake oil of the 1994 elections will be immigration reform. Pete Wilson, the Governor of California, has written a number of opinion essays calling for, inter alia, a constitutional amendment denying citizenship to children born in the United States whose parents are illegal residents.[1] An examination of the protection vel non of the constitutional rights afforded to these children reveals that the rights of citizen children born to illegal aliens are, at best, illusory. Whether or not citizenship status will eventually be denied to children of illegal aliens born within United States borders, children who are currently born in the United States to illegal aliens are citizens, entitled to constitutional protection.[2]

This Article will examine the denial of constitutional rights to citizen children born to illegal aliens. Although the United States Constitution does not specify which branch of government has the power to regulate immigration, the Supreme Court held that Congress is vested with a plenary and unqualified power to determine which classes of

1. Pete Wilson, *About Time We Stopped Rewarding Illegals*, HOUS. CHRON., Aug. 29, 1993, (Outlook), at 1.

2. "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1. *See also* United States v. Wong Kim Ark, 169 U.S. 649 (1898).

aliens may enter and remain in the country.[3] Thus, the Court ruled that an alien has no right to enter or remain in the United States.[4]

A different question, however, may be presented when the exclusion or deportation of an alien affects the rights of a United States citizen. In such situations, the United States citizen, not the alien, would assert that the deportation or exclusion is unconstitutional.

One situation which frequently triggers the implication of constitutional issues occurs when an alien requests relief from deportation under section 244 of the Immigration and Nationality Act ("INA").[5]

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3. The Chinese Exclusion Case, 130 U.S. 581 (1889). The Supreme Court stated,

> The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.

Id. at 609. In the *Chinese Exclusion Case*, the Court held

> That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.

Id. at 603. The Court reaffirmed this principle in Fong Yue Ting v. United States, 149 U.S. 698 (1983), when it stated: "The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain condition, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation . . . ." *Id.* at 711. The Court has consistently reaffirmed this principle by "sustain[ing] Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'" Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (quoting Boutilier v. INS, 387 U.S. 118, 123 (1967)). Additionally, the Court stated that "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Id.* at 766 (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)).

The Supreme Court also stated in *Fiallo v. Bell* that

> [a]t the outset, it is important to underscore the limited scope of judicial inquiry into immigration legislation. This Court has repeatedly emphasized that "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens. . . . Our cases "have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." . . . Our recent decisions have not departed from this long-established rule.

430 U.S. 787, 792 (1977) (citations omitted).

4. Fong Yue Ting v. United States, 149 U.S. 698, 724 (1983); The *Chinese Exclusion Case*, 130 U.S. 581, 599 (1889).

5. The relevant suspension of deportation provision states in part:

> As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien (other than an alien described in section 1251(a)(4)(D) of this title) who applies to the Attorney General for suspension of deportation and —

In order to be eligible for such relief, the alien must prove that his or her deportation will cause *extreme hardship* to his or her United States citizen child or lawful permanent resident spouse. A review of the case law reveals that it is practically impossible for aliens to demonstrate extreme hardship.[6]

Part I of this Article examines the constitutionality of deporting an alien who is a parent of a United States citizen child. It is often contended that the deportation of a citizen child's alien parents results in an unconstitutional de facto deportation of the child because a citizen may not constitutionally be deported. While the Supreme Court has never considered the issue, many courts of appeal and several district courts have reviewed such claims.[7] These courts have unanimously held that the government may deport alien parents without violating the constitutional rights of their citizen children.[8]

Part II of this Article analyzes whether the deportation of alien parents violates the substantive due process rights of citizen children. The courts' protection of fundamental family rights in other contexts

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(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. § 1254(a) (1988 & Supp. II 1993).

6. INS v. Jong Ha Wang, 450 U.S. 139 (1981) (per curiam); Hernandez-Patino v. INS, 831 F.2d 750 (7th Cir. 1987); Hernandez-Cordero v. INS, 819 F.2d 558 (5th Cir. 1987); Sanchez v. INS, 755 F.2d 1158 (5th Cir. 1985); Le Blanc v. INS, 715 F.2d 685 (1st Cir. 1983); Bueno Carrillo v. Landon, 682 F.2d 143 (7th Cir. 1982).

7. The de facto deportation of citizen children occurs in other contexts outside the suspension of deportation litigation. Nayak v. Vance, 463 F. Supp. 244 (D.S.C. 1978), for example, involved alien parents as exchange visitors who had to return to their country because of the two-year foreign residency requirement of INA § 212(e) codified as amended at 8 U.S.C. § 1182(e). Gallanosa v. United States, 785 F.2d 116 (4th Cir. 1986) also involved an exchange visitor situation who filed a motion to reopen deportation to apply for suspension. Other cases such as Acosta v. Gaffney, 558 F.2d 1153 (3d Cir. 1977), and Martinez de Mendoza v. INS, 567 F.2d 1222 (3d Cir. 1977) (per curiam), are more accurately described as dealing with a "stay of deportation." *Acosta*, 558 F.2d at 1155; *see also infra* notes 114-124 and accompanying text. The question of de facto deportation of citizen children in suspension cases is exacerbated because aliens often cannot afford to retain counsel. In many cases in which aliens are fortunate enough to have counsel, counsel either does not raise the constitutional issues or money runs out before the case gets into federal court.

8. While one district court opinion held that the constitutional rights of citizen children were violated by deportation of the non-citizen parents, Acosta v. Gaffney, 413 F. Supp. 827 (D.N.J. 1976), *rev'd*, 558 F.2d 1153 (3d Cir. 1977), this decision was subsequently reversed by the appellate court.

will be contrasted with their complete denial of these same rights in suspension of deportation proceedings. Part II concludes that citizen children have substantive due process rights to remain with their parents and to have their rights addressed in their parents' deportation proceedings.

Part III will examine whether these citizen children have been afforded their procedural due process rights. The role of the executive branch and the courts in immigration matters is evaluated in this section. Emphasis is placed on the extreme deference accorded by the judiciary to agency determinations. Part IV analyzes whether deportation proceedings implicate the equal protection component of the Fifth Amendment. In Part V, the capacity of an immigrant child to make a decision concerning his or her autonomy is addressed. Part VI proposes a number of methods that courts and government may implement to protect the rights of citizen children. This Article concludes that the courts should adjudicate issues that threaten to deprive a person of "all that makes life worth living"[9] and, furthermore, that the Supreme Court should protect constitutional rights in a manner consistent with its prior controlling decisions.

II. The Tradition of the American Family: Substantive Due Process Analysis

A. The Protection Traditionally Granted by the Courts to Family Relationships

In a recent United States Supreme Court case, *Michael H. v. Gerald D.*,[10] Justice Scalia set forth an analysis for deciding what liberty interests merit constitutional protection.[11] Writing for the plurality, Justice Scalia rejected Michael's claim that his paternal interest was protectable under the Fourteenth Amendment.[12] Justice Scalia found, in construing the Due Process Clause, that the "interest denominated as a 'liberty' [must] be 'fundamental', (a concept that, in isolation, is hard to objectify), but also that it [must] be an interest traditionally protected by our society."[13] In an eloquent dissent Justice Brennan

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

10. 491 U.S. 110 (1989). In this case, the Supreme Court considered whether California's presumption of legitimacy for a child born to a married woman infringed upon the due process rights of the biological father and daughter. *Id.* at 113. Michael H. was the biological father of a child conceived and born to a married woman living with her husband. *Id.* at 115-16.

11. *Id.* at 122.

12. *Id.* at 119.

13. *Id.* at 122.

maintained that Justice Scalia had interpreted tradition too narrowly and argued that the Court should focus not upon the historical treatment of men who beget children by having adulterous affairs with married women, but "whether parenthood is an interest that historically has received our attention and protection."[14]

In response, Justice Scalia announced his methodology for defining a tradition. In footnote six of the opinion, he writes, "Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[15]

Even under this analysis, notwithstanding its narrow construction of tradition, it may be argued that United States citizen children are deprived of a fundamental liberty interest if their parents are deported from the United States.[16]

Justice Scalia's inquiry asks whether there is a specific tradition of protection for the right being asserted.[17] If such a tradition exists, then the Court deems the right fundamental, and abridgment of that right is subject to a strict level of scrutiny. As Justice Scalia wrote in *Michael H.*:

> As we have put it, the Due Process Clause affords only those protections "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Our cases reflect "continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society. . . ."[18]

Justice Scalia refused to expand the definition of "family" to include the biological father of a child whose mother was married to another man.[19] Scalia reasoned that the expansion of the notion of "unitary family" beyond "marital" family or "the household of unmar-

14. *Id.* at 139. (Brennan, J., dissenting). For a strong criticism of Scalia's narrow view of tradition, see Steven R. Greenberger, *Justice Scalia's Due Process Traditionalism Applied to Territorial Jurisdiction: The Illusion of Adjudication Without Judgment*, 33 B.C. L. REV. 981 (1992). *See also* L. Benjamin Young, Jr., *Justice Scalia's History and Tradition: The Chief Nightmare in Professor Tribe's Anxiety Closet*, 78 VA. L. REV. 581 (1992).

15. *Michael H.*, 491 U.S. at 127-28 n.6.

16. Although the statute at issue in *Michael H.* is a state statute tested for substantive due process under the Fourteenth Amendment and not the Fifth Amendment, the fundamental analysis is the same. For purposes of this paper, the substantive due process analysis applies to both state and federal statutes.

17. *Michael H.*, 491 U.S. at 127.

18. *Id.* at 122-23 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) and Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)).

19. *Id.* at 131.

ried parents and their children" would "bear no resemblance to traditionally respected relationships."[20] Scalia's two-pronged inquiry looked first to historical support for the asserted right, and second to the extant modern decisions and legislation.

Where a citizen child faces state-imposed separation from his parents, Justice Scalia's idea of tradition mandates the recognition of a fundamental right. The family relationship has been constitutionally protected since the early 1920s. In *Meyer v. Nebraska*,[21] the Court stated that the concept of liberty included "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, marry, to establish a home and bring up children, to worship God according to the dictates of his [life]."[22] In 1925 in *Pierce v. Society of Sisters*,[23] the Court acknowledged the unique protections extended to parents and children under the Constitution.[24] In *Pierce*, the Court stated, "The 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."[25]

Over the years, the Court has determined which rights among family relationships warrant constitutional protection.[26] The Court has recognized the right to decide whether to procreate,[27] the right to use contraceptives,[28] the right of an unwed father to retain custody of his illegitimate children,[29] and the right to live with extended family.[30]

Lower courts have recognized additional family rights that warrant constitutional protection. In *Prisco v. United States*,[31] the court noted that "[i]n a long line of cases extending over sixty-five years, the Supreme Court has held that the parent-child relationship is protected as a matter of substantive due process."[32] Regardless of how far the courts have expanded this penumbra of rights, its core philosophy has

20. *Id.* at 123 n.3.
21. 262 U.S. 390 (1923).
22. *Id.* at 399.
23. 268 U.S. 510 (1925).
24. *Id.*
25. *Id.* at 535.
26. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2806 (1992).
27. Skinner v. Oklahoma, 316 U.S. 535 (1942).
28. Carey v. Population Servs., Int'l, 431 U.S. 678 (1977); Griswold v. Connecticut, 381 U.S. 479 (1965).
29. Stanley v. Illinois, 405 U.S. 645 (1972).
30. Moore v. City of East Cleveland, 431 U.S. 494 (1977).
31. 851 F.2d 93 (3rd Cir. 1988).
32. *Id.* at 97.

remained intact; the right of family association is a significant interest in fundamental rights jurisprudence. Any state action that potentially affects such rights should be analyzed under the strict scrutiny test.[33]

> Severance of the relationship between a parent and his child will survive constitutional scrutiny only if . . . (a) the asserted governmental interest [is] compelling; (b) there [is] a particularized showing that the state interest in question would be promoted by terminating the relationship; (c) it [is] impossible to achieve the goal in question through any means less restrictive of the rights of parent and child; and (d) the affected parties [are] accorded the procedural protections mandated by the Due Process Clauses.[34]

As the court in *Sims v. State Department of Public Welfare*[35] stated, "[i]t is now clear that there is a fundamental right emanating from the Constitution, which protects the integrity of the family unit from unwarranted intrusions by the state."[36] The importance of the traditional family to our country's heritage and the precedent of protecting the traditional family strongly suggests that a fundamental right to the companionship of one's family does or should exist.

B. Children Have A Fundamental Right To The Companionship of Their Parents

While most family rights decisions have addressed parents' rights, the Court of Appeals in *Franz* held that a child has a constitutionally protected interest in the companionship of his or her parent.[37]

Franz's wife and children were relocated through the Federal Witness Protection Program. Franz sued the United States, the Department of Justice, and the Attorney General for declaratory relief and monetary damages. The District Court held that the father failed to state a claim.[38] The Court of Appeals reversed, holding that Franz had stated a cause of action against the administrator of the witness protection program for abrogation of father's and children's "constitutionally protected rights . . . to one another's companionship."[39] According to the appellate court, the administrator could not infringe upon these rights "without (1) affording the father requisite procedural protections, (2) making a . . . showing of a legitimate state inter-

33. Franz v. United States, 707 F.2d 582, 603 (D.C. Cir. 1983).
34. *Id.* at 602.
35. 438 F. Supp. 1179 (S.D. Tex. 1977).
36. *Id.* at 1190.
37. *Franz*, 707 F.2d at 586.
38. *Id.* at 585.
39. *Id.* at 586.

est sufficient to justify the infringement, or (3) availing themselves of equally effective alternative solutions . . . that would have been less restrictive of the [father's and children's] rights."[40]

The appellate court further stated that "[i]t is beyond dispute that 'freedom of personal choice in matters of family life is a fundamental liberty interest' protected by the Constitution."[41] The court declared that "[a]mong the most important of the liberties accorded this special treatment [that of recognition as a fundamental right] is the freedom of a parent and child to maintain, cultivate, and mold their ongoing relationship."[42] The court held that to avoid unnecessary infringement of fundamental rights, the government must make a "*particularized* showing of advantage in every case in which it contemplates depriving someone of constitutionally protected interests."[43]

The court in *Franz* considered three factors in its determination of the validity of government action which interferes with parent-child relations. The court first considered that parents in the United States "historically have participated heavily in the rearing of their children."[44] Furthermore, this country holds the belief that "parents have a *right* to maintain contact with and shape the development of their children."[45] The court then stated that protecting the relationships between parents and children facilitates the socialization of children and ensures diversity and pluralism in the country's culture.[46] Most significantly, however, the court recognized "the profound importance of the bond between a parent and a child"[47] and stated that a child's "right to protection from interference in the relationship derives from the psychic importance to him of being raised by a loving, responsive, reliable adult."[48]

Where a parent is subject to deportation, a child's interests should be afforded at least the same consideration as those where a parent is enrolled in the Witness Protection Program. Both programs are under the direction of the Attorney General. While the court in *Franz* found no language requiring consideration of the impact of the

40. *Id.*
41. *Id.* at 594 (quoting Santosky v. Kramer, 455 U.S. 745, 753 (1982)).
42. *Id.* at 595.
43. *Id.* at 606 (emphasis added).
44. *Id.* at 597.
45. *Id.*
46. *Id.*
47. *Id.* at 599.
48. *Id.*

admission of a witness to the program on family members, nevertheless the court considered the impact upon family members an important factor in determining the constitutionality of the relocation.[49] Strict scrutiny should be applied to the suspension of deportation hearings even in the absence of administrative language mandating attention to the effect of state action on third parties. The Immigration and Naturalization Service ("INS") could easily meet the constitutional criteria of the *Franz* court by applying strict scrutiny review to deportations which may interfere with parent-child relationships.

The *Franz* court's position that the child's interest in the parent-child relationship deserves the same constitutional protection as the parent's interest is supported by earlier Supreme Court decisions. *In re Gault*[50] and *Bellotti v. Baird*,[51] established that a minor's fundamental rights generally merit as much constitutional protection as those of an adult.[52] The Southern District of Texas followed this view in *Sims v. State Department of Public Welfare*.[53] In *Sims*, the court stated,

> In a suit for the involuntary termination of parental rights, the child's interest is generally distinct from that of either the State or the parents. The interest of the state and the interest of the child differ in such a manner that they must be assumed to be adverse until there has been a final adjudication on the merits.[54]

Subsequent cases have reinforced the notion that children and parents have a protectable interest in the continuation of the parent-child relationship. *Myres v. Rask*,[55] for example, held that parents had a constitutionally protected right to the companionship and support of their children, and thus were allowed to bring a civil rights action for the wrongful death of their child.[56] Although the court in *Baldwin v. Ledbetter*[57] maintained that the interest of a child in the support and nurture of his or her parent is not a liberty interest which has *explicitly* been recognized "as protected by the Due Process clause, . . . 'we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case.'"[58]

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49. *Id.* at 597.
50. 387 U.S. 1 (1967).
51. 443 U.S. 622 (1979).
52. *Gault* 387 U.S. at 13; *Bellotti*, 443 U.S. at 635.
53. 438 F. Supp. 1179 (S.D. Tex. 1977).
54. *Id.* at 1194.
55. 602 F. Supp. 210 (D. Colo. 1985).
56. *Id.* at 213.
57. 647 F. Supp. 623 (N.D. Ga. 1986).
58. *Id.* at 638 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 501 (1977)).

