Michigan Law Review

Volume 121 | Issue 4

2023

Recognizing the Right to Family Unity in Immigration Law

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https://doi.org/10.36644/mlr.121.4.recognizing

NOTE

RECOGNIZING THE RIGHT TO FAMILY UNITY IN IMMIGRATION LAW

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The Trump Administration's travel ban and separation of families at the U.S.-Mexico border drew newfound attention to the constitutional due process right to family unity. But even before then, the right to family unity has had a substantial history. Rooted in the Supreme Court's line of privacy rights cases, the right to family unity is amorphous. This ambiguity has given rise to disagreement regarding not only legal doctrine surrounding the right but also whether the right even exists. This Note clarifies this disagreement by offering a historical account of the right to family unity and an overview of three categories of immigration cases in which litigants assert this right. Acknowledging that a substantive resolution of the problem of family separation in immigration will require legislative and executive intervention, this Note argues instead that courts should adopt two recommendations that would, as a matter of judicial process, more fully recognize the right. These measures would validate the dignitary interests of immigrant families and signal to the legislative and executive branches the constitutional implications of their longstanding inaction.

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* J.D. Candidate, May 2023, University of Michigan Law School. Thank you to Professor David B. Thronson for his guidance and feedback and Professors Emily A. Prifogle and Julian Davis Mortenson for their support during the early stages of the writing process. I would also like to thank Paul Kyumin Lee and the rest of the Divided Families Podcast team for inspiring this project and always reminding me to stretch my empathy beyond borders. Lastly, thank you to all of the hardworking editors of the *Michigan Law Review* Vol. 121. In particular, I would like to thank the Notes Office and my Notes Editors Hank Minor and Sofia Squatriti for their insightful comments.

 doi:10.36644/mlr.121.recognizing

INTRODUCTION

The constitutional due process right to family unity[1] is intuitively recognizable yet legally indistinct. The term itself is indeterminate, having gone by other names such as the right to "family integrity" or "familial association."[2] One Second Circuit judge described the constitutional right of "intimate association" as being "[l]ike the wind that blows where it wills and can be heard, yet no one knows 'from where it cometh and whither it goeth,' " concluding, "this constitutional right is real despite the lack of exact knowledge regarding its derivation and contours."[3] The right gained renewed attention following the Trump Administration's separation of families at the U.S.-Mexico border,[4] leading President Biden to condemn the actions of his predecessor and declare that his administration would "protect family unity."[5]

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1. I will loosely refer to the broader "right to family unity" as encompassing the rights to marriage and childrearing, which arguably also include the rights to be with one's spouse or child.

2. Ms. L. v. U.S. Immigr. & Customs Enf't, 302 F. Supp. 3d 1149, 1161 (S.D. Cal. 2018) ("[I]t has long been settled that the liberty interest identified in the Fifth Amendment provides a right to family integrity or to familial association."); *see also infra* Section I.B.

3. Patel v. Searles, 305 F.3d 130, 133 (2d Cir. 2002) (citation omitted).

4. *Family Separation – A Timeline*, S. POVERTY L. CTR. (Mar. 23, 2022), https://www.splcenter.org/news/2022/03/23/family-separation-timeline [perma.cc/BF9H-X37Q].

5. Exec. Order No. 14,011, 86 Fed. Reg. 8,273, 8,273 (Feb. 2, 2021).

Recently, some legal scholars have traced the roots of family separation in practices against enslaved, indigenous, and immigrant populations throughout U.S. history, while others have argued that separating families under a "zero-tolerance" policy violates the Eighth and Thirteenth Amendments.[6] Such broad recognition of family separation as a violation of human decency and civil rights has led some legal advocates to assert a right to family unity even in nonimmigration cases.[7]

The ambiguity of the right to family unity yields advantages and drawbacks. On the one hand, the ubiquity of family makes the importance of the right immediately recognizable. The right to family unity also serves as a conduit through which advocates can draw parallels to other historical injustices[8] and organize against a wide range of policies. For example, many Americans viewed the Trump Administration's "zero-tolerance" policy to deter migrants at the U.S.-Mexico border and President Trump's executive orders banning immigrants from several predominately Muslim countries as a single "family separation policy" despite the differences in type of governmental action and scope.[9]