C. The Effect of Parents' Wrongdoing on the Child's Ability To Assert A Fundamental Family Right

Where wrongdoing on the part of the parent triggers state action, government cannot automatically disenfranchise the child from his or her fundamental family rights. It is a basic concept of due process that one should not suffer a deprivation of liberty due to the arbitrary act of the government.[59] Penalizing children for the acts of their parents by refusing to honor the child's constitutional rights clearly denies essential values inherent in our judicial system.

In *White v. Rochford*,[60] children brought a civil rights action against police officers for leaving them in a car on a freeway after their uncle was arrested for drag racing.[61] Appellant children charged, inter alia, the state with interfering with their right to liberty and family integrity.[62] The court relied on *Meyer v. Nebraska*,[63] *Pierce v. Society of Sisters*,[64] and *Skinner v. Oklahoma*[65] to hold that the children's complaint stated a cause of action and that their substantive due process rights had been violated.[66] The court stated that it was "difficult to believe that this relationship [was] any less harmed by depriving children of adult care and stranding them on a freeway than by controlling school curricula."[67]

The dissent argued that "it was the uncle's illegal activities that caused the children to be stranded, not any actions by the police."[68] The majority opinion found this approach overbroad and noted the danger of allowing the state to use a "you brought this on yourself" justification for constitutional violations.[69] Similarly, citizen children of illegal immigrants have no control over their parents' actions. They are not the wrongdoers, and yet they are penalized as if they were responsible for their parents' behavior.

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59. "Due process of law [as referred to in the Fifth Amendment] refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, *exercised within the limits therein prescribed* . . . ." Hurtado v. California, 110 U.S. 516, 535 (1884) (emphasis added).

60. 592 F.2d 381 (7th Cir. 1979).

61. *Id.* at 382.

62. *Id.* at 383.

63. 262 U.S. 390 (1923).

64. 268 U.S. 510 (1925).

65. 316 U.S. 535 (1942).

66. *White*, 592 F.2d at 383 n.1.

67. *Id.*

68. *Id.* at 389 (Kilkenny, J., dissenting).

69. *Id.*

Plyler v. Doe[70] also stands for the proposition that children should not be penalized for their parents' acts.[71] In this 1982 decision, the United States Supreme Court stated that children may not be punished for parental behavior beyond their control.[72] In perhaps the most frequently-cited portion of Justice Brennan's opinion, the Court held that "[e]ven if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."[73]

In *Plyler*, the Court reviewed a statute that withheld state funds for the education of children who were in the United States illegally.[74] The statute also authorized the school districts to deny enrollment to these children.[75] Justice Brennan, writing for the majority in *Plyler*, conceded that the state may withhold certain benefits from those who are in the United States illegally as a product of their own conduct.[76] Justice Brennan, however, emphasized that alien children require protection from the imposition of a "discriminatory burden on the basis of a legal characteristic over which children can have little control."[77] Justice Brennan recognized that lax enforcement of immigration laws, combined with opportunities for the employment of undocumented aliens, resulted in a "substantial 'shadow population' of illegal migrants—numbering in the millions" who are encouraged to stay in the United States as a source of cheap labor, but who are not afforded the benefits offered to citizens.[78] The Court refused to define illegal aliens as a suspect class because of their voluntary entry into this country.[79] Brennan's rationale is based on a child's lack of control over the decisions parents make regarding residence.

Brennan said there are persuasive arguments that support the view that a state may withhold benefits from residents who are in the United States illegally.[80]

> These arguments do not apply with the same force to classifications imposing disabilities on the minor children of such illegal

70. 457 U.S. 202 (1982).
71. *Id.* at 220.
72. *Id.*
73. *Id.*
74. *Id.* at 205 n.1.
75. *Id.* at 205.
76. *Id.* at 219, 228.
77. *Id.* at 220.
78. *Id.* at 218.
79. *Id.* at 219 n.19.
80. *Id.* at 225.

> entrants. . . . [T]hose who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences . . . . But the children of those illegal entrants are not comparably situated.[81]

The parents have the ability to follow the law and leave the country, but the children do not have this ability. The Texas statute in question was directed against the children on the basis of a "legal characteristic" over which they have no control.[82] Thus, Justice Brennan concluded, it would be difficult to conceive of a rational justification for penalizing these children for their presence within the United States.[83] In *Plyler*, the Court emphasized the fact that "education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all," and that "education has a fundamental role in maintaining the [basic] fabric of our society."[84] In addition, the Court discussed the effect that a deprivation of education would have on a child: "[B]y depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority."[85]

In his concurring opinion in *Plyler*, Justice Blackmun observed that "[c]hildren [who are] denied an education are placed at a permanent and insurmountable competitive disadvantage, for an uneducated child is denied even the opportunity to achieve."[86] Justice Blackmun went on to state that the lack of education results in the creation of a "discrete underclass."[87] This language pervades virtually every sentence of the concurrence. Justice Blackmun sees the uneducated as relegated to a "second-class" existence, and states that the right to an education "strike[s] at the heart of equal protection values by involving the State in the creation of permanent class distinctions."[88] Justice Powell's concurring opinion in *Plyler* also expresses concern over the vicarious punishment of innocent children. Justice Powell states that "[t]hese children . . . have been singled out for a lifelong penalty and stigma," and that a legislative classification that threatens to create "an underclass of future citizens and residents can-

81. *Id.* at 219-20.
82. *Id.* at 220.
83. *Id.*
84. *Id.* at 221.
85. *Id.* at 222.
86. *Id.* at 234 (Blackmun, J., concurring).
87. *Id.*
88. *Id.*

not be reconciled with one of the fundamental purposes of the Fourteenth Amendment."[89]

Chief Justice Burger dissented, stating that the Equal Protection Clause does not prohibit legislation which distinguishes between groups based on characteristics over which they can exert no influence.[90] The Chief Justice stated that the Clause is designed to protect "against arbitrary and irrational classifications . . . it is not an all-encompassing 'equalizer' designed to eradicate every distinction for which persons are not 'responsible.'"[91]

This reasoning is only persuasive if one assumes that the classification which deprives children of an education, based solely on parentage, is rational. Chief Justice Burger does not argue that denying a non-citizen child an education promotes a state interest. Rather, he relies, in part, on the Supreme Court's holding in *San Antonio Independent School District v. Rodriguez*.[92] The Court in *Rodriguez* upheld a Texas statute which authorized an ad valorem tax by each school district on property within the district.[93] The tax supplemented educational funds received from the state and resulted in substantial differences in the per pupil expenditures in accordance with local tax assessments.[94] *Rodriguez* can be distinguished in that under the Texas statute, an education was provided to all children. In *Plyler*, however, children of illegal aliens faced a total deprivation of education.[95] In *Rodriguez*, Justice Powell stressed that the appellants' contention was not that the lack of personal resources brought about an absolute deprivation, but rather that children residing in poor districts received a lesser quality education than children residing in wealthier school districts.[96] He further added that the "Equal Protection Clause does not require absolute equality or precisely equal advantages,"[97] and that no system can assure precise equality in education because of the infinite variables affecting the educational process.[98] *Plyler*, on the other hand, did not address "absolute equality." *Plyler*, instead, addressed

89. *Id.* at 238-39 (Powell, J., concurring).

90. *Id.* at 245 (Burger, C.J., dissenting).

91. *Id.* at 245.

92. *Id.* at 247 (relying on San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)).

93. *Rodriguez*, 411 U.S. at 9.

94. *Id.* at 1.

95. *Plyler*, 457 U.S. at 205.

96. *Rodriguez*, 411 U.S. at 23.

97. *Id.* at 24.

98. *Id.*

absolute deprivation of a right. Thus, the Court in *Plyler* analyzed the Equal Protection Clause with a greater degree of scrutiny.

In *Plyler*, the Court also stressed the importance of education in enabling an individual to successfully function in society. The majority and dissenting opinions both emphasize advancement on the basis of individual merit, and the inherent opportunity in education to raise one's self esteem which inculcates "fundamental values necessary to the maintenance of a democratic political system."[99] Yet the Court did not apply strict scrutiny to the Texas statute in *Plyler*.

The District Court and the Court of Appeals held that it was unnecessary to decide whether the statute would survive strict scrutiny because the discrimination embodied in the statute would not survive rational basis review.[100] The Supreme Court conceded that public education is not a fundamental right granted by the Constitution, and that alienage is not a suspect class. Yet, the Court applied the intermediate scrutiny test because public education is more than a mere "benefit" conferred by the government, and because undocumented children are a "discrete class of children not accountable for their disabling status."[101]

The discussion in *Plyler* focused upon the disadvantages that result from the deprivation of education. The holding specifically applied to children who share the undocumented status of their parents.[102] The judiciary extended this line of reasoning in public assistance cases to *citizen* children whose parents are undocumented.[103] The rationale in *Plyler*, however, has failed to reach the sphere of immigration law.

The principle of *Plyler*, which prohibited the government from depriving alien children of the non-fundamental right to an education, should be extended to protect the fundamental rights of citizen children to live with their parents. To fail to do so is to punish these citizen children by refusing to enforce their constitutional rights.

The need to recognize a child's fundamental right to the companionship of his or her parents is supported by *Franz v. United States*.[104] Under *Franz*, state interference adversely affecting a child's fundamental right to companionship cannot be justified absent a showing

99. *Plyler*, 457 U.S. at 221 (quoting Ambach v. Norwick, 441 U.S. 68, 77 (1979)).
100. *Id.* at 208.
101. *Id.* at 220, 223.
102. *Id.* at 229.
103. Holley v. Lavine, 553 F.2d 845 (2d Cir. 1977); Doe v. Miller, 573 F. Supp. 461 (N.D. Ill. 1983); Darces v. Woods, 679 P.2d 458 (Cal. 1984).
104. 707 F.2d 582 (D.C. Cir. 1983).

that the parents are unfit to care for their offspring.[105] The court acknowledged that the state may sever the bond between parent and child if the parent neglects the child.[106] Nonetheless, without a showing that the parents' behavior harms their child, state action cannot violate the child's fundamental rights unless it is established that the action is the least restrictive means to achieve a compelling end.[107]

In most suspension of deportation cases, the parents and children enjoy a normal, healthy and loving relationship.[108] Unless the state can show that the parents are unfit, the deportation should be reviewed under a strict scrutiny standard. Where the state can show a valid *parens patriæ* justification for separation of parent and child, the child's constitutional rights would not be violated because the state would be acting in the best interests of the child. To substantially affect the parent-child relationship without compelling reason, however, is clearly a violation of the child's rights.

III. Procedural Due Process and the Right of Children to Parental Companionship

A. The Failure of the Courts to Apply the General Rule of Protection of Rights for the Citizen Child in the Immigration Context

1. The Role of the Court in Immigration Proceedings

Not long ago, a citizen child had virtually no remedy for a determination of the deportability of his or her parents.[109] The Attorney General has not always had the power to suspend a deportation proceeding. Prior to 1940, an alien's only remedy was to appeal directly to Congress.[110] The 1952 version of the INA gave the Attorney General the power to suspend deportation if the alien could demonstrate "exceptional and extremely unusual hardship."[111]

105. *Id.* at 604.
106. *Id.*
107. *Id.*
108. It has been the author's experience when practicing immigration law that all of the members of the family appeared to constitute a closely united family.
109. In 1917 Congress passed the first comprehensive revision of the immigration laws. Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874 (1917). Section 19 required the deportation of all aliens who were in the United States in violation of the Act. *Id.* at 897.
For a historical reference to suspension of deportation see Foti v. INS, 375 U.S. 217, 222-26 (1963).
110. Alien Registration Act of 1940, Pub. L. No. 76-670, § 20, 54 Stat. 670, 672 (1940).
111. INA, Pub. L. No. 82-414, § 244(a)(1), 66 Stat. 163, 214 (1952) (current version at 8 U.S.C. § 1254(a) (1988 & Supp. V 1993)).

Statutory relief is now available which allows a deportable alien to suspend the deportation proceedings when certain specific conditions are satisfied. 8 U.S.C. section 1254(a)(1)[112] provides that the Attorney General may suspend deportation and adjust the status of an otherwise deportable alien who: (1) has been physically present in the United States for not less than seven years; (2) is a person of good moral character; and (3) is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or his spouse, parent, or child, who is a citizen of the United States or an alien admitted for permanent residence.[113]

The first and second statutory requirements are "findings of fact" and must be "supported by reasonable, substantial, and probative evidence on the record considered as a whole."[114] The third statutory requirement, extreme hardship, is at the discretion of the Attorney General, and is not determined by an objective standard.[115] The "extreme hardship" provision is problematic because the term is not defined by the INS and the courts have declined to meaningfully review the Attorney General's discretion in its interpretation. While the Supreme Court in *INS v. Jong Ha Wang*[116] expressly stated that "[t]he crucial question in this case is what constitutes 'extreme hardship,'"[117] it has never attempted to define the term. Thereafter, with respect to the words "extreme hardship," the Court observed that "the Act commits [this] definition in the first instance to the Attorney General and his delegates"[118] and they "have the authority to construe 'extreme hardship' narrowly should they deem it wise to do so."[119]

Lower courts seem to agree that *Jong Ha Wang* is inconsistent with prior federal courts of appeals decisions which held that determinations of extreme hardship were reviewable under 8 U.S.C. § 1105(a)(4) to the same extent as under § 1254(a)(1).[120] Because the Attorney General, under *Jong Ha Wang*, has the power to define "extreme hardship," lower courts seem hesitant to substantively review determinations of "extreme hardship."[121] At the same time, lower

112. (1988 & Supp. V 1993) (amending INA § 244(a)(1) (1952)).
113. *Id.*
114. 8 U.S.C. § 1105(a)(4) (1992).
115. 8 U.S.C. § 1254(a)(1) (1988 & Supp. V 1993).
116. 450 U.S. 139 (1981) (per curiam).
117. *Id.* at 144.
118. *Id.*
119. *Id.* at 145.
120. *See infra* note 399.
121. *Jong Ha Wang*, 450 U.S. at 145. *See* Hernandez-Cordero v. INS, 819 F.2d 558, 561-62 (5th Cir. 1987).

courts do not believe that *Jong Ha Wang* foreclosed all review in this area.[122] The federal courts of appeals, when reviewing allegations of extreme hardship, believe "that judicial review remains available to ensure that an alien, denied relief [of a suspension of deportation/extreme hardship determination,] . . . has had a fair and full consideration of his claims."[123] *Wang* was decided according to classic lines of limited judicial review, following the principle of "plenary power" and deferring to other branches of government as illustrated in *Fiallo v. Bell*.[124] The United States Supreme Court discussed the limited scope of judicial inquiry into immigration legislation in *Fiallo*. The Court, addressing the issue of whether the father of an illegitimate child qualifies as a parent under the INA, stated that "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens."[125] Furthermore, Justice Powell, author of the majority opinion in *Fiallo*, wrote that "in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'"[126] In *Fiallo*, the Court specifically stated that it had no judicial authority to substitute a political judgment for that of Congress, and that the denial of preferential status to certain parents is a "policy question entrusted exclusively to the political branches of our government."[127] Therefore, the burden currently rests with the alien to demonstrate statutory eligibility and equitable justifications for the exercise of discretion by the INS.

The dissatisfaction with the holding in *Fiallo* was readily apparent when, shortly thereafter, the Ninth Circuit decided *Palmer v. Reddy*.[128] One way to circumvent the harsh consequences of *Fiallo* is to have a stepmother petition for her husband's illegitimate child. In order to approve the petition, the Board of Immigration Appeals ("BIA") requires a stepparent to show "an interest in the stepchild's welfare prior to that child's eighteenth birthday."[129] The stepmother can demonstrate an interest in the child by either "permitting the child to live in the family home and caring for him as a parent, or . . . by

122. Jara-Navarrete v. INS, 813 F.2d 1340, 1342 (9th Cir. 1987).

123. Ramos v. INS, 695 F.2d 181, 185-86 (5th Cir. 1983).

124. 430 U.S. 787 (1977).

125. *Fiallo*, 430 U.S. at 792 (quoting Oceanic Navigation v. Stranaham, 214 U.S. 320, 339 (1909)).

126. *Id.* at 792 (quoting Mathews v. Diaz, 426 U.S. 67, 80 (1976)).

127. *Id.* at 798.

128. 622 F.2d 463 (9th Cir. 1980).

129. *In re* Moreira, 17 I. & N. Dec. 41, 46 (BIA 1979).

demonstrating an active parental interest in the child's support, instruction and general welfare."[130] The requirement of "active parental interest" was entirely eliminated by the Ninth Circuit in *Palmer*.[131] In *Palmer*, the court literally construed the stepchild provision of the INA, and only required a valid marriage to the natural parent.[132] Although it is questionable whether this interpretation is consistent with congressional intent to reunify families, it clearly helps fathers, such as the one involved in *in re MacMillan*,[133] bring their children into America.[134]

Congress finally addressed the harsh consequences of *Fiallo* in 1986 when Congress passed section 315 of the Immigration Reform and Control Act ("IRCA"), amending the definition of a child in INA section 101(b)(1)(D).[135] The new provision extends the definition of a child to include an illegitimate child by virtue of his or her relationship to the natural father.

The harsh effects of *Jong Ha Wang* have not been corrected in a similar fashion. On the contrary, in *INS v. Doherty*[136] the Court affirmed that a denial of a motion to reopen deportation is only subject to review for abuse of discretion.[137] In *Doherty*, the Court upheld the Attorney General's denial of an alien's motion to reopen deportation

130. *Id.* at 47.

131. *Palmer*, 622 F.2d at 464.

132. *Id.*

133. 17 I. & N. Dec. 605 (BIA 1981). In *in re MacMillan*

> the beneficiaries, twin brothers, were born in London, England, on July 26, 1962, to the petitioner's husband and a woman who was not then and never became his wife. The beneficiaries' natural mother abandoned them when they were infants and they have since resided with their paternal grandmother in Grenada, West Indies.

Id. The BIA reluctantly decided to construe § 101(b)(1)(B) in accordance with *Palmer v. Reddy*. This literal interpretation of § 101(b)(1)(B), by the Ninth Circuit, rendered the beneficiaries stepchildren of the petitioner, entitling them to immediate relative status. *Id.* at 606-07.

134. *Id.*

135. This part of the statute provides:

> (b) As used in subchapters I and II of this chapter—
> (1) The term "child" means an unmarried person under twenty-one years of age who is . . . (D) an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the chid to its natural mother or to its natural father if the father has or had a bona fide parent-child relationship with the person.

INA, Pub. L. No. 82-414, § 101, 66 Stat. 163, (1952) (codified as amended in 8 U.S.C. § 1101 (Supp. V 1993)).

136. 112 S. Ct. 719 (1992).

137. *Id.* at 720.

in an attempt to apply for asylum and withholding of deportation.[138] The Court held that the Attorney General did not abuse his discretion even though a decision to withhold deportation is mandatory.[139] Thus, under the holding of *Doherty*, even if Congress rewrote 8 U.S.C. section 1254 to require the Attorney General to grant suspension of deportation under specified circumstances, a motion to reopen could still be denied, and would be upheld absent an abuse of discretion.

This anomaly was pointed out by Justice Scalia who, partly dissenting in *Doherty*, explained that "[b]ecause of the mandatory nature of the withholding-of-deportation provision, the Attorney General's power to deny requests withholding claims differs significantly from his broader authority to administer discretionary forms of relief such as asylum and suspension of deportation."[140]

As a result of the Court's holding in *Doherty*, a denial of a motion to reopen deportation in order to request a withholding of deportation may constitute a violation of our international obligations. In *INS v. Cardoza-Fonseca*,[141] the Court recognized that the mandatory duty imposed by 8 U.S.C. § 1253(h) parallels the United States mandatory non refoulment provision under Article 33.1 of the United Nations Convention Relating to the Status of Refugees.[142] Article 33.1 of the Convention, which is subject to certain exceptions, provides: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[143]

In comparison, 8 U.S.C. section 1253(h)(1) states: "The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such county on account of race, religion, nationality, membership in a particular social group, or political opinion."[144]

In the suspension of deportation context, there is no mandatory provision that requires the Attorney General to grant relief. Nor is

138. *Id.* at 722.

139. *Id.* at 725. The Court came to this conclusion notwithstanding the fact that asylum, like extreme hardship, can be determined at the discretion of the Attorney General. *Id.*

140. *Id.* at 729 (Scalia, J., dissenting).

141. 480 U.S. 421, 428-29 (1987).

142. 19 U.S.T. 6259, 6267; 189 U.N.T.S. 150, 176 (1954).

143. *Id.*

144. 8 U.S.C. § 1253(h)(1) (Supp. V 1993).

there a treaty ratified by the United States that requires granting relief. A denial of a motion to reopen a request for suspension of deportation, however, may violate fundamental rights of a United States citizen.

In order to understand the impact of *Jong Ha Wang*, it is necessary to understand two separate situations which implicate suspension of deportation hearings. The first situation is one in which aliens at their original deportation hearing are eligible for suspension and request suspension to be granted on the merits. The second, and more frequent situation, involves an alien who is ineligible for suspension at the time of the original deportation hearing because he or she has not demonstrated seven years of continued physical presence in the United States, or does not have a United States citizen child. A typical example of the second scenario involves an alien who requests voluntary departure but does not leave the country. Upon eligibility, the alien files a motion to reopen the deportation proceedings in order to request the substantive relief of deportation suspension.[145]

Motions to reopen immigration proceedings are disfavored for the same reasons that petitions for rehearing and motions for a new trial on the basis of newly discovered evidence are disfavored.[146] This is especially true in a deportation proceeding where, as a general matter, each delay works to the advantage of a deportable alien who wishes to merely remain in the United States.[147] Motions to reopen are couched in the negative[148] and are subjected to inconsistent standards of review. These inconsistencies were put to rest in *INS v. Abudu*[149] and *INS v. Doherty*.[150] This very limited standard of review

145. The Immigration Act of 1990 amended 8 U.S.C. § 1252(e) of the INA by providing that an alien, granted voluntary departure, who remains in the United States after the scheduled date of departure other than for exceptional circumstances, shall not be eligible for certain types of relief.

146. INS v. Abudu, 485 U.S. 94, 107 (1988).

147. *See, e.g.*, INS v. Rios-Pineda, 471 U.S. 444, 450 (1985).

148. 8 C.F.R. § 3.2 provides in part:

> Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted . . . unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing.

8 C.F.R. § 3.2 (1994).

149. According to the Court in *INS v. Abudu*:

> There are at least three independent grounds on which the BIA may deny a motion to reopen. First, it may hold that the movant has not established a prima facie case for the underlying substantive relief sought. The standard of review of such a denial is not before us today. . . . Second, the BIA may hold that the

for statutory eligibility, as well as for discretionary decisions, makes this procedure burdensome for the alien and is likely to produce situations in which the constitutional rights of the citizen child are violated without the procedural safeguards of a hearing.

To compound the problem, *Jong Ha Wang* has been applied to both the substantive and procedural aspects of this avenue of relief.[151] Little attention is given to the fact that a substantive decision to grant suspension avoids deportation and confers lawful permanent residency. In contrast, a decision to reopen grants the alien only an evidentiary hearing at which he or she will have the opportunity to prove the facts necessary for suspension (and for a temporary stay of deportation).

2. *What Constitutes Extreme Hardship*

While the Supreme Court stated that the "words [extreme hardship] are not self-explanatory,"[152] no case has yet defined the term precisely. The BIA has defined situations that do *not* constitute extreme hardship.[153] "The mere fact that an alien's child is born in the

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> movant has not introduced previously unavailable, material evidence, 8 CFR § 3.2 (1987), or, in an asylum application case, that the movant has not reasonably explained his failure to apply for asylum initially, 8 CFR § 208.11 (1987). . . . We decide today that the appropriate standard of review of such denials is abuse of discretion. Third, in cases in which the ultimate grant of relief is discretionary . . . the BIA may leap ahead, as it were, over the two threshold concerns (prima facie case and new evidence/reasonable explanation), and simply determine that even if they were met, the movant would not be entitled to the discretionary grant of relief. We have consistently held that denials on this third ground are subject to an abuse-of-discretion standard.

485 U.S. at 104-05. *See also* INS v. Rios-Pineda, 471 U.S. 444 (1985) (suspension of deportation); INS v. Bagamasbad, 429 U.S. 24 (1976) (adjustment of status).

150. *See infra* notes 136-40 and accompanying text.

151. In *Jong Ha Wang*, there appear to be two interconnected issues: (a) whether the BIA should have reopened the deportation proceeding, and (b) whether the aliens had demonstrated extreme hardship. INS v. Jong Ha Wang, 450 U.S. 139, 139 (1981). Thus, *Jong Ha Wang* is applied to both procedural and substantive aspects of judicial review in suspension cases. For example, *Jong Ha Wang* is routinely cited for the proposition that courts should exercise restraint in ordering the BIA to reopen deportation proceedings. *See, e.g.*, Mesa v. INS, 726 F.2d 39, 41 (1st Cir. 1984) (stating the Board's decision not to reopen must be accepted by a court unless arbitrary, capricious, or an abuse of power). It is also regularly read to mean that the agency "has considerable discretion to decide what constitutes 'extreme hardship.'" Luna v. INS, 709 F.2d 126, 127 (1st Cir. 1983). Thus *Jong Ha Wang* broadly controls not only cases involving motions to reopen but also direct appeals from denials of suspension.

152. *Jong Ha Wang*, 450 U.S. at 144.

153. In a recent BIA interim decision, the BIA reviewed the factors that do not constitute extreme hardship:

> While the political and economic conditions in the alien's homeland are relevant, they do not justify a grant of relief unless other factors such as advanced age

United States does not entitle the alien to any favored status in seeking discretionary relief from deportation."[154] Economic loss alone does not constitute extreme hardship, but it is a factor to be considered in determining eligibility for suspension of deportation.[155] The Third Circuit's reasoning is that "to hold otherwise would open the doors to permanent residence in the United States to any citizen of an underdeveloped country who could get here."[156] Claims of inadequate medical care, educational systems, and lower standards of living have also been held insufficient by the courts to establish extreme hardship.[157] Economic difficulties combined with the fact that two children who have spent their lives in the United States and speak only English will be forced to live in the Philippines is also insufficient.[158] Even a claim that deportation would impose severe economic hardship upon petitioners' children because of the unavailability of employment in the foreign country has not created a prima facie showing of extreme hardship.[159]

Thus, the term "extreme hardship" as it is presently, albeit vaguely, defined provides practically unattainable relief for the citizen child whose parents are subject to deportation. The Attorney General and his delegates retain an immense amount of power because they are not required to define the term clearly. Furthermore, the limited scope of judicial review in these cases burdens the citizen child who suffers a loss of rights.

> or severe illness combine with economic detriment to make deportation extremely hard on the alien or his qualifying relative. Economic detriment in the absence of other substantial equities is not extreme hardship. Even a significant reduction in the standard of living is not by itself a ground for relief. The loss of a job and the concomitant financial loss incurred does not rise to the level of extreme hardship. Similarly, the readjustment of an alien to life in his native country after having spent a number of years in the United States is not the type of hardship that is characterized as extreme, since similar hardship is suffered by most aliens who have spent time abroad.

In re IGE, No. 3230, 1994 BIA LEXIS 13 (BIA Sept. 16, 1994).

154. Villena v. INS, 622 F.2d 1352, 1359 (9th Cir. 1980).

155. Barrera-Leyva v. INS, 637 F.2d 640, 643 (9th Cir. 1980).

156. Acosta v. Gafney, 558 F.2d 1153, 1157 (3d Cir. 1977).

157. *Barrera-Leyva*, 637 F.2d at 643-44.

158. *Id.* at 644.

159. "In at least one case, however, we distinguished between inability to find comparable employment and inability to find *any* employment, suggesting that the inability to secure *any* employment constitutes more than mere economic detriment." *Id.* at 643 (citing Kasravi v. INS, 400 F.2d 675, 676 (9th Cir. 1968)) (emphasis added).

B. From Extreme Hardship to Extreme Deference

Many scholars take different positions regarding the proper role of judicial review over agency determinations. Regardless of point of view, there is consensus that judicial review of most agency action is an essential safeguard against abuses of agency authority.[160] There is also consensus that judicial intervention can undermine agency effectiveness.[161] The difficulty lies in distinguishing between the situations in which a court should supply an independent statutory hearing from the situations in which a court should accept any reasonable interpretation by the agency.

The Supreme Court applies a two-step test for judicial review of agency statutory interpretation. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* Justice Stevens, for a unanimous Court, articulated this two-step approach:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . If, however, the court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[162]

In the second step of *Chevron*, the Court distinguished between two different situations:

> [(1)] If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to statute. [(2) When Congress has not intentionally left a gap,] a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[163]

160. *See, e.g.*, LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 321 (1965).

161. *Id.* at 321-22.

162. 467 U.S. 837, 842-43 (1984) (footnotes omitted).

163. *Id.* at 843-33 (footnotes omitted).

The Court cited *Jong Ha Wang* as an example of the latter situation.[164] The delegation rationale of *Chevron*, however, is intimately related to the question of extreme deference given to agency determinations in immigration law. Specifically, a determination of "extreme hardship" in the context of suspension of deportation, committed by the INA to the Attorney General's discretion, creates an ambiguity or silence. The factors that create "extreme hardship" are not defined. Thus, the second step of the *Chevron* test, implicit delegation by Congress, is triggered. In other words, a superficial reading of *Chevron* indicates that Congress has delegated both policy formation and construction of rules required to fill any gaps to the Attorney General, justifying a highly deferential attitude by the courts.[165]

As one commentator pointed out, the *Chevron* standard is "fully consistent with traditional principles of judicial review."[166] Courts retained their authority, first recognized by Chief Justice Marshall in *Marbury v. Madison*,[167] to "say what the law is."[168] This authority is reinforced by *Chevron*, which specifically states that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."[169] This notion of deference is supported by Justice Scalia:

> It is not immediately apparent why a court should ever accept the judgment of an executive agency on a question of law. Indeed, on its face the suggestion seems quite incompatible with Marshall's aphorism that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Surely the law, that immutable product of Congress, is what it is, and its content—ultimately to be decided by the courts—cannot be altered or affected by what the Executive thinks about it. I suppose it is harmless enough to speak about "giving deference to the views of the Executive" concerning the meaning of a statute, just as we speak of "giving deference to the views of the Con-

164. *Id.* at 844.

165. *Chevron* is the last of a long line of cases to give significant deference to administrative agencies, leading some commentators to believe that *Chevron* altered the scope of review. *See, e.g.*, Robert A. Anthony, *Which Agency Interpretations Should Bind the Courts?*, 7 YALE J. ON REG. 1, 4 (1990); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 460-61 (1989). It appears, however, that these statements have exaggerated the importance of *Chevron*. "*Chevron's* rhetoric, though it seemed bold, was hardly revolutionary." Russell L. Weaver, *Some Realism About Chevron* 58 MO. L. REV. 129, 135-36 (1993).

166. Weaver, *supra* note 165, at 137.

167. 5 U.S. (1 Cranch) 137 (1803).

168. *Id.* at 177.

169. Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837, 843 & n.9 (1984).

> gress" concerning the constitutionality of particular legislation—the mealy-mouthed word "deference" not necessarily meaning anything more than considering those views with attentiveness and profound respect, before we reject them. But to say that those views, if at least reasonable, will ever be *binding*—that is seemingly, a striking abdication of judicial responsibility.[170]

The same idea is reflected by Justice Scalia's concurring opinion in a more recent Supreme Court decision: "[D]eference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in the light of the principles of construction courts normally employ."[171]

The principle that deference depends upon congressional delegation does not necessarily lead to the conclusion that statutory ambiguity alone establishes such delegation. It is one thing to find express congressional delegation in the form of legislative rule making authority. It is quite another to assume that ambiguity or silence constitutes such a delegation.[172]

While certain factors, such as inherently broad statutory language and the perceived expertise of the agency suggest that delegation is appropriate, the courts have identified danger signals that indicate that deference to the agency is less appropriate. One of these danger signals is the presence of a constitutional issue.[173] This danger signal is based on the well-recognized principle that the courts will construe statutes to avoid passing on constitutional issues.[174]

Because courts generally require clear statements of congressional intent to reach such constitutional issues, agency interpretations that raise constitutional questions are less likely to merit deference.[175]

The issue of deference is particularly important in the area of immigration law since courts have traditionally deferred to the political branch of government that has expertise in immigration, the BIA. This Article exhibited that the determination of extreme hardship in the suspension of deportation involves the constitutional rights of the

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170. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 513-14 (1989).