On the other hand, when legal advocates draw parallels between these types of policies, it can obscure the differences in *how* governmental action separates families. Worse, such rhetorical flourish can undermine those advocates' credibility.[10] The ubiquity of family can make it difficult to determine

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6. Anita Sinha, *A Lineage of Family Separation*, 87 BROOK. L. REV. 445 (2022); Jenny-Brooke Condon, *When Cruelty Is the Point: Family Separation as Unconstitutional Torture*, 56 HARV. C.R.-C.L. L. REV. 37 (2021); Ndjuoh MehChu, *Help Me to Find My Children: A Thirteenth Amendment Challenge to Family Separation*, 17 STAN. J. C.R. & C.L. 133, 141 (2021) (stating the drafters of the Thirteenth Amendment intended for the Amendment to end "the sharp cry of the agonizing hearts of severed families").

7. *E.g.*, Khalifa v. City of New York, No. 15-CV-06611, 2019 WL 1492905, at *5 (E.D.N.Y. Apr. 4, 2019) (arguing denial of familial association where a father and his children were driven to the hospital in separate vehicles by invoking the "recent controversy regarding the separation of families in the immigration context").

8. Sinha, *supra* note 6; *see also* Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2325 (2019) ("As a motif, family separation has defined large swathes of our nation's history. To state the obvious, the United States has a long history of dehumanizing nonwhite populations, and separating and breaking apart families has often operated as a tool for dehumanization.").

9. *See, e.g.*, Fazia Patel, *Deference to Discrimination: Immigration and National Security in the Trump Era*, AM. BAR ASS'N (Apr. 27, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/immigration/deference-to-discrimination [perma.cc/SFG5-ZDCU] ("Like the zero-tolerance policy that operated at the U.S.-Mexico border between April and June 2018, the Muslim Ban operates as a family separation policy by preventing Americans' spouses, children, and parents from coming to the United States.").

10. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) ("Whatever rhetorical advantage the dissent may see in doing so, *Korematsu* has nothing to do with this case."); MehChu, *supra* note 6, at 172 ("[Jamal] Greene argues that reputational costs further dampen the prospects of Thirteenth Amendment doctrinal expansion because lawyers bringing Thirteenth Amendment arguments before a judge assume the risk of compromising their credibility with claims likely to be perceived as fanciful.").

what constitutes a family and to develop principles that circumscribe the contexts in which the right to family unity is implicated. Counterintuitively, the fact that most people have families makes some degree of family separation inevitable and, therefore, more easily taken for granted. Professor Stephen Lee aptly describes the separation of families by immigration laws as a "slow death" that "captures the kinds of harms that happen slowly and over time, which can often go overlooked or unnoticed."[11] The Southern District of California recognized a likely violation of the substantive due process right to family unity when it enjoined the Trump Administration's "zero tolerance" policy, but this is by far the exception and not the rule.[12] Instead, families are routinely separated by immigration laws despite the right to family unity and the principle of family reunification that is supposedly central to our immigration system.[13]

This Note aims to clarify confusion over the right to family unity by providing an overview of immigration cases in which litigants assert this right. It also argues that courts should adopt two recommendations to validate the dignitary interests of immigrant families. Part I offers a history of the right to family unity broadly and specifically within the immigration context. Part II begins by briefly outlining the scope of "family." It then untangles disagreement surrounding the right to family unity by examining three categories of cases in which the right is often raised: (1) cases considering "exceptional hardship" upon family members, (2) cases involving petitions for a family member's admission into the United States, and (3) cases involving family members in immigration detention. Part III argues that the judiciary should adopt two recommendations for examining the right to family unity in immigration cases. First, courts should separate procedural from substantive due process inquiries in analyzing this right. Second, courts should adopt the "undue burden" standard applied in access to abortion and other family privacy cases. These recommendations will enable courts to safeguard the right to family unity and signal to the legislative and executive branches the constitutional implications of their actions.

I. THE RIGHT TO FAMILY UNITY

The right to family unity in the immigration context lies at the intersection of family and immigration law. Section I.A lays out an overview of the broader constitutional origins of the right to family unity. Section I.B traces the evolution of the right in immigration law.

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11. Lee, *supra* note 8, at 2327.

12. Ms. L. v. U.S. Immigr. & Customs Enf't, 310 F. Supp. 3d 1133, 1145–49 (S.D. Cal. 2018); *see infra* Sections II.B–D.

13. Anita Ortiz Maddali, *Left Behind: The Dying Principle of Family Reunification Under Immigration Law*, 50 U. MICH. J.L. REFORM 107, 149 (2016).

A. *The Constitutional Origins of the Right to Family Unity*

The Constitution does not mention "family," much less a specific right to family unity. Unenumerated family rights instead originate from a long line of Supreme Court decisions interpreting the Fourteenth Amendment to protect family privacy. Starting in the 1920s, the Court recognized parents' rights over rearing and educating their children in *Meyer v. Nebraska*[14] and *Pierce v. Society of Sisters*,[15] respectively. *Meyer* and *Pierce* "mark[ed] off a 'private realm of family life which the state cannot enter.' "[16] Subsequent decisions recognized the right to marry,[17] to use contraception,[18] and to choose whether to carry a pregnancy to term.[19] Prior to uncertainty in the wake of the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*,[20] these cases have been understood to recognize subcategories of a broader right to privacy.[21] While *Meyer* and *Pierce* laid the groundwork, it was these later decisions that "ushered in a dramatically different understanding of the relationship between family law and the Constitution."[22]

By emphasizing equality and autonomy, these cases struck down laws that governed, for example, who could marry or assert parental rights.[23] Privacy was reconceived as an *individual* right, breaking from a former emphasis on familial relationships or the family as a single unit.[24] More recently, the Supreme Court has recognized family relationships beyond the traditional nuclear family.[25] The Court then extended this line of reasoning when it prevented states from enforcing statutes banning same-sex marriage, which

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14. 262 U.S. 390 (1923).

15. 268 U.S. 510 (1925).

16. David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. 529, 532 (2008) (citing Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

17. Loving v. Virginia, 388 U.S. 1, 12 (1967).

18. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

19. Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

20. Although the *Dobbs* majority overruled the right to choose whether to carry a pregnancy to term, it stated the decision "does not undermine" other privacy rights. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2237 (2022). At the same time, Justice Thomas wrote in his concurrence that, in future cases, the Court "should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*." *Id.* at 2301 (Thomas, J., concurring).

21. *See* Meyer, *supra* note 16, at 532–33; John Guendelsberger, *The Right to Family Unification in French and United States Immigration Law*, 21 CORNELL INT'L L.J. 1, 44 n.315 (1988).

22. Meyer, *supra* note 16, at 533.

23. *Id.*; *see, e.g.*, Loving v. Virginia, 388 U.S. 1, 6–7 (1967); Stanley v. Illinois, 405 U.S. 645, 657–58 (1972).

24. Meyer, *supra* note 16, at 544.

25. *Id.* at 546–48; *see, e.g.*, Troxel v. Granville, 530 U.S. 57 (2000) (holding in favor of a parent who objected to an award that granted a child's grandparents visitation rights on the basis of the fundamental right of childrearing); Lawrence v. Texas, 539 U.S. 558 (2003) (striking down a Texas law that criminalized sexual contact between same-sex partners).

signified a complete departure from the Court's traditional understanding of family.[26]

Although rights involving marriage and parent-child relationships safeguard specific forms of family unity, the Court has recognized a general right to family unity as well.[27] A series of decisions in the 1970s involved assertions not only of the right to enter into a marital relationship and to educate one's child but also to associate with one's family.[28] Whereas this emerging, broader right to family unity could be read as a mere gloss on the right to childrearing recognized in *Meyer* and *Pierce*, the Court's 1977 decision in *Moore v. City of East Cleveland* more clearly established the right.[29] *Moore* involved an East Cleveland zoning provision that restricted the occupancy of a single-family dwelling unit to members of a nuclear family, prohibiting Ms. Moore from living with her two grandsons.[30] In striking down the ordinance, the Court explicitly rejected the city's argument that the line of cases originating from *Meyer* and *Pierce* should be distinguished because Ms. Moore was one generation removed from her grandchildren.[31] The Court held this distinction could not overcome the "basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause."[32] Expanding the scope of "family," the opinion emphasized that prior decisions "establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[33]