171. Equal Employment Opportunity Comm. v. Arabian American Oil Co., 499 U.S. 244, 260 (1991) (Scalia, J., concurring).

172. Eric M. Braun, Note, *Coring The Seedless Grape: A Reinterpretation of* Chevron USA Inc., v. NRDC, 87 COLUM. L. REV. 986, 995 (1987).

173. Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 247-48 (1985).

174. "[W]e ought not to pass on questions of constitutionality .... unless such adjudication is unavoidable." Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101, 105 (1944).

175. Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in The Supreme Court*, 95 HARV. L. REV. 892 (1982).

citizen child.[176] Judicial review of agency determinations may require a de novo examination of the facts that implicate constitutional rights.

When the Supreme Court reviewed *Jong Ha Wang*, the constitutional rights of petitioner's citizen children were not addressed. As discussed earlier, the Court focused on whether petitioners had presented a prima facie case that deportation would result in extreme hardship to either themselves or their children, so as to entitle them to discretionary relief under the Act.[177] The Court stated that the crucial issue of the case was determining what factors constitute "extreme hardship."[178] Although the Court never defined the term, it chided the Ninth Circuit for "improvidently encroach[ing] on the authority which the Act confers on the Attorney General and his delegates."[179]

Although the issue of extreme hardship is committed to the discretion of the Attorney General, and although *Jong Ha Wang* was decided three years before *Chevron*, the Court could have interpreted the statute as consistent with the delegation rationale in *Chevron*, because Congress is likely to entrust constitutionally charged statutory issues to the judiciary. "Agencies have little expertise in constitutional interpretation and may have an institutional interest in the expansion of their authority."[180]

Another danger signal also ignored by the Court in *Jong Ha Wang* is agency interpretation of statutorily required procedures.[181] The question in *Jong Ha Wang* boiled down to whether the alien parents should be given a hearing in order to evaluate the merits of their *prima facie* case for suspension of deportation.[182] The Supreme Court reminded the Ninth Circuit that motions to reopen were not in the

176. *See infra* note 241 and accompanying text.

177. INS v. Jong Ha Wang, 450 U.S. 139, 141 (1981).

178. *Id.* at 144.

179. *Id.* According to the Court:

> Secondly, and more fundamentally, the Court of Appeals improvidently encroached on the authority which the Act confers on the Attorney General and his delegates. The crucial question in this case is what constitutes "extreme hardship." These words are not self-explanatory, and reasonable men could easily differ as to their construction. But the Act commits their definition in the first instance to the Attorney General and his delegates, and their construction and application of this standard should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute.

Id.

180. Braun, *supra* note 172, at 1003.

181. JAFFE, *supra* note 160, at 566. "Insofar as procedural questions involve estimates of fairness, the judges are not only experts, but are free from the pressure on the administrator to realize his program." *Id.*

182. *Jong Ha Wang*, 450 U.S. at 141.

Act, but were drafted in the negative in the regulations.[183] The Court chided the Ninth Circuit once more for "circumvent[ing] this aspect of the regulation, which was obviously designed to permit the Board to select for hearing only those motions reliably indicating the specific recent events that would render deportation a matter of extreme hardship for the alien or his children."[184]

It is unclear to what extent the Constitution requires independent judicial review of agency determinations of fundamental interests. Due process, however, may compel independent review for certain types of rights not derived from the constitution.

The Supreme Court, in *Ng-Fung Ho v. White*[185] made clear that judicial review is necessary before a lawful resident alien who claims to be a United States citizen can be deported.[186] In this case, the Court was confronted with an act of Congress that ordered the deportation of certain persons by executive order without a right to a judicial hearing.[187] Specifically, the Court stated:

> To deport one who so claims to be a citizen, obviously deprives him of liberty . . . . It may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law. The difference in security of judicial over administrative action has been adverted to by this court.[188]

The mere possibility of deporting someone claiming United States citizenship without a judicial hearing is constitutionally unacceptable. Yet, this is exactly what happens to citizen children in suspension of deportation cases. In particular, such Fifth Amendment concerns arise where the BIA denies a motion to reopen, basing its decision on the wide discretion of the Attorney General to determine "extreme hardships," and the extreme deference that courts give that decision.

C. Due Process and the Interest of the Child in the Determination of "Extreme Hardship"

Turning to the procedural due process rights of a citizen child in the area of suspension of deportation, the enormous discretion

183. *Id.* at 143.
184. *Id.*
185. 259 U.S. 276 (1922).
186. *Id.* at 284-85.
187. *Id.* at 277.
188. *Id.* at 284-85 (citations omitted).

wielded by the Attorney General and the lack of an opportunity to hear the child's concerns creates an irrebuttable presumption that the deportation of the parents does not cause extreme hardship to the child.

A good illustration is *Hernandez-Cordero v. INS*,[189] in which the respondents were a husband and wife, both citizens of Mexico who had continuously resided in the United States since their marriage in 1975.[190] They had four children.[191] The three youngest were American citizens, ages eight, nine and eleven.[192] The husband was self-employed and the wife was a homemaker.[193] They built their own house on a lot bought in 1983.[194] Mr. Hernandez, through hard work and thrift, accumulated assets totaling $70,000 by 1987.[195] These assets included their home, a motor vehicle, his tools, and a piece of fully paid, unimproved real estate.[196] The respondents attempted to demonstrate that extreme hardship would result from deportation.[197] As in many suspension cases including *Jong Ha Wang*,[198] there was ample evidence that the Hernandezes were an exemplary family who had worked hard to establish a life for themselves in the United States and who would suffer devastating consequences if deported to Mexico.[199] The majority opinion referred to them as "honest, dependable hardworking members of society" and stated that "[a]ny of us would be happy to see them gain citizenship."[200] While the children spoke Spanish, they did not read or write in Spanish and each had entered an American school.[201] Respondents introduced affidavits from a psychologist, who concluded the Hernandez family would suffer severe emotional and psychological consequences if forced to return to Mexico.[202] An economist detailed the severe economic hardship that the family would encounter, and six teachers described the serious educa-

189. 819 F.2d 558 (5th Cir. 1987) (en banc).
190. *Id.* at 559.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* at 567.
195. *Id.* at 568.
196. *Id.*
197. *Id.* at 559.
198. *INS v. Jong Ha Wang*, 450 U.S. 139, 139 (1981).
199. *Hernandez-Cordero*, 819 F.2d at 568.
200. *Id.* at 563.
201. *Id.* at 568.
202. *Id.*

tional and emotional difficulties the Hernandez children would suffer if their parents were deported and they accompanied them.[203]

The Fifth Circuit, en banc, reversed the panel decision and found that the BIA had not abused its discretion when it decided the children would not suffer extreme hardship.[204] The court defined "extreme hardship" as hardship which is "uniquely extreme, at or closely approaching the outer limits of the most severe hardship the alien could suffer and so severe that any reasonable person would necessarily conclude that the hardship is extreme."[205] This interpretation, as the dissent points out, "strips the phrase 'extreme hardship' of virtually all content and abdicates our responsibility under the Administrative Procedure Act to assure against arbitrary and capricious administrative action."[206]

On appeal, the respondents did not raise any constitutional issues, but argued that the court used an extremely narrow definition of extreme hardship and that the BIA had failed to analyze the hardship factors both individually and cumulatively. The latter argument, rejected by the en banc opinion, had been successfully employed in other cases to overturn the BIA's exercise of broad discretion.[207] The result in *Hernandez-Cordero* confirms the prediction made in a 1983 Harvard Law Review Note:

> [B]ecause *Jong Ha Wang* seems to preclude the courts from enforcing their own substantive notions about the appropriateness of granting discretionary relief from deportation, the courts may be unable to affect anything more than the language in which the Board couches its conclusions. Thus, effective judicial con-

203. *Id.* The dissenting opinion written by Circuit Judge Alvin B. Rubin and joined by four other judges describes the affidavits in depth and concluded that the hearing officer "considered all families to be fungible and, therefore, apparently attached no weight to [these] affidavits." *Id.* Judge Rubin goes on to state:

> Testimony from employers, creditors, and teachers confirms that the Hernandezes are an exemplary family who have worked long and hard to establish a life for themselves in the United States and who would suffer devastating consequences if deported to Mexico. Although a recitation of evidence from the record is sometimes redundant, in this instance it is the only way adequately to portray the family.

Id.

204. *Id.* at 564.

205. *Id.* at 563.

206. *Id.* at 564 (Robin, J., dissenting). *See also infra* part III.A.2. and accompanying text.

207. *Hernandez-Cordero*, 819 F.2d at 561.

> trol of agency discretion to deny relief from deportation may be a short-lived phenomenon.[208]

The Cerrillos failed to argue the effect that their deportation would have on their children's constitutional rights if they chose to leave their children behind. This was discussed by the Ninth Circuit in *Cerrillo-Perez v. INS*.[209] In *Cerrillo-Perez*, the respondents had nine children. The three youngest children, aged nine, eight, and four, were United States citizens.[210] They were, like the Hernandezes, hard-working people who were employed and owned their own home.[211] The BIA denied their application for suspension of deportation on the premise that the three United States citizen children would accompany their parents to Mexico and that this would not result in extreme hardship to the children.[212]

The Hernandezes argued that the BIA failed to consider a relevant factor — the hardship to their United States citizen children if they were to remain in the United States following the parents' deportation.[213] The court, in contrast, considered such separation a distinct possibility:

> We need not consider the validity of the BIA's findings regarding the children's ability to adjust to life in Mexico because the Board failed entirely to consider the alternative possibility that the citizen children would stay in this country.
>
> Citizen children have, of course, an absolute right to remain in the United States. The Cerrillos' citizen children were born to Mexican nationals here illegally. They are obviously too young to decide for themselves whether to live in Mexico or the United States following their parents' deportation. Accordingly, their parents would be forced to make the decision for them. The Cerrillos are faced with a difficult choice. Either they can keep their family together and bring all of their children with them to Mexico or they can break up their family and arrange for three of their children to remain [in the United States]. Faced with similar dilemmas, parents have often made the painful choice of dividing their family in order to provide [their children] with an opportunity for a better life. In some of these instances, parents have fled their homeland to escape persecution and left their children with friends or relatives; in others the parents have remained and sent their children to a safe haven.

208. Note, *Developments in the Law — Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1398 (1983).

209. 809 F.2d 1419, 1422-27 (9th Cir. 1987).

210. *Id.* at 1421.

211. *Id.*

212. *Id.* at 1423.

213. *Id.*

> That young American citizens may be separated from their parents — and concomitantly, that alien parents may be separated from their children — are relevant factors to be considered when determining extreme hardship.[214]

In *Cerrillo-Perez*, the court stated: "Our decisions establish that the Constitution protects the sanctity of the family precisely because it is deeply rooted in the Nation's history and tradition."[215] This language acknowledges the central role of family relationships in our society and the need to protect those relationships through the legal system.[216] Our country's preoccupation with family reunification is demonstrated by Congress' recent enactment of provisions to ensure family fairness in the 1990 Amendment to counteract hardship situations created by IRCA.[217]

Nayak v. Vance[218] is another example of the disastrous effect of the failure to argue the constitutional rights of citizen children. Dr. Nayak came to the United States as a visiting physician from India.[219] While in the United States, Dr. Nayak and his wife had a child.[220] The specified term of Dr. Nayak's visit expired.[221] Exchange visitors, such as Dr. Nayak, are required to return to their native land for two years, or to work or reside in another foreign country before they are eligible to apply for permanent residency in the United States.[222] This two-year foreign residency requirement, however, can be waived by law.[223] The Nayak's child allegedly suffered from a rare skin disease

214. *Id.* at 1423-24.

215. *Id.* at 1423 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).

216. Moreover, the preservation of family unity is recognized as a critical factor in admitting refugees to a country. *See* UNITED NATIONS HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 43-44 (1979). Equally important, it is universally recognized that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the state." *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. Doc. A/810, at 71 (1948). Additionally, "[t]he legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united." H.R. REP. No. 1199, 85th Cong., 1st Sess. 7 (1957). It is against this background that the BIA must examine the eligibility of an alien to remain in this country when his or her deportation might result in the break up of a family or otherwise cause hardship to a "spouse, parent, or child, who is a citizen . . . or . . . permanent residen[t]" of the United States. 8 U.S.C. § 1254(a)(1) (1994).

217. The Immigration Act of 1990, Pub. L. No. 101-649, § 301, 104 Stat. 5029 (1990).

218. 463 F. Supp. 244 (D.S.C. 1978).

219. *Id.* at 245. *See supra* note 7.

220. *Nayak*, 463 F. Supp. at 245.

221. *Id.*

222. *Id.*

223. *Id. See* 8 U.S.C. § 1182(e) (1994).

that could only be treated in the United States.[224] Dr. Nayak, acting as plaintiff pro se, feared that if he were forced to leave the child here, the child would be neglected or put up for adoption to strangers.[225]

Constitutional issues should have been raised in this case. The family could either be torn apart so that the child would receive the medical care needed, or the child could remain with his family and endure needless pain and suffering from the rare skin disease. The court closely followed the opinion of the Third Circuit in *Acosta*,[226] stating that the child could always return to the United States.[227] No hearing was ever conducted to determine the rights of the Nayaks' citizen child.

Another child in need of medical care available only in the United States, suffered the same fate in *Gallanosa v. United States*.[228] Mr. Gallanosa entered the United States from the Philippines on a visa to obtain medical training.[229] He was accompanied by his wife and one child.[230] Three children were later born in the United States.[231] The Gallanosas obtained several extensions, but finally the INS instituted deportation proceedings.[232] At their deportation hearing, they were granted voluntary departure.[233] The Gallanosas, however, did not leave voluntarily and failed to file an application for suspension of deportation.[234] They subsequently filed three motions to reopen their deportation to apply for suspension of deportation.[235]

The Gallanosas claimed their citizen child needed medical care that was only available in the United States.[236] Deportation of the Gallanosas would result in a de facto deportation of their child, therefore, denying their child her constitutional rights as an American citizen.[237] The court rejected their claim, finding that the assertion that

224. *Nayak*, 463 F. Supp. at 250.
225. *Id.* at 246.
226. Acosta v. Gaffney, 558 F.2d 1153 (3d Cir. 1977). *See infra* notes ????-278 and accompanying text.
227. *Nayak*, 463 F. Supp. at 247.
228. 785 F.2d 116 (4th Cir. 1986).
229. *Id.* at 117.
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.* Voluntary departure allows an alien to leave the United States without the stigma and penalties of deportation. THOMAS A. ALIENIKOFF & DAVID A. MARTIN, IMMIGRATION POLICY AND PROCESS 598 (2d ed. 1991).
234. *Gallanosa*, 785 F. 2d at 117.
235. *Id.*
236. *Id.* at 120.
237. *Id.*

medical care was only available in the United States was not a substantial constitutional claim.[238] The court also concluded that the deportation of the parents did not violate any constitutional rights of the citizen children.[239] The court was quick to point out, however, that "[t]he basis for the Gallanosas' constitutional claim [was] not clearly put."[240] Given existing decisions regarding the right of children to the companionship and care of their parents, the holding in the *Gallanosa* case is misguided. Considering the important rights at stake, more than a cursory dismissal of the child's interests in the deportation of his or her parents is warranted.

In *Martinez de Mendoza v. INS*,[241] the mother of a citizen child asserted that returning to Colombia would put her and her child in mortal danger.[242] Mrs. Mendoza's husband had severely abused her several times.[243] He returned to Colombia after serving a sentence for shooting two men who had tried to prevent him from attacking his wife and daughter.[244] The court found that Mrs. Mendoza's claim that she and her daughter would be placed in grave danger was sufficient to remand the case to the INS for further investigation regarding whether deportation would cause "extreme hardship."[245] More importantly, the court added in a footnote that "if the allegations that de facto deportation of Yolanda Carmen Mendoza [petitioner's citizen child] would expose her to physical danger [were] correct, they may well be sufficient to raise questions of the constitutionality of such deportation not answered by our decision in *Acosta*."[246] Equally important is the court's acknowledgement of the holding in *Acosta* that a citizen child of an alien subject to deportation has standing as a "person aggrieved" by the deportation order within the meaning of the Administrative Procedure Act.[247] If a court can find that a child has standing to challenge the INS's decision, the court should recognize

238. *Id.*
239. *Id.*
240. *Id.*
241. 567 F.2d 1222 (3d Cir. 1977).
242. *Id.* at 1223.
243. *Id.* at 1224.
244. *Id.*
245. *Id.* at 1226. The court does not use the term "extreme hardship" because the petitioner did not request suspension of deportation. In this case, petitioner filed a motion to stay deportation. *Id.* at 1224. However, in footnote eight of the opinion, the court indicates that Mrs. Martinez de Mendoza had been present in the United States for all but one month since June 1970, and thus may be eligible for suspension of deportation. *Id.* at 1225 n.8.
246. *Id.*
247. *Id.* at 1223 n.1. *See also* 5 U.S.C. §§ 702-706 (1992).

that the child's interests are affected. The only shortcoming of the *de Mendoza* decision is that it did not conclude that a hearing to determine the child's rights should be guaranteed under the Constitution.[248]

Where there is no *parens patriæ* justification, the child's interests are viewed separately from those of the state. Government action in deportation cases should, therefore, be seen as adversarial to the child's interest, as in the witness protection context. The current practice in deportation suspension cases, however, treats the citizen child as a mere bystander. The "extreme hardship" inquiry does not provide sufficient procedural protections to the fundamental rights of the child. The child's constitutional interests are so obscured by this standard that they are barely recognizable. Nevertheless, the fundamental right of a child to parental companionship does exist and should not be disregarded by the Attorney General.

As indicated earlier, the court in *Franz* noted that "[h]olding the hearing before execution of the decision is particularly important where, as here, the deprivation of the protected interest might be irrevocable or might cause irreparable harm."[249] When a child's parent faces deportation, his or her constitutional interests are clearly at stake. It is impractical to consider the rights of the child *after* the parent has been deported. To deny a citizen child the right to challenge government action in an adversarial forum is a gross violation of the principles of due process. The state should be required to satisfy the child's due process rights by providing a separate hearing for the child. The INS, as a governmental agency, should not be exempt from the demands of the Due Process Clause.

D. Citizen Children and Procedural Due Process Rights

In the *Michael H.* decision, Justice Scalia reasoned that because the father could not assert any substantive parental right, there was no need to examine whether he was entitled to procedural due process.[250] As one scholar has put it: "Even if the Court is willing to stretch history and establish a biological father's due process right to a paternity hearing, why bother if the biological father of a bastard child has no substantive parental rights to claim once paternity is established?"[251] Scalia's "history and tradition" analysis of fundamental rights sup-

248. *Martinez de Mendoza*, 567 F.2d at 1226.
249. Franz v. United States, 707 F.2d 582, 608 (D.C. Cir. 1983).
250. Michael H. v. Gerald D., 491 U.S. 110, 126-27 (1989).
251. Young, *supra* note 14, at 591.

ports the right of a child to the care and nurturing of his parents.[252] Thus, it could be argued that after a finding that such a right exists, the child must be afforded the procedural right to a hearing when he faces separation from his family.[253]

In *Franz*, the District of Columbia Circuit stated that "the affected parties must be accorded the procedural protections mandated by the Due Process Clauses."[254] The court noted that it is beyond dispute that the termination of the parent-child relationship must meet the requirements of due process.[255] While the procedural due process rights of the illegal immigrant parent may be satisfied by the suspension of deportation hearing, the citizen child is not granted the same protection.

The court in *Ramos v. INS*,[256] stated that "[e]ven where all requirements [for discretionary suspension of deportation] are met, suspension of deportation may be denied in the exercise of discretion."[257] Thus, while the Attorney General is required to consider relevant hardship factors, the "decision whether to suspend deportation of an alien who satisfies the . . . statutory requirements [for such suspension] is therefore discretionary, and is subject only to a most restricted judicial review."[258] The fundamental right of the citizen child to parental companionship should not be circumvented by incorporating a mere cursory examination of the effect upon the child into the determination of the alien parent's rights. By failing to subject state action to strict scrutiny within the context of the child's rights, the Attorney General deprives citizen children of constitutionally protected rights without the benefit of due process.

The three functions served by the principle of procedural due process recognized by the *Franz* court are equally valid within the context of suspension of deportation.

> First, by exposing to adversarial testing the government's asserted rationale for its action, it reduces the likelihood of error — i.e., the risk that the government will act on the basis of what, in reality, is an insufficient justification. Second, it permits the adversely affected parties to inform the government of ways in which the government's objectives might be achieved through means less restrictive of their rights. Third, it accords the af-

252. *Id.* at 590-91.
253. *Id.* at 591-92.
254. *Franz*, 707 F.2d at 602.
255. *Id.* at 607.
256. 695 F.2d 181 (5th Cir. 1983).
257. *Id.* at 184.
258. *Id.* at 184-85.

> fected parties some measure of dignity; it enables them to participate in and understand the process whereby their interests are assessed and, if necessary, restricted.[259]

Furthermore, the three factors identified by the court in *Franz* are roughly equivalent to the three factors the Court in *Mathews v. Eldridge*[260] examined to determine what type of process was due.[261] Under *Mathews*, the type of procedural protections due depends upon the evaluation of the private interests at stake, the government's interest, and the risk that the procedures used will lead to an erroneous decision.[262] Clearly, the interests at stake of the citizens' child are enormous: the right to live as a citizen in his country of birth with the companionship of his parents. The government's interest in protecting our borders and ensuring compliance with immigration laws is significant. Nevertheless, the risk that the child will be erroneously deprived of rights by a procedure that does not contemplate a hearing to determine the best interest of the child, and the Attorney General's unfettered discretion violates the *Mathews* standard because the child is deprived of basic constitutional protection.

The 1986 congressional amendment of the INA provisions governing immigration based on marriage provides a good illustration of a deprivation of procedural due process rights of a United States citizen. The amendments were enacted to deter and detect fraudulent marriages more effectively.[263] Perhaps the most controversial aspect of the Immigration Marriage Fraud Amendments Act ("IMFA") is section 5, which added two new provisions to the INA.[264] Both provi-

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259. *Franz*, 707 F.2d at 608 (footnotes omitted).

260. 424 U.S. 319 (1976).

261. *Id.* at 334-35.

262. *Id.*

263. Immigration Marriage Fraud Amendments Act, Pub. L. No. 99-639, 100 Stat. 3537 (1986).

264. The first provision is 8 U.S.C. § 1255(e):

> (e)(1) [A]n alien who is seeking to receive an immigrant visa on the basis of a marriage which was entered into during the period described in paragraph (2) may not have the alien's status adjusted under subsection (a) of this section.
> (2) The period described in this paragraph is the period during which administrative or judicial proceedings are pending regarding the alien's right to enter or remain in the United States.

8 U.S.C. § 1255(e) (Supp. V 1993).

The other new provision, 8 U.S.C. § 1154(h) reads:

> (h) [A visa] petition may not be approved to grant an alien immediate relative status or preference status by reason of a marriage which was entered into during the period described in section 1255(e)(2), of this title, until the alien has resided outside the United States for a two year period beginning after the date of the marriage.

8 U.S.C. § 1154(h) (Supp. V 1993).

sions establish irrebuttable presumptions that an alien who marries either a United States citizen or a lawful permanent resident while in exclusion or in deportation hearings has entered into a fraudulent marriage in order to obtain immigration benefits.[265] Several lawsuits challenged the constitutionality of these sections.[266] The constitutional arguments presented on behalf of the rights of a citizen spouse in these cases parallel those discussed in this paper with respect to a citizen child: the fundamental right to marry and live with your family, as guaranteed by the Equal Protection and Due Process Clauses.[267]

Most courts have upheld the constitutionality of these sections of the IMFA under Congress' plenary power over immigration.[268] The similarity of the predicament facing the citizen spouse and the citizen child is clear: an American citizen should not be placed in the situation of having to choose between his or her country and his or her family.

In 1990, before the Supreme Court had the opportunity to address the constitutionality of 8 U.S.C. § 1225(e), Congress amended the section by providing a hearing to permit affected aliens to avoid the two-year foreign residency requirement if they proved by clear and convincing evidence that their marriage was genuine.[269]

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265. *Id.*

266. These sections created an irrebuttable presumption that the marriage was a sham marriage and could not confer immigration benefits. Thus, there was no provision for a hearing that would allow the parties to show that they had entered into a bona fide marriage. *See* Azizi v. Thornburgh, 908 F.2d 1130 (2d Cir. 1990); Anetekhai v. INS, 876 F.2d 1218 (5th Cir. 1989); Almario v. Attorney General, 872 F.2d 147 (6th Cir. 1989).

267. *Azizi*, 908 F.2d at 1133-35 (rejecting due process and equal protection challenges); *Anetekai*, 876 F.2d at 1221-23 (rejecting due process, equal protection, and Ninth and Tenth Amendment violations); *Almario*, 872 F.2d at 151-52 (rejecting due process and equal protection violations).

268. *See supra* note 266.

269. 8 U.S.C. § 1154(g) states:

> RESTRICTION ON PETITIONS BASED ON MARRIAGES ENTERED WHILE IN EXCLUSION OR DEPORTATION PROCEEDINGS.
>
> Notwithstanding subsection (a) of this section, except as provided in section 1255(e)(3) of this title, a petition may not be approved to grant an alien immediate relative status or preference status by reason of a marriage which was entered into during the period described in section 1255(e)(2) of this title, until the alien has resided outside the United States for a 2-year period beginning after the date of the marriage.

8 U.S.C. § 1154(g) (Supp. V 1993).

Furthermore, section 1255(e) states:

> RESTRICTIONS ON ADJUSTMENT OF STATUS BASED ON MARRIAGES ENTERED WHILE IN EXCLUSION OR DEPORTATION PROCEEDINGS; BONA FIDE MARRIAGE EXCEPTION.
>
> (1) Except as provided in paragraph (3), an alien who is seeking to receive an immigrant visa on the basis of a marriage which was entered into during the

Although the burden of proof is demanding, Congress at least acknowledged that the procedural due process rights of a United States citizen were violated by the irrebuttable presumption of a fraudulent marriage.

E. De Facto Deportation And The Prospect of Returning to The United States

Although the judiciary is quite active in protecting the child in areas of law,[270] the courts have nonetheless deferred to the Attorney General's decisions in immigration cases. The argument that a citizen child is subject to de facto deportation when his or her parents are deported has not been fully addressed by the Supreme Court due to the Court's position that immigration is an area traditionally left to Congress.[271] The de facto deportation argument stresses the child's lack of choice when the parents are forced to leave the country. Deportation either deprives the citizen child of the right to be brought up in this country with the accompanying educational and economic benefits available to every other citizen child, or it deprives the citizen child of the right to a family life with his or her natural parents. The Third Circuit's opinion in *Acosta*[272] is the prevailing opinion of most

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period described in paragraph (2) may not have the alien's status adjusted under subsection (a) of this section.

(2) The period described in this paragraph is the period during which administrative or judicial proceedings are pending regarding the alien's right to enter or remain in the United States.

(3) Paragraph (1) and section 1154(g) of this title shall not apply with respect to a marriage if the alien establishes by clear and convincing evidence to the satisfaction of the Attorney General that the marriage was entered into in good faith and in accordance with the laws of the place where the marriage took place and the marriage was not entered into for the purpose of procuring the alien's entry as an immigrant and no fee or other consideration was given (other than a fee or other consideration to an attorney for assistance in preparation of a lawful petition) for the filing of a petition under section 1154(a) of this title or section 1184(d) with respect to the alien spouse or alien son or daughter. In accordance with regulations, there shall be only one level of administrative appellate review for each alien under the previous sentence.

8 U.S.C. § 1154(e) (Supp. V 1993).

270. Parham v. J.R., 442 U.S. 584 (1979) (finding that a state's procedure for admitting a child for treatment to a state mental hospital must be consistent with constitutional guarantees); *In re* Winship, 397 U.S. 358 (1970) (holding that minors in delinquency proceedings must have charges proved beyond a reasonable doubt); *In re* Gault, 387 U.S. 1 (1967) (holding that minors charged with delinquency were entitled to due process).

271. *See supra* note 3.

272. Acosta v. Gaffney, 558 F.2d 1153, 1157-58 (3d Cir. 1977).

Courts have upheld the constitutionality of the deportation of aliens with United States citizen children, inter alia, under the rationale that deportation of the parents has only an incidental impact upon the rights of the child.

As stated by the court in *in re Amoury*, 307 F. Supp. 213 (S.D.N.Y. 1969):

courts: because the child is of "tender" years, he or she would undoubtedly choose to reside wherever her parents live.[273] When the child reaches the age of discretion, he or she will be able to decide where to live.[274]

In *Acosta*, the Third Circuit Court of Appeals was faced with the de facto deportation of a young girl along with her Colombian national parents.[275] The child claimed that she would be deprived of her constitutional right to live in the United States. The court replied:

> The right of an American citizen to fix and change his residence is a continuing one which he enjoys throughout his life. Thus while today Lina Acosta, as an infant twenty-two months of age, doubtless desires merely to be where she can enjoy the care and affection of her parents, whether in the United States or Columbia, she will as she grows older and reaches years of discretion be entitled to decide for herself where she wants to live and . . . return to the United States to live.[276]

Although this logic is superficially persuasive, it simply is not the constitutional standard in cases involving fundamental rights. The Supreme Court has never held that a law must directly affect, or completely deprive, the exercise of a fundamental right in order to be held

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> The order of deportation is not directed toward [the citizen child] and obviously no action is contemplated under its terms with respect to him. It is all too true that ofttimes individuals, entirely innocent of wrongful conduct, suffer equally with those who commit the wrongful act which brings penalties in its wake. But this does not mean that a constitutional violation has been visited upon the innocent person.

Id. at 216.

Similarly, in *Bueno-Carrillo v. Landon*, 682 F.2d 143 (7th Cir. 1982), the court agreed with the BIA that "while petitioner's return to Mexico may mean that the child will also leave the United States, there is nothing in the law requiring the child's departure, and nothing to prevent her return." *Id.* at 146. Additionally, in *Lopez v. Franklin*, 427 F. Supp. 345 (E.D. Mich. 1977), the court reasoned:

> This Court would agree that if an act of the government did result in the "outright destruction" of an essential privilege of citizenship, that act would indeed by "repugnant to the Constitution" . . . . However this Court does *not* agree that the decision of the *parents*, (who are the only subjects of the deportation order) to take their infant child back with them to their native land, results in the "outright destruction" of any privileges of United States citizenship that child has. The child does not lose his citizenship status upon his departure from this country. He is perfectly free to return to the United States whenever he has the desire and the means (either independently or through others) to do so.

Id. at 348-349 (emphasis added). Building on this reasoning, the court in *Acosta* asserted that the parents' deportation "will merely postpone, but not bar," the child's ultimate residence in the United States. *Acosta*, 558 F.2d at 1158.

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

274. *Id.*

275. *Id.*, 558 F.2d at 1155.

276. *Id.* at 1158.

unconstitutional. To the contrary, the test for invoking strict scrutiny is whether the law in question substantially impinges upon or burdens the exercise of a fundamental right.[277] Thus, the court's reasoning makes very little sense. Indeed, the court comes perilously close to holding that children enjoy no fundamental constitutional rights; a proposition that the Supreme Court has consistently rejected.[278]

The *Acosta* court appears to have confused two separate rights. While American citizens enjoy the right to decide where to live,[279] they may not be compelled to leave the country.[280] The latter right is at stake in deportation cases. To hold that a child enjoys no right because he or she is incapable of exercising it makes little sense. Furthermore, the court interprets the deprivation of up to eighteen, or more, years of the child's life as "merely a postponement," not a bar upon the child's residence in the United States.[281] A child who leaves this country due to deportation action against his or her parents suffers from more than a trivial delay in the enjoyment of the benefits and opportunities that attend United States citizenship. Rather, the *de facto* deportation of these children potentially acts as a bar to any future return to the United States when viewed from educational, economic, social, and cultural perspectives. Thus, even if Lina Acosta does ultimately elect to return to the United States once she reaches the age of majority, she may be unable to avail herself of any constitutional protections as a practical matter.

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277. *See supra* notes 31-34 and accompanying text.

278. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976); Goss v. Lopez, 419 U.S. 565, 581 (1975); Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 511 (1969); *In re* Gault, 387 U.S. 1, 13 (1967).