Moore gave rise to novel arguments, such as claiming violations of the constitutional right to "family association"[34] in section 1983 actions[35] brought by parties whose family members were killed by state actors.[36] In one of these cases, the District of Colorado noted that it would be "ironic" to recognize the rights to marry, procreate, and educate one's child while also denying parents the "constitutional protection for the continued life of their child."[37]

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26. Obergefell v. Hodges, 576 U.S. 644 (2015).

27. Guendelsberger, *supra* note 21, at 45.

28. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645 (1972) ("[A]t the least, Stanley's interest in retaining custody of his children is cognizable and substantial.").

29. *See* 431 U.S. 494 (1977) (plurality opinion).

30. *Moore*, 431 U.S. at 495–96.

31. *Id.* at 500–01.

32. *Id.* at 501.

33. *Id.* at 503.

34. Myres v. Rask, 602 F. Supp. 210, 210 (D. Colo. 1985).

35. 42 U.S.C. § 1983.

36. Guendelsberger, *supra* note 21, at 49; *see also Myres*, 602 F. Supp. at 213 n.4.

37. *Myres*, 602 F. Supp. at 213 ("To constitutionally protect families from lesser intrusions into family life, yet allow the state to destroy the family relationship altogether, would drastically distort the concept of ordered liberty protected by the Due Process Clause.").

This history reveals two sources of confusion in the legal doctrine governing family separation. First, there is no single landmark case that clearly announces or articulates a right to family unity. Instead, a series of cases tangentially and vaguely allude to this right without embracing it head-on. This vague origin renders uncertain the foundation on which this doctrine is built. The Court has circumvented the lack of enumeration by stating that the right to privacy, of which the right to family unity is a subset, is "older than the Bill of Rights" and is created by the "penumbras" of the First, Third, Fourth, and Fifth Amendments.[38]

The variegated cases supporting the right to family unity are not amenable to a principled development of legal doctrine. This creates a discrepancy between the ease with which litigants and courts can assert the existence of a right to family unity and the difficulty of articulating the legal doctrine that safeguards it.[39]

Second, although conceptualizing family rights as individual rights improves administrability, it can also oversimplify the constitutional rights at stake. Like all constitutional rights, the right to family unity is not absolute and can be overridden by state interests.[40] The newfound emphasis on individual rights has made it easier for courts to balance the right against such interests.[41] But this ease of administrability comes at the expense of capturing the reality that "the rights of individuals are intertwined, and the family itself has a collective personality."[42] Consequently, courts apply imprecise balancing tests and standards as opposed to clear rules.[43]

B. *The History of the Right to Family Unity in Immigration Law*

The strength of the right to family unity in the immigration context has ebbed and flowed with the rise and decline of the "plenary power doctrine,"

38. Griswold v. Connecticut, 381 U.S. 479, 484, 486 (1965); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 624–25 (1980); *see also* Guendelsberger, *supra* note 21, at 47 (discussing the various opinions in *Griswold* and stating the "source of this privacy right has been the source of disagreement").

39. *E.g.*, Payne-Barahona v. Gonzáles, 474 F.3d 1, 3 (1st Cir. 2007) ("Nothing in these Supreme Court cases points directly toward the result Payne seeks nor does his brief try to build the bridge."); *Myres*, 602 F. Supp. at 213 (stating "[a] culture that draws its strength from family values that long predate the constitution must persistently proclaim and protect those values" without explaining *how* these values should be protected).

40. Karst, *supra* note 38, at 627.

41. Kerry Abrams, *Family Reunification and the Security State*, 32 CONST. COMMENT. 247, 269 (2017).

42. *Id.* at 268 (quoting Justice Sandra Day O'Connor).

43. *Id.*; *see also* Karst, *supra* note 38, at 625 ("Perhaps because of its origins in the least stable terrain of modern constitutional doctrine, the freedom of intimate association still has a pliable quality, inviting question-begging and the manipulation of circular arguments.").

which allows the federal government to exercise exclusive control over the nation's borders.[44] Although federal courts did not directly consider the right to family unity in immigration cases until the 1950s (during what was arguably the height of the plenary power doctrine), courts have invoked this right since the beginning of Chinese Exclusion in the 1890s.[45] Sections I.B.1–2 trace the history of the right to family unity in immigration law across two eras, and Section I.B.3 highlights key problems facing the right today.

1. The Era of Chinese Exclusion: 1890–1924

Even in the midst of Chinese Exclusion at the turn of the nineteenth century,[46] courts acknowledged a sense of the right to family unity. A striking opinion by the District of Oregon concluded that a Chinese merchant who was entitled to enter the United States was also entitled to bring his wife and children with him because these family relations were "his by *natural right*; and he ought not to be deprived of either, unless the intention of [C]ongress to do so is clear and unmistakable."[47] The Supreme Court similarly concluded that, even if they lacked their own individual certifications, the wives and children of Chinese merchants could enter the United States by virtue of their relationship to the father.[48]

These Chinese Exclusion cases are especially notable because they recognized a semblance of the right to family unity for non-European immigrants. The principle of family reunification that is ostensibly part of our current immigration system traces back to the Emergency Quota Act of 1921, the first immigration law to give specific privileges to family members.[49] But the National Origins Act of 1924's introduction of immigration quotas exposed the racist context in which this nascent right operated. Specifically, these quotas were part of a policy that sought to regulate the ethnic makeup of the nation

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44. *See also* Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens' Rights*, 41 VILL. L. REV. 725, 733–34 (1996) (explaining that the plenary power doctrine rests on the idea that Congress's power to control immigration is "inherent within its sovereign right to control U.S. territory and to protect its borders"). *See generally* Abrams, *supra* note 41.

45. Guendelsberger, *supra* note 21, at 64; Abrams, *supra* note 41, at 260.

46. Abrams, *supra* note 41, at 253.

47. *Id.* at 256 (emphasis added) (citing *In re* Chung Toy Ho, 42 F. 398, 400 (C.C.D. Or. 1890)).

48. *Id.* at 257 (citing United States v. Mrs. Gue Lim, 176 U.S. 459, 468 (1900)).

49. The Act restricted immigration by creating quotas based on national origin but exempted children under the age of eighteen from counting toward quotas and allowed certain categories of family members to gain admission before nonfamily members. Emergency Quota Act of 1921, Pub. L. No. 67-5, § 2(d), 42 Stat. 5; Kerry Abrams, *What Makes the Family Special?*, 80 U. CHI. L. REV. 7, 10–11 (2013); *see also* Maddali, *supra* note 13, at 111.

by prioritizing immigrants from Northern Europe.[50] Despite judicial reluctance to enforcing such quotas,[51] early twentieth-century immigration policies specifically benefited European immigrants.[52]

With respect to the right to family unity, the period is difficult to characterize because of the inconsistencies in how the right is recognized across race and gender, among other factors. For example, although national dialogue over unjust deportation ignored the concerns of non-European immigrants, scholars at the time also recognized that families came in various forms, such as those with female heads of households.[53] These complexities make further study of the first half of the twentieth century worthwhile, especially given that there may have been an early constitutional framing of the right.[54]

2. The Height and Decline of the Plenary Power Doctrine: 1950–1970

Despite this early awareness of a right to family unity, protecting family integrity was initially deprioritized in the face of the pressing national security concerns and McCarthyism of the 1950s.[55] These conditions produced the height of the plenary power doctrine in *United States ex rel. Knauff v. Shaughnessy*,[56] in which the spouse of a U.S. citizen was excluded without a hearing.[57] In *Knauff*, the Supreme Court upheld Congress's expansive authority to regulate national borders, holding, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[58] But the gradual constitutionalization of family law and the "due process revolution" of the 1970s corresponded with a decline of the plenary power doctrine.[59] The result has been the lack of a fully coherent doctrine of constitutional rights within immigration law,[60] where aliens' rights are treated

50. Maddali, *supra* note 13, at 124; *see also* Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST. 67, 72–75 (1999).