279. This right derives from the right to travel and migrate. Shapiro v. Thompson, 394 U.S. 618, 630-31 (1969).

280. This right is based directly on the concept of citizenship. United States v. Wong Kim Ark, 169 U.S. 649, 676, 682, 688 (1898). According to Aleinikoff and Martin:

> Some of the language of the majority opinion seemed to leave open the status of children born within the United States to alien parents only temporarily present within the national borders. But in fact the *Wong Kim Ark* decision has served to establish for the United States a "general rule of universal citizenship" by birth, in the words of a leading immigration treatise, G & M § 12.5. Birth in the territorial United States, even to parents fresh across the border after an illegal entry, results in U.S. citizenship. The only exceptions to this *jus soli* rule are exceedingly narrow: birth to foreign sovereigns and accredited diplomatic officials; birth on foreign public vessels—meaning essentially warships, not commercial vessels—even while they are located in U.S. territorial waters (we wonder: does this ever happen?); birth to alien enemies in hostile occupation of a portion of U.S. territory.

ALIENIKOFF & MARTIN, *supra* note 151, at 976.

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

While the *Acosta* court dismissed as much as eighteen years of a individual's life as having "no effect" upon the individual,[282] the United States Supreme Court has recognized the developmental importance of childhood years as *crucial* to the future success of the individual as a functioning member of United States society.[283] Justice Brennan stated in *Plyler*, "[t]oday, education is perhaps the most important function of state and local governments. . . . Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."[284] In a concurring opinion, Justice Blackmun noted that "[c]hildren who are denied an education are placed at a permanent and insurmountable competitive disadvantage, for an uneducated child is denied even the opportunity to achieve."[285] Even the dissent, authored by Chief Justice Burger, agreed that an enlightened society should not deny any child, regardless of his illegal status, the right to a basic education.[286] Yet, the *Acosta* court failed to recognize the potential hazards of deprivation of education, labelling the extended separation from the United States as a "mere postponement" of the enjoyment of this right.

A young child who leaves this country before reaching school age will undoubtedly be at a severe disadvantage if he or she chooses to return and attempt to function as an adult member of our society. For example, where will this citizen find employment? Can we realistically expect him or her to possess basic skills which other, minimally educated United States residents acquire during their elementary school education? Such an individual may not even possess basic skills necessary to seek employment, such as filling out applications and answering questions posed by interviewers. A returned citizen is at a severe disadvantage even as compared to noncitizens who are illegally residing in this country. Members of this latter group are granted an elementary education just as resident citizen children are under *Plyler*.[287]

Even if a newly-returned citizen manages to break into the American job market, a language barrier will arise assuming the citizen child was not raised in an English speaking country. Although non-English speaking individuals comprise a substantial percentage of

282. *Id.*
283. *See* Plyler v. Doe, 457 U.S. 202 (1982).
284. *Id.* at 223 (quoting Brown v. Board of Education, 347 U.S. 483, 493 (1954)).
285. *Id.* at 234 (Blackmun, J. concurring).
286. *Id.* at 242 (Burger, C.J., dissenting).
287. *Id.* at 226, 230.

this country's work force, an individual who speaks another language can only aspire to a narrow range of jobs. This distinguishing factor, alone, poses a great disadvantage to the returned citizen.

A deported child is unlikely to receive an elementary education comparable to that which we guarantee to children residing in this country, especially if the child's family is impoverished. Many other countries assess the cost of schooling directly on the family, thus affording a formal education only to wealthier members of society.

In *Jong Ha Wang*, the Ninth Circuit Court of Appeals recognized the hardship imposed on a child due to a language barrier.[288] The court reviewed a deportation order for two Korean nationals whose two school age children were citizens of the United States.[289] The opinion overturned a prior decision by the BIA, which failed to consider the parent's claim of educational hardship.[290] The Ninth Circuit Court stated that "both children have spent their entire lives in this country; they do not speak Korean. Under these circumstances we do not believe that the Board should summarily have dismissed the Wangs' claim of hardship to their children."[291] Thus, the court recognized that language plays a significant role in determining a child's plight upon entering a foreign country.

The Ninth Circuit Court of Appeals also considered language proficiency to be a requisite element of the BIA's rehearing process. In *Ramirez-Durazo v. INS*,[292] the court upheld a BIA decision which considered whether fluency in Spanish could be a mitigatory element in favor of deporting children of noncitizen parents to a Spanish-speaking country.[293] In *Jara-Navarrete v. INS*,[294] the court found that the BIA abused its discretion by failing to consider factors such as language and psychological effects on a child, when it cursorily upheld the deportation order and concluded that the three children were "still very young and . . . should be able to adapt successfully to Mexico."[295]

According to *Plyler*, all children living in this country, regardless of their citizenship, have the right to obtain a basic education and

288. Jong Ha Wang v. INS, 622 F.2d 1341, 1348 (9th Cir. 1980), *rev'd per curiam*, 450 U.S. 139 (1981).
289. *Id.* at 1344.
290. *Id.* at 1349.
291. *Id.* at 1348.
292. 794 F.2d 491 (9th Cir. 1986).
293. *Id.*
294. 813 F.2d 1340 (9th Cir. 1986).
295. *Id.* at 1342.

learn English.[296] That courts are concerned with a child's language-assimilation upon deportation of his or her parents indicates that this factor may ultimately convince a court to allow a family to remain in this country. Accordingly, language and education should be substantial considerations if a court expects displaced citizen children to eventually choose to return to this country. If we consider the deportation of citizen children to be a "mere postponement" of residence in the United States, we must acknowledge that education alone will be a major deterrent to their return.

The Ninth Circuit has recognized a child's right to remain with his or her family and has attempted to preserve that right by considering separation alone to constitute extreme hardship.[297] After the Supreme Court's decision in *Jong Ha Wang*, however, most courts simply assume that a child would choose to leave the country to remain with his or her family.[298] Other courts, however, have held that the BIA cannot assume that citizen children will accompany their parents upon deportation.[299] The rights at stake for the child are basic, and deserve more than perfunctory treatment.

As shown earlier, even the dissent in *Plyler* agreed without hesitation that an "enlightened society" should not deprive even illegal aliens of an education.[300] Chief Justice Burger wrote, "it would be folly—and wrong—to tolerate creation of a segment of society made up of illiterate persons, many having a limited or no command of our language."[301]

Plyler applies to undocumented alien children. Thus, one can logically infer that education holds an esteemed role in the life of the citizen child as well. Yet, when that citizen child faces de facto deportation, our courts have down played that education today is "perhaps [the] most important function of state and local governments."[302] One could argue that a court is only concerned with the education of children who are going to remain and live in the United States. This reasoning, however, is extremely short-sighted if a court also assumes, as in *Acosta*, that a child may choose to return and live in the United States once he or she obtains majority. When that child returns, *Ply-*

296. Plyler v. Doe, 457 U.S. 202, 223 (1982).

297. Cerrillo-Perez v. INS, 809 F.2d 1419, 1427 (9th Cir. 1987).

298. *Id.* at 1423 ("[T]he Board failed entirely to consider the alternative possibility that the citizen children would stay in this country.")

299. *Id.*

300. *Plyler*, 457 U.S. at 242 (Burger, J., dissenting).

301. *Id.*

302. *Id.* at 222 (quoting Brown v. Board of Education, 347 U.S. 483 (1954)).

ler's observations regarding the urgent need for an education in order to succeed in the United States are applicable.

F. *Jong Ha Wang* and *Plyler*: Can They be Reconciled?

The Supreme Court, in *Plyler*, admitted that without education, children who are already disadvantaged by racial prejudices and by an inability to speak English "will become permanently locked into the lowest socio-economic class."[303] A year earlier, however, the Court refused to even consider an alleged deprivation of the right to education for citizen children in *Jong Ha Wang*.[304] The Court chose to uphold the discretion conferred on the INS by Congress, rather than address any deprivation of rights claims.[305] The Court's only reference to education was the statement that the BIA was acting within its authority when it refused to believe that the two young Korean children, with affluent and educated parents, would be subject to educational deprivation amounting to extreme hardship.[306] The *Jong Ha Wang* opinion reasoned that any attempt by the judiciary to broaden or modify the definition of "extreme hardship" would constitute an improper encroachment on the authority that the INA granted the Attorney General.[307] Furthermore, a reviewing court should not invalidate an interpretation by the Attorney General because it prefers a different interpretation.[308]

If a child is forced to depart with his or her parents, what is the probability that a non-English speaking child will be able to "mainstream" and succeed in the socio-economic system of the United States upon return? The Court's failure to address this issue in the deportation context is disheartening. By the time the child has reached the age of majority, it may be too late to take advantage of opportunities this country offers. The "choice" which the citizen child would hypothetically make regarding whether to return to the United States would become illusory — any inability to comprehend English or to participate in our social system may deter a later return to this country. Furthermore, if the adult child were to return to the United States, our government would incur a great economic burden of supporting a culturally disadvantaged citizen.

303. *Id.* at 208.
304. INS v. Jong Ha Wang, 450 U.S. 139, 145 (1981).
305. *Id.*
306. *Id.* at 143, 145.
307. *Id.* at 144.
308. *Id.*

IV. Equal Protection and the Right of Children to Parental Companionship

As discussed above, there is no significant difference between a child who is separated from a parent enrolled in a witness protection program and one who is separated from a deported parent. The children's interests are identical; the programs are both under the direction of the Attorney General, and the children's lives are affected by parental actions over which they had no control. The court in *Franz* noted in its discussion of substantive due process that the same result might be reached through an equal protection analysis:

> We observe that the Witness Protection Program, as implemented, results in the denial of access by a particular group . . . to a fundamental right (the right to the companionship of one's child or parent). Accordingly, the Program should be subjected to "strict scrutiny" under the Equal Protection Clause. In other words, the government must show that discrimination between members of the affected group and other parents and children is necessary to promote a "compelling governmental interest."[309]

Deportation of a parent denies citizen children the same fundamental right to parental companionship that the court found the Witness Protection Program denied children in *Franz*. There is no reason why the Attorney General should not be required to meet a strict scrutiny standard within the context of deportation.

To deny citizen children of illegal immigrant parents a fundamental right is the kind of invidious discrimination against which the Equal Protection Clause protects.[310]

> The interests of a child under the equal protection clause deserve no less weight than those of an adult . . . . This concept has led the Court to identify three properties a trait may possess that militate in favor of rigorous scrutiny: immutability, stigma, and general irrelevance to ability or merit.[311]

Children of illegal immigrants do not choose their parents, yet their rights as citizens are given no attention because of their parentage.

In most equal protection cases, a reviewing court applies the "rational basis" test to the legislation in question.[312] Under this highly

309. Franz v. United States, 707 F.2d 582, 603 n.89 (D.C. Cir. 1983).

310. While the Equal Protection Clause is directed at the States, the Supreme Court has recognized that "discrimination may be so unjustifiable as to be violative of [the Due Process Clause]." Bolling v. Sharpe, 397 U.S. 497, 499 (1954).

311. Note, *Developments In The Law — The Constitution and the Family*, 93 HARV. L. REV. 1157, 1364-65 (1980).

312. *Id.* at 1188.

deferential test,[313] the law will be upheld if it bears some reasonable relation to a legitimate state interest. That is, the law will pass constitutional muster as long as it can reasonably be deemed to further a state interest. Moreover, the state interest need not be expressly articulated in the law.[314] A legitimate post hoc justification is sufficient. The Supreme Court, however, has noted that such a deferential standard of review will often not fulfill the intent of the Equal Protection Clause.[315] Accordingly, when a law creates a "suspect class" the law is subject to strict scrutiny.[316] Under this test, to survive constitutional challenge, the law must be "precisely tailored to serve a compelling governmental interest."[317] Because laws that undergo strict scrutiny review are typically deemed unconstitutional, this stringent level of review has been described as "'strict' in theory and fatal in fact."[318] If less burdensome means are available to achieve the same objective, the law will be deemed unconstitutional.[319] The application of strict scrutiny in an equal protection claim is triggered by classifications based on a suspect class or those affecting a fundamental right. Otherwise, courts typically apply the rational basis test.[320]

The concept of a suspect class may be traced to the famous footnote in *United States v. Carolene Products Co.*[321] In this case, the Court hinted that a law which "prejudice[s] against discrete and insular minorities may be a special condition . . . which may call for a correspondingly more searching judicial inquiry."[322] In *Graham v.*

313. Professor Gerald Gunther described the rational basis test as providing for "minimal scrutiny in theory and virtually none in fact." Gerald Gunther, *The Supreme Court 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

314. *Id. See also* New Orleans v. Dukes, 427 U.S. 297, 305 (1976).

315. JOHN E. NOVACK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 574-75 (4th ed. 1991).

316. McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Korematsu v. United States, 323 U.S. 214, 216 (1944).

317. *See* Plyler v. Doe, 457 U.S. 202, 217 (1982). Some cases have stated that the law must be "necessary" to achieve a compelling governmental interest. *See* Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

318. Gunther, *supra* note 313, at 8.

319. *See* Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

320. The courts apply intermediate scrutiny when a quasi-suspect class is created by a law. See *supra* notes 71-85 and accompanying text for a discussion of intermediate scrutiny and quasi-suspect classifications. In addition, a law need not always facially create a suspect class in order for heightened review to be applied. If it is shown that the legislation was motivated by a discriminatory purpose, strict scrutiny will apply if the law has an undue impact on a suspect or quasi-suspect class. *See* Washington v. Davis, 426 U.S. 229, 240-42 (1976).

321. 304 U.S. 144 (1938).

322. *Id.* at 153 n.4.

Richardson[323] the Court adopted this logic as the test for defining a suspect class.[324] Finally, in *San Antonio Independent School District v. Rodriguez*[325] the Court clarified the principle of a suspect class: groups that have been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness" are entitled to special judicial protection.[326] According to this principle, therefore, classifications based on race, national origin and alienage are inherently suspect.[327]

The Supreme Court has established that "distinctions on the basis of race, national origin, and alienage can survive constitutional attack only if they serve compelling state objectives and are precisely tailored to meet those objectives."[328] The fact that children, and not adults, are being unfairly discriminated against does not affect the analysis. For example, in *Brown v. Board of Education*,[329] the Court held that segregated schools deny black children equal protection by the law.[330]

> [T]he courts have not made the treatment of classifications that rely on any of these suspect or semi-suspect traits depend on whether the traits were used to distinguish between classes of children or between classes of adults. The Court has invalidated state actions which were discriminatory to children in several different settings. Children cannot be denied equal treatment under the law on the basis of their race, alienage, gender, or parentage.[331]

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323. 403 U.S. 365 (1971).
324. *Id.* at 372.
325. 411 U.S. 1 (1973).
326. *Id.* at 28.
327. Note, *supra* note 311, at 1365.
328. *Id.*
329. 347 U.S. 483 (1954).
330. *Id.* at 495.
331. *See* Note, *supra* note 311, at 1365. *Accord* Trimble v. Gordon, 430 U.S. 762 (1977); Stanton v. Stanton, 421 U.S. 7 (1975). *Plyler* considers children of aliens unlawfully in the country as a quasi-suspect class. Plyler v. Doe, 457 U.S. 202, 219-20 (1982). While noting that undocumented status is "the product of their (aliens) own unlawful conduct," the Court declared that this logic does "not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants." *Id.* Although the parents could leave Texas, the Court held that "the children who are the plaintiffs in these cases 'can affect neither their parents' conduct nor their own status." *Id.* at 220 (quoting Trimble v. Gordon, 430 U.S. 762, 770 (1977)). Thus, finding a quasi-suspect classification due to a combination of the children's unaccountability for their illegal status and the importance of education, the Court ruled the statute unconstitutional. *Id.* at 230. "Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice." *Id.* at 220. *See also supra* notes 60-67 and accompanying text.

The argument that children of illegal immigrants are afforded equal protection because they have the choice to accompany the deported parent is unpersuasive. The Supreme Court in *Shapiro v. Thompson*,[332] and later in *Zobel v. Williams*,[333] held that penalizing a citizen for exercising a fundamental right is a clear violation of the Equal Protection Clause.[334] *Shapiro* involved a challenge to various state statutes which required at least one year of residency before state residents could collect welfare benefits.[335] The Court, holding this to be a penalty on the exercise of the right to travel, applied strict scrutiny: "Any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional."[336] In *Shapiro*, however, the burden on the right to travel was only incidental.[337] Chief Justice Warren dissented, arguing that travel was neither prohibited nor actually deterred.[338] Also dissenting, Justice Harlan contended that the impact on the exercise of the right to travel was "indirect" and "insubstantial" because the plaintiff's evidence indicated that travel was not in fact deterred by the laws.[339] He therefore claimed that laws which "incidentally" cause inequalities should not be ruled unconstitutional.[340] Hence, to the extent that *Shapiro* may be taken as a rejection of these dissenting arguments, it suggests that a law's burden on the exercise of a right does not have to be direct to be unconstitutional.[341] Therefore, the courts that upheld the deportation of aliens with citizen children erred in basing their holdings on the incidental effects of the deportation on the child.