51. *See* Kerry Abrams, *Peaceful Penetration: Proxy Marriage, Same-Sex Marriage, and Recognition*, 2011 MICH. ST. L. REV. 141, 156–62.

52. Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921–1965*, 21 LAW & HIST. REV. 69, 98–104 (2003) ("The racism of the policy was profound, for it denied, *a priori*, that deportation could cause hardship for the families of non-Europeans.").

53. *Id.* at 93, 97.

54. For example, Max Kohler, a former assistant attorney general, invoked *Meyer* in arguing against the separation of families by immigration laws. *Id.* at 94–95.

55. *But see* Abrams, *supra* note 41, at 260 ("Even at the height of plenary power, however, the idea of family rights still held a cherished place in the popular imagination.").

56. 338 U.S. 537 (1950).

57. *See* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1642–43 (1992).

58. *Knauff*, 338 U.S. at 544.

59. Abrams, *supra* note 41, at 269–70 ("In immigration law, however, where the norm was 'no process,' the *Mathews* test offered a new hope."); Motomura, *supra* note 57, at 1651.

60. Motomura, *supra* note 57, at 1698.

differently by state and federal governments and where there is debate over the categories proposed to limit the types of immigrants that receive constitutional protections.[61]

Following the height of the plenary power doctrine in *Knauff*, *Fiallo v. Bell*[62] was heard during the early era of equal protection challenges against discriminatory statutes.[63] *Fiallo* involved challenges to sections of the Immigration and Nationality Act (INA) brought by unwed fathers and their children for alleged discrimination by refusing to qualify such fathers as "parents" under the INA.[64] Instead of applying heightened scrutiny, the Court held that it would not review the executive branch's denial of a visa waiver as long as discretion was exercised on the basis of a "facially legitimate and bona fide reason."[65] The announcement of this standard subtly narrowed the plenary power doctrine.[66] The standard is still extremely deferential to Congress, and courts continue to cite *Fiallo* in favor of a broader view of the doctrine.[67] Although scholars have predicted the end of the plenary power doctrine for decades, it remains very much alive and at odds with the assertion of constitutional rights in modern immigration law.[68]

3. Current Problems Facing the Right to Family Unity

The complex histories of both family and immigration law reveal the challenges that have produced a morass of cases grappling with the right to family unity. Because "family" is a malleable term—and families are so frequently separated—courts struggle to define the scope and nature of the right. Additionally, the need to balance national security interests against the requirements of constitutional due process poses difficulties in determining how and when the right is violated.

Courts have been primarily concerned with limiting the potentially expansive scope of the right to family unity, especially considering the Supreme Court's warning to "exercise the utmost care" in breaking "new ground" in

61. Scholars cite *Yick Wo v. Hopkins* as the basis of the "aliens' rights tradition" because there the Court held that the meaning of "any person" in the Fourteenth Amendment was "not confined to the protection of citizens." *See, e.g.*, Kelly, *supra* note 44, at 739–742 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)). For a discussion on categories such as "excludable" and "deportable" aliens, see Motomura, *supra* note 57, at 1701–02, 1702 n.381, and Santos v. Smith, 260 F. Supp. 3d 598, 608–10 (W.D. Va. 2017) (discussing the "entry fiction doctrine").

62. 430 U.S. 787 (1977).

63. Abrams, *supra* note 41, at 272.

64. *Fiallo*, 430 U.S. at 788–91.

65. *Id.* at 794–95 (1977) (citing Kleindienst v. Mandel, 408 U.S. 753, 770 (1972)).

66. Abrams, *supra* note 41, at 273.

67. *Id.* at 273–74.