If the right to travel analysis is applied to the de facto deportation of citizen children, the conclusion remains the same, the parents' deportation substantially penalizes the exercise of a constitutional right. If the child remains in the United States, he or she will be deprived of the right to family life and the love and care of his or her parents. If the child leaves with his or her parents, he or she will be deprived of the right to remain and grow up in the United States. In either event, the child will be denied the socialization process necessary to function

332. 394 U.S. 618 (1969).
333. 457 U.S. 55 (1982).
334. *Shapiro*, 394 U.S. at 627; *Zobel*, 457 U.S. at 65.
335. *Shapiro*, 394 U.S. at 621-22.
336. *Id.* at 627.
337. *Id.* at 634.
338. *Id.* at 647 (Warren, C.J., dissenting).
339. *Id.* at 676 (Harlan, J., dissenting).
340. *Id.*
341. *Id.*

adequately as a constructive member of our society. In these situations the burden on the fundamental rights of the child is substantial and unavoidable. To force a child to leave his or her country of citizenship in order to enjoy the parental companionship to which he or she has a right is clearly beyond the bounds of what the Supreme Court has deemed permissible. Any other citizen child asserting this right would be able to do so without fear of de facto deportation. The system, for all practical purposes, forces children to choose between exercising a fundamental right or relinquishing the benefits of United States citizenship. It is hard to imagine a more blatant violation of the Equal Protection Clause.

V. Capacity and Children's Right to Autonomy

Courts frequently justify de facto deportation of citizen children by noting that the child can choose to stay in the United States or leave and return at some future date.[342] This rationale is based on a number of assumptions. Are these courts assuming capacity for all minors at the time of the hearing? Or, are they assuming incapacity for all minors and delegating this critical and pivotal decision of that child to the parents? If they assume future capacity, such an assumption would be nonsensical considering that the decision to remain or leave is made at the time of the hearing. This perfunctory treatment of the child's interests runs counter to all decisions concerning the legal capacity of children, and effectively precludes the child from asserting constitutional rights which have been recognized for the past thirty years.

The Supreme Court has conferred considerable constitutional rights to minors. *In re Gault*[343] was the first case to extend constitutional protections to children, acknowledging that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[344] The Court, in *Tinker v. Des Moines Independent Community School District*,[345] recognized school children's First Amendment rights to voice their opposition to the Vietnam War.[346] In *Planned Parenthood v. Danforth*,[347] the Court clearly stated that "[c]onstitutional rights do not mature and come into being magically only when one attains the

342. *E.g.*, Acosta v. Gaffrey, 558 F.2d 1153, 1158 (3d Cir. 1977).
343. 387 U.S. 1 (1967).
344. *Id.* at 13.
345. 393 U.S. 503 (1969).
346. *Id.* at 513.
347. 428 U.S. 52 (1976).

state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[348]

All states presume incompetence for minors under a certain age, which varies from state to state. The Supreme Court has held that:

> the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.[349]

Courts have not extended to children the full spectrum of "adult" constitutional rights because children are in a different position than adults. In *Bellotti v. Baird*,[350] the Court "recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."[351]

During the early development of family rights jurisprudence, the courts did not clearly resolve the question of whether minors had individual constitutional rights, because most of these cases involved a clash between family autonomy and the state.[352] Later, when cases arose from conflicts between the rights of the parents and the child, the courts determined that the child's rights should be considered independently of the parents in certain circumstances. The most common cases were those involving the privacy rights of minors seeking abortions.[353] The Supreme Court has recognized situations in which the minor's constitutional rights will be viewed as equivalent to the rights of an adult. When the child's interests conflict with the parents' or the state's, the child's interests must be viewed separately.

> The Supreme Court has recognized full constitutional rights for minors when, because of the character and importance of the child's underlying interest, the Court will not risk relying on the presumptions that the interests of the parents and the state are

348. *Id.* at 74.

349. Belloti v. Baird, 443 U.S. 622 at 635 (1979).

350. 443 U.S. 622 (1979).

351. *Id.* at 634.

352. *E.g.*, Parham v. J.R., 442 U.S. 584, 604-06 (1975).

353. *See* City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983); Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983); *Bellotti*, 443 U.S. at 650; Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

> consistent with the child's interests or that the child is too immature to make an independent, informed decision.[354]

When a child's interests are at stake, the court may take several different approaches. The court can enforce parental control over the minor and assume that the parent will choose what is in the best interest of the child.[355] The court can also intervene under the doctrine of *parens patriæ*, after a finding that the parent is not acting, or likely to act, in the best interest of the child.[356] Thirdly, the court can deem the minor to be a "mature minor;" that is, a minor capable of making an informed and mature decision after consideration of the long-term consequences of that decision.[357] The "mature minor" doctrine was first used by the courts in presuming minors capable of giving informed consent to medical treatment.[358] This doctrine has since been extended to many different contexts, granting authority for a mature minor's consent to various medical procedures, treatment for alcohol abuse, use of contraceptives, and custody proceedings.[359]

The "mature minor" doctrine clearly recognizes the minor's rights as separate and distinct from those of the parent:

> Parents have a right to control of their children, and the state can limit such control only upon demonstrating a compelling interest. Absent such an interest, the state must enforce parental control . . . . [T]he parents' right to control does not include the right to make certain choices with "grave and indelible" consequences on behalf of mature minors. Instead, a minor who can prove her maturity has the *sole* right to make such decisions.[360]

The mature minor doctrine can be implemented through a two-tier test which first assesses the minor's maturity.[361] If the minor is found to be mature enough to understand the nature and consequences of the decision at issue, then he or she should be free to make his or her own decisions. This is determined on a case-by-case basis since the ability of the minor to make competent choices varies depending upon the subject matter of the decision.[362] If the minor does not have the capacity to make the decision, the court should make the decision in

354. Alison M. Brumley, *Parental Control of a Minor's Right to Sue in Federal Court*, 58 U. CHI. L. REV. 333, 339 (1991).

355. *See* Parham v. J.R., 442 U.S. 584, 603-04 (1979).

356. *See* Prince v. Massachusetts, 321 U.S. 158, 170 (1944).

357. Leslie A. Fithian, Note, *Forceable Repatriation of Minors: The Competing Rights of Parent and Child*, 37 STAN. L. REV. 187, 208 (1984).

358. *Id.* at 201.

359. *Id.*

360. *Id.* at 208.

361. Brumley, *supra* note 354, at 346, 351.

362. *Id.* at 353.

the best interests of the child.[363] The court would consider "what the immature minor would choose if she were mature, taking into account the child's expressed preference and partial competency."[364]

There are several possible scenarios for a citizen child facing de facto deportation. First, the child may lack the capacity to make a decision. If the child cannot decide whether to remain, the courts have two potential courses of action. One is to allow the parents to make that decision for the child. This is problematic in that it assumes that the parents will make a decision that is in the best interests of the child. Unfortunately, this may not always be the case. In *in re Polovchak*,[365] the parents of a twelve-year-old boy (a legal permanent resident of the United States) decided to return to the Ukraine after six months in this country.[366] Although the boy wanted to remain in the United States, and evidence suggested that he would be subject to persecution if he returned to the Soviet Union, his parents were "adamantly opposed to allowing [him] to remain in the country."[367]

There are situations in which parents will not make the "best" decision for the child. In the case of Walter Polovchak, his parents had the luxury of remaining in the United States. They were both legal permanent residents who were not facing deportation proceedings. Nevertheless, they wanted their son to return to a country to which he did not want to return. In a situation in which the parents leave the country, it is much more likely that the parents will take the child with them. Most parents would be unwilling to leave their children in a foreign country. Thus, the parents are forced to decide between relinquishing their right to raise their own children or allowing their children to become "deportees." This places the child in the unfortunate position of being denied his or her constitutional rights due to the parents' desire to raise and care for the child themselves.

Fortunately for Walter Polovchak, he was old enough to articulate and act on his preference. In many situations, the child may be too young to voice such a preference. What should the court do in these cases? One answer is for the court to leave the "decision" to the parents. Another answer is for the court to apply the *parens patriæ* power and determine what would be in the best interests of the child.[368] This would require the court to determine what the child

363. *Id.* at 354.
364. *Id.*
365. 454 N.E.2d 258 (N.D. Ill. 1983).
366. *Id.* at 259.
367. *Id.*
368. Brumley, *supra* note 354, at 354.

would decide to do were he or she mature enough to make a decision.[369] However, the complexity surrounding immigration issues, ranging from differences in languages to differences in cultures, makes it unlikely that the courts could make an accurate determination of what the child would want. Perhaps a better alternative would be to suspend deportation or to stay the proceedings until the minor is mature enough to decide what to do. This would also give parents the extra time they need to adjust to the possibility that their child will remain in the United States.

By forcing the parents to decide, or imposing a premature decision on an immature child, the courts either punish the child for the acts of the parents or break up the family unit. By allowing the family to remain intact in this country until the minor is mature enough to make a competent decision, the courts avoid the problems implicated in *Santosky v. Kramer*.[370] In *Santosky*, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment required a state to support its allegations by clear and convincing evidence before it may completely or irrevocably sever the rights of parents in their natural child.[371] The courts have consistently based the right of parents to control their minor children on the assumption that the parent's affection for the child will lead him or her to act in the best interest of the child.[372] The state can only interfere with the parent-child relationship to protect the child, when the parent does not act in the child's best interest.[373] If the court decided that it was in the best interest of the child to remain in the United States, it would be acting under a *parens patriæ* justification. The parents would be deported and the family would be separated, probably terminating the parent-

369. *Id.*

370. 455 U.S. 745 (1982). In language relevant to the situation of the child that faces de facto deportation the Court said:

> The fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even where blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life .... When the state moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Id. at 755.

371. *Id.* at 747, 769.

372. Parham v. J.R. 442 U.S. 584, 602 (1979).

373. Prince v. Massachusetts, 321 U.S. 158, 166 (1944). "It has long been recognized that, as between a parent and a third person, parental custody of a child may not be displaced absent grievous cause or necessity." Alison D. v. Virginia M., 572 N.E.2d 27, 29 (N.Y. 1991) (quoting Ronald FF. v. Cindy GG., 70 N.Y.2d 141, 144 (1991)).

child relationship completely. The Supreme Court in *Santosky* held that the state could only permanently terminate parental rights upon a showing of "clear and convincing evidence" of parental neglect or unfitness.[374] This would create a legal "catch-22" because the court would be encouraged to deem the parents unfit in order to allow the child to enjoy the benefits of United States citizenship.

If the child is mature enough to decide whether to remain in the country, then the court should at least consider the stated preference. If the child's wishes are consistent with his or her parents' wishes, the only problems are those already discussed in the fundamental rights section. If the mature minor's choice conflicts with his or her parents', the *Polovchak* problem arises. Many children who are competent to make a decision are not sophisticated enough to know how to access the legal system. The child still may be forced to leave the country with his or her parents if he or she is unable to assert his or her rights. Regardless of the approach the courts choose, some type of inquiry is necessary to ensure that the rights of the citizen child are protected.

Another problem with the courts' reliance on the notion that a child can choose to remain in or return to the United States is that children lack the capacity to make adult decisions. Certainly, a child does not have the capacity to make an informed, voluntary decision as to where he or she will live. "Society has set certain age limits and it is presumed that children below these ages lack full capacity."[375] These observations regarding a child's capacity are applicable to situations in which the courts rule on the deportation of a citizen child's alien parents.

> In practice, a ruling in a case involving a dispute about a child's capacity to make an independent decision will rarely be made solely on the basis of the child's maturity and comprehension. Rather, the tendency will be to assess this capacity by reference to what is thought to be in the child's best interests. If the [child's] decision is felt to be contrary to those interests, the most likely result will be a conclusion that the child lacks the capacity to make it.[376]

The courts, in many cases, attribute full capacity to young toddlers or infants.[377] Even if the court assumes that the child will have the capacity to decide in the future, deportation of the child's parents could

374. *Santosky*, 455 U.S. at 748.

375. John Seymour, *An Uncontrollable Child: A Case Study in Children's and Parent's Rights*, 6 INTL. J. L. FAM. 98, 100 (1992).

376. *Id.* at 101.

377. *Id.*

be suspended until the child has the capacity. By deporting the parents of young children, the court strips the children of their ability to assert their legal rights.

The Attorney General's current practice violates the substantive due process rights of citizen children to enjoy the companionship of their parents. It also denies citizen children the procedural protections mandated by the Constitution before such a right can be revoked or restricted. Citizen children of illegal immigrant parents are also unfairly discriminated against, in violation of the Equal Protection Clause, when they are penalized for exercising fundamental rights enjoyed by other citizen children. In all cases in which citizen children of illegal immigrant parents are involved, the government should be required to make a showing that: (1) the government action promotes the best interests of the children under the *parens patriæ* doctrine; or (2) the government action is necessary to achieve a compelling government objective.

VI. Solutions

A. Deference and Due Process

To provide sufficient flexibility and protect important personal rights, as well as the administrator's needs, independent review should be grounded in the Due Process Clause. Under this approach, independent review is required when the importance of the underlying right and the possibility of an erroneous determination outweighs the government's interests, indicating that limited review would be fundamentally unfair.[378] To ensure fairness, the determination of the Attorney General and his delegates should be subject to the balancing test of *Mathews v. Eldridge*.[379]

The first prong of the *Mathews* test examines the importance of the right asserted.[380] Constitutional rights are important factors in this prong of the test even if the citizen child cannot assert the specific constitutional right to live in this country.[381] An interest similar to that was found by the Supreme Court to be implicated in *Ng Fung Ho v. White*.[382] In that case the Court said that "to deport one who so claims to be a citizen obviously deprives him of liberty . . . . It may

378. Mathews v. Eldridge, 424 U.S. 319, 330 (1976).
379. *Id.* at 335.
380. *Id.*
381. Acosta v. Gaffney, 558 F.2d 1153, 1157 (3rd Cir. 1977).
382. 259 U.S. 276 (1922).

result also in loss of both property and life; or of all that makes life worth living."[383]

This second prong is the risk of an erroneous determination by the agency.[384] The historic distrust of agency adjudication, and the practical concerns of agency bias or lack of expertise may render the second prong in *Mathews* the most important step.[385]

The BIA's expertise has traditionally been acknowledged in assessing extreme hardship.[386] There is no reason, however, to believe courts could not evaluate extreme hardship just as easily. An inquiry into the procedural protections afforded by the administrative scheme and the extent of agency bias are highly relevant. When as a result of the agency's shortcomings the value of heightened judicial review becomes evident, only the strongest countervailing interests will render such independent review unnecessary.[387]

The third prong in *Mathews*, the analysis of public interest and administrative burdens,[388] should largely depend upon whether the parties seek a full hearing de novo or seek independent judgment on the record compiled by the agency. In a case involving the deportation of a citizen child in which a motion to reopen is filed to request suspension of deportation, a hearing is required in order to build a record for the agency.[389] Since there are significant risks of erroneous determinations, the third prong is also satisfied.

The central advantage of the *Mathews* formula is that it does not mandate one particular form of procedure for every situation. While the courts have been unsympathetic to rights advanced by citizens in cases dealing with the INA, Congress has stepped in and acknowledged those rights. Thus, the First Amendment rights denied in *Kleindienst v. Mandel*[390] were vindicated by amendments to the 1990 Act.[391] The denial of the right of a United States citizen father to bring his illegitimate child to America in *Fiallo*[392] was overruled by

383. *Id.* at 284 (citations omitted).

384. *Mathews*, 424 U.S. at 335.

385. *See* JAFFE, *supra* note 160, at 647-48 (suggesting independent judicial review might be warranted when the administrative adjudication carries "grave consequences to the individual").

386. INS v. Jong Ha Wang, 450 U.S. 139 (1981) (per curiam).

387. *See* Monaghan, *supra* note 173, at 262.

388. *Mathews*, 424 U.S. at 335.

389. 8 C.F.R. § 3.8(d) (1994).

390. 408 U.S. 753 (1972).

391. INA, Pub. L. No. 82-414, § 212(a)(3), 66 Stat. 163 (1952) (current version at 8 U.S.C. § 1182(a)(3) (1988 & Supp. V 1993)).

392. Fiallo v. Bell, 430 U.S. 787 (1977).

section 315 of IRCA, which allowed fathers to bring their illegitimate children into America if they show a "*bona fide* parent-child relationship."[393]

The Attorney General typically has broad discretion regarding all deportation matters. Unfortunately, in making decisions within the statutory framework, the Attorney General, the INS, and the courts have completely overlooked the rights of United States citizens.

While courts recognize that the INS should have great discretion in deportation matters,[394] there has been a serious oversight with regard to the rights of the citizen children of illegal immigrants. The fundamental rights of citizen children are viewed only peripherally, and in the worst cases, these rights are completely disregarded. The Attorney General's broad discretion in immigration cases should be exercised within the boundaries of the Constitution. The courts must hold the Attorney General to this basic standard.

Because the effect of deporting a citizen child's parents is only addressed when the INS defines the discretionary concept of "extreme hardship," the courts have allowed the INS to escape the well-established constitutional scrutiny which is applied to fundamental rights. As discussed earlier, superficial examination of the effect of the parent's deportation upon a child violates the substantive due process rights of the child, the procedural due process rights of the child, and the Equal Protection component of the Fifth Amendment.[395]

It is unclear why our courts will not intervene when these proceedings deny the rights of United States citizens. The Supreme Court cites the government's legitimate interest in "creating official procedures for handling motions to reopen . . . so as readily to identify those cases raising new and meritorious considerations."[396] The Court is justifiably concerned with the possible "flood" of aliens who will meet the prima facie requirements if the courts adopt a liberal construction of the term "extreme hardship."[397] However, the possibility that many citizens are losing certain fundamental or "quasi-fundamental" rights should be of paramount concern.

In a dissent for the Court of Appeals' decision in *Jong Ha Wang v. INS*,[398] Judge Goodwin expressed concern with the shift of adminis-

393. *See supra* note 135 and accompanying text.
394. INS v. Jong Ha Wang, 450 U.S. 139, 144 (1981).
395. *See supra* notes 21-34 and accompanying text.
396. INS v. Jong Ha Wang, 450 U.S. 139, 145 (1981).
397. *Id.*
398. 622 F. 2d 1341 (9th Cir. 1980), *rev'd per curiam*, 450 U.S. 139 (1981).

tration in hardship deportation cases from the INS to the courts, stating that Congress' confidence in the broad discretion conferred upon the INS should remain intact after the Supreme Court's decision in *Jong Ha Wang*.[399] The Court, however, cannot justify the infringement of a citizen's fundamental rights merely because Congress has authorized the infringement.

B. A Broader Definition of Extreme Hardship

If the courts offered citizen children of illegal aliens the same rights as citizen children of United States citizens, they would have to intervene in INS suspension of deportation proceedings. This would require recognizing that economic, educational, and cultural deprivations constitute extreme hardship for children facing de facto deportation.

Several pre-*Jong Ha Wang* decisions more closely approximate the concept of "extreme hardship" to comport with the rights of a United States citizen child. In *Jong Ha Wang v. INS*, the Ninth Circuit held that the Board should consider the "aggregate effect of deportation on all such persons when the alien alleges hardship to more than one," and that where a showing of economic hardship is combined with other substantial hardships, the Board should grant the alien a hardship hearing.[400] The Ninth Circuit reasoned that the term "extreme hardship" should be liberally construed "to effectuate its ameliorative purpose."[401] The factors which the court considered in its determination of extreme hardship were medical problems of the child, the age of the child, the effect on the child's education, separation from other family members, and the difficulty in adjusting to a new country.[402]

The Ninth Circuit Court of Appeals adopted the "totality of circumstances" reasoning in *Barrera Leyva v. INS*.[403] The court discussed the need to consider many factors, taken together, which may constitute extreme hardship.[404] The court further held that failure to consider these factors amounts to an abuse of discretion by the Board of Immigration Appeals.[405] Another Ninth Circuit decision held that the immigration judge abused his discretion in failing to note

399. *Id.* at 1351-52 (Goodwin, J., dissenting).
400. *Jong Ha Wang*, 622 F.2d at 1349.
401. *Id.* at 1346.
402. *Id.* at 1348 n.7.
403. 637 F.2d 640 (9th Cir. 1980).
404. *Id.* at 643.
405. *Id.*

"favorable" factors stemming from the suspension of deportation for the mother of six citizen children.[406] Included in these favorable factors should be the cost the government would incur for the care and placement of the children.[407]

The United States Supreme Court's deference to the discretion of the Attorney General in *Jong Ha Wang* overturned the holdings in these earlier cases. The *Jong Ha Wang* opinion states that the traditional scope of discretion of the Attorney General is encroached upon when a Court of Appeals orders a case be reopened because it finds more suitable criteria for the definition of "extreme hardship."[408] In this holding, the Court explicitly overturned the Ninth Circuit's "liberal construction" theory. Furthermore, the holding in *Barrera Leyva* is no longer good law because it relied on the holding in *Jong Ha Wang* when it stated that because "due consideration was not accorded to many factors . . . taken together, the Board or immigration judge may have found . . . extreme hardship."[409] However, if the alien's claims are distorted or disregarded at the initial immigration hearing, or by the Board of Immigration Appeals, the Ninth Circuit found judicial review appropriate despite the Supreme Court's limitation on judicial intervention.[410] The Ninth Circuit's holding is limited to cases in which the immigration judge makes unsupported or unsubstantiated claims that the petitioner did not support her children, committed welfare fraud or inexcusably allowed his or her spouse to neglect to contribute to the children's support.[411] Thus, a court's discretion is limited to cases where the immigration court has distorted the facts regarding the circumstances of the petitioner's request. The Supreme Court has yet to address this issue after *Jong Ha Wang*.

C. Substitute the Substantial Evidence Test for Abuse of Discretion as a Remedy

Pursuant to INA § 244(a)(1), the Attorney General may, *in his discretion*, suspend the deportation of an alien if, *in the Attorney General's opinion*, the deportation of the alien would result, inter alia, in the extreme hardship to the alien or his spouse, parent or child who is

406. De La Luz v. INS, 713 F.2d 545 (9th Cir. 1983).
407. *Id.* at 546.
408. *INS v. Jong Ha Wang*, 450 U.S. 139, 144 (1981).
409. *Barrera Leyva*, 637 F.2d at 645.
410. Jara-Navarrete v. INS, 813 F.2d 1340 (9th Cir. 1986). The court specifically mentions that other circuits are following this approach. *Id.* at 1343. Chook Hae v. INS, 756 F.2d 1350, 1351-52 (9th Cir. 1985).
411. De La Luz v. INS, 713 F.2d 545, 546 (9th Cir. 1983).

a citizen of the United States or an alien lawfully admitted for permanent residence.[412] Abuse of discretion, in this context, suggests an almost extreme deference to the administrative agency's superior ability to make evidentiary rulings that call for application of judgment.

As one commentator has stated, "it is not clear exactly what appellate courts mean when they apply tests such as 'abuse of discretion.'"[413] In *Jong Ha Wang*, the Supreme Court stated that the reviewing court could not overturn the construction given by the Attorney General to the term "extreme hardship" simply because it preferred another interpretation of the statute.[414] As Professor Leonard suggests with reference to trial courts, "there is something troubling about this since the issue is the appellate court's ability to decide that the trial court (in this case, the Attorney General) did indeed commit an error."[415] When an appellate court finds that error has been committed and such error has affected a substantial right of a party, the obvious question raised by Professor Leonard is whether there can be any doubt that the appellate court has the authority to reverse.[416]

Notwithstanding this logic, the courts are constrained by the holding in *Jong Ha Wang*, and suspension of deportation has become an illusory remedy.

Case law since *Jong Ha Wang* demonstrates that the circuits are split in reviewing suspension of deportation cases.[417] Courts are split on the issue of what constitutes "extreme hardship" and the degree of discretion the BIA should be allowed to exercise in determining extreme hardship.[418] As section two of this Article discussed, a leading case in the Ninth Circuit is *Cerrillo-Perez v. INS*,[419] which required the

412. INA, Pub. L. No. 82-414, § 244(a)(1), 66 Stat. 163 (1952) (current version at 8 U.S.C. § 1254(a)(1) (1988 & Supp. V 1993)).

413. David P. Leonard, *Power and Responsibility in Evidence Law*, 63 S. CAL. L. REV. 937, 975 (1990).

414. *Jong Ha Wang*, 450 U.S. at 144.

415. Leonard, *supra* note 413, at 979.

416. *Id.* Replacing the abuse of discretion with a substantial evidence test means that the role of the reviewing federal court would be to determine whether there is substantial evidence in the record to support the decision of the Attorney General, not to reweigh the evidence or try the issue de novo. *See generally*, Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938) ("Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."). If supported by substantial evidence, the findings of the Attorney General are conclusive and must be affirmed. However, if an error were committed by the Attorney General, no amount of discretion should prevent the reviewing court from reversing.

417. *See* Cerrillo-Perez v. INS, 809 F.2d 1419 (9th Cir. 1987); Hernandez-Cordero v. INS, 819 F.2d 558 (5th Cir. 1985).

418. *Cerrillo-Perez*, 809 F.2d 1419; *Hernandez-Cordero*, 819 F.2d at 562-63.

419. 809 F.2d 1491.

BIA to carefully show that it considered all relevant factors and did not distort or disregard factors. *Hernandez-Cordero v. INS*[420] takes an opposite approach.[421] In *Hernandez*, the Fifth Circuit gave the BIA almost complete deference in reviewing its decisions.[422] The majority only examined whether "'any consideration had been given' by the BIA to the factors establishing 'extreme hardship.'"[423]

The two standards of review for determinations of "extreme hardship" from the Fifth Circuit and the Ninth Circuit yield very different results. The *Hernandez-Cordero* standard of review is very low rendering the BIA decision basically final. The *Cerrillo* standard of review allows the appellate court more discretion for review.

The *Hernandez* and *Cerrillo* cases demonstrate the varying level of scrutiny BIA suspension of deportation decisions receive when they are appealed under the "abuse of discretion" test. These two cases illustrate the confusion in the reviewing courts as to their ability to determine whether the Attorney General committed an error and demonstrate how inadequate the abuse of discretion standard is for the determination of extreme hardship.[424]

D. Congressional Action

Congress should overrule *Jong Ha Wang* for the same reason it overruled *Fiallo v. Bell*[425] and *INS v. Phinpathya*.[426] In *Phinpathya*, the Supreme Court overturned a long line of Ninth Circuit decisions regarding the first eligibility requirement for suspension of deportation, the requirement of continuous physical presence in the United States for a specified time period.[427] The Court construed this provision literally.[428] In doing so, the Court held that any absence, no matter how insignificant, would disrupt the continuity of the alien's physical presence and, thus, if the absence occurred in the past seven

420. 819 F.2d 558.
421. 819 F.2d 558 (5th Cir. 1985).
422. *Id.* at 564.
423. *Id.* at 563 (quoting Sanchez v. INS, 755 F.2d 1158, 1160 (5th Cir. 1985)).
424. The Ninth Circuit seems to have found a way to give teeth to the abuse of discretion test while formally deferring to the INS discretion in defining "extreme hardship." *See supra* note 410. However, the Supreme Court has yet to rule on the validity of these "abuse of discretion" cases after *Jong Ha Wang*. Currently this appears to be the most plausible way for the courts to "check" the congressionally delegated power without raising a separation of powers issue.
425. 430 U.S. 787 (1977).
426. 464 U.S. 183 (1984).
427. *Id.* at 196.
428. *Id.* at 192 ("We do justice to this scheme only by applying 'the plain meaning of [section 244(a)], however severe the consequences.' ").

years, preclude suspension.[429] By passing the Immigration Reform and Control Act, Congress amended section 1254 of the INA to avoid the harshness of such literal interpretation and the consequent banishment of aliens.[430] Section 1254 now states: "An alien shall not be considered to have failed to maintain continuous physical presence in the United States under paragraphs (1) and (2) of the subsection (a) if the absence from the United States was brief, casual and innocent and did not meaningfully interrupt the continuous physical presence."[431]

Congress should adopt a liberal construction of extreme hardship and provide guidelines that require the Attorney General to make a finding of extreme hardship if a majority of the factors set out in the guidelines are present. In addition to limiting the Attorney General's discretion, Congress should require the courts to apply a substantial evidence test upon review.[432]

While agency expertise is often cited as a justification for agency discretion,[433] a determination of what factors constitute extreme hardship for a person or family is not an esoteric question that requires specialized training. As the dissent in *Hernandez-Cordero* stated: "[W]hat constitutes [extreme] hardship requires knowledge of human affairs, judgment, and empathy—qualities that federal judges should have in at least as much measure as administrative officers."[434]

VII. Conclusion

An examination of the treatment of both alien and citizen children in this country reveals that the courts are sympathetic to the educational needs of indigent children who cannot affect their status. In economic benefits cases, the courts protect citizen children of alien parents who are vicariously punished for the wrong doing of their par-

429. *Id. Cf. Kamheangpatiyooth v. INS*, 597 F.2d. 1253 (9th Cir. 1979) (extending the *Fleuti* test to lawful permanent residents who were considered not to have meaningfully interrupted their residence in the United States if the absence was brief, casual and innocent); Rosenberg v. Fleuti, 374 U.S. 449 (1963).

430. See De Gurules v. INS, 833 F.2d 861, 862 (9th Cir. 1987) for a discussion of Congress' actions.

431. 8 U.S.C. 1254(bb)(2) (Supp. V 1993).

432. The need for clarity regarding the application of the substantial evidence test stems from the language of the majority opinion in INS v. Doherty, 112 S.Ct. 719, 724 (1992). The Doherty Court appears to only require an abuse of discretion test to be applied to the review of withholding of deportation which is a mandatory form of relief, *id.* at 727. *See also id.* at 729-30 (Scalia, J., dissenting).

433. *See* KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.00-3, 43-44 (Supp. 1982).

434. *Hernandez-Cordero*, 819 F.2d at 567 (Robin, J., dissenting).

ents. This protection, however, does not extend to immigration law, where citizen children's rights are consistently ignored when their parents are deported.

There are several possible remedies for this disparity in treatment. First, the courts should cease to defer to the unfettered grant of discretion to the Attorney General. The definition of extreme hardship must be scrutinized by the judiciary. Congress is not beyond the constitutional scrutiny of the court; if a court suspects that a citizen has been deprived of constitutionally-protected rights, it should examine, at a minimum, the scope of the deprivation.

The holding in *Plyler* is logical and just. Following the Supreme Court's ruling in *Plyler*, the delegation of complete discretion to the INS should be reexamined. The judiciary has the power and ability to determine how much hardship a citizen child must endure before our government should label the hardship extreme. The courts must meet the challenges presented by Congress, the Attorney General, and the INS, and fulfill their role as the final arbiters of constitutional rights.

Second, if the courts continue to defer to the discretion of the Attorney General, the abuse of discretion remedy should be invoked more often to check the authority of the INS. The courts have the power and the means to determine whether the INS has abused its discretion by failing to consider all the relevant factors surrounding each petition for a suspension of deportation proceedings. The deprivation of rights issues can and should be examined in this context. The best solution is to amend the INA to require the Attorney General to consider the guidelines proposed in this paper in determining whether extreme hardship exists, and to substitute the substantial evidence test for abuse of discretion as a standard of review.

Third, the courts should utilize the Ninth Circuit's approach in cases such as *Jong Ha Wang*, *Cerrillo-Perez* and *Jara-Navarete*, in reexamining the citizen children's constitutional rights to education, family autonomy, and residence in the United States. In examining the constitutional rights of citizen children, the courts should not focus upon their status as children, but upon their status as citizens.

Our nation's failure to prevent illegal immigration into the United States has led to a cultural and economic crisis. However, penalizing citizen children because they were born to illegal alien parents is both illogical and unjust. Before we deprive a citizen child of his or her fundamental rights and resign him or her to a life outside of the United States, we must consider thoroughly the condemnation which we visit on the heads of the innocent:

> [W]hat does it say about our notions of justice when we harbor a willingness to act against our own children in the name of immigration control? What messages do we communicate to ourselves and to the world when our courts, once the immigration law cloak is invoked, turn a blind eye to the reality that our citizen children are hurt in order for our society to strike at their parents?[435]

These concerns are very real. We must consider the moral and legal dilemmas we create when we allow the INS to deport citizen children without employing any constitutional safeguards.

The United States Supreme Court must exercise leadership and determine the proper role of the judiciary in this important and sensitive area. Failure to do so will leave the constitutional issues of immigration law in the hands of Congress, the Attorney General, and the INS, and give these entities unfettered discretion in constitutional interpretation.

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