68. *Id.* at 279–80. For a more recent article arguing against the underpinnings of the plenary power doctrine, see Nikolas Bowie & Norah Rast, *The Imaginary Immigration Clause*, 120 MICH. L. REV. 1419 (2022).

the field of substantive due process doctrine.[69] This has led some courts to conclude there simply is no right to family unity.[70] For example, the First Circuit has reasoned that, if there were a right prohibiting family separation as a result of deportation, it would be difficult to explain why the same right would not exist in the context of imprisonment or mandatory conscription.[71] The difficult task of developing a principled method of circumscribing the right to family unity has dissuaded courts from recognizing it.[72]

These cases erroneously conclude that, because the right to family unity is not implicated in a given instance, the right itself does not exist. The flawed nature of this reasoning is supported by the fact that other cases have recognized the right to family unity as clearly established yet restricted in its application. For example, the Fifth Circuit, citing *Moore*, has recognized the right to family unity but has repeatedly acknowledged it is "nebulous."[73] Similarly, the Eastern District of New York has held that, although the right to remain united with one's family is well established, this right is not implicated when families are separated due to immigration enforcement.[74] This understanding is also articulated in the high-profile case of *Ms. L v. ICE*, in which migrant parents brought a class action seeking to enjoin the federal government's separation of parents from their children while held in immigration detention.[75] The Southern District of California stated, "the 'right to family integrity has been recognized in only a narrow subset of circumstances,'" and explained that the plaintiffs must show "their *generally held constitutional right to family integrity* applies in the *particular circumstances* alleged here."[76] Although subtle, this formulation is different from concluding that, because the right is not implicated in a particular context, it does not exist in those contexts at all.

That the case law does not articulate a principled method for determining the scope of the right to family unity is a central problem that has given rise to two other, more specific issues. The first is consistent confusion regarding the relationship between the right to family unity and the right to reside in the United States.[77] This issue arises in cases involving noncitizens who seek to

69. Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)).

70. *E.g.*, Reyna *ex rel.* J.F.G. v. Hott, 921 F.3d 204, 210–11 (4th Cir. 2019) (citing the line of cases recognizing family privacy rights to conclude there is no "substantive due process right to family unity in the context of immigration detention pending removal").

71. Payne-Barahona v. Gonzáles, 474 F.3d 1, 3 (1st Cir. 2007).

72. *E.g.*, Lin v. United States, No. 5:07-cv-26, 2007 WL 951618, at *5 (S.D. Tex. Mar. 28, 2007) ("Only a strained reading could distill from this caselaw a substantive due process right to 'family unity' in a general sense.").

73. Rolen v. City of Brownfield, 182 F. App'x 362, 364 (5th Cir. 2006) (per curiam).

74. Saget v. Trump, 375 F. Supp. 3d 280, 374 n.31 (E.D.N.Y. 2019).

75. 302 F. Supp. 3d 1149 (S.D. Cal. 2018).

76. *Ms. L*, 302 F. Supp. 3d at 1162 (emphasis added).

77. For a more nuanced discussion of these rights, see David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1191–97 (2006).

enter or stay in the country by virtue of a family relationship. The Ninth Circuit has, in dicta, rejected this argument by conflating the right to family unity and the right to reside in the United States, addressing only the latter.[78] The issue also arises in cases of U.S. citizens who, despite their right to reside in the country, would be forced to leave the country along with the removal of a noncitizen family member. A "de facto deportation" theory is typically argued in cases involving U.S. citizen children who are dependent on their noncitizen parents.[79]

The second issue is the role of procedural due process in protecting the right to family unity in the particular circumstances where it is recognized. Specifically, courts disagree on whether family unity is a protected "liberty" interest for purposes of procedural due process.[80] The Supreme Court has offered little clarity on this issue, splitting along ideological lines in *Kerry v. Din*, where a U.S. citizen sought a fuller explanation for her noncitizen husband's visa denial.[81] The plurality opinion, written by Justice Scalia, concluded that she had no liberty interest, while the dissent, written by Justice Breyer, stated that she did.[82] Justice Kennedy's concurrence did not reach the issue of whether there was a protected liberty interest.[83] The crux of the disagreement between Justices Scalia and Breyer was whether due process rights could attach to a nonfundamental liberty interest that flows not from a statutorily protected entitlement but "'implicit[ly]' from the design, object, and nature of the Due Process Clause."[84] This is unsurprisingly a frequent point of contention, given the unsettled nature of procedural due process both generally and in immigration law.[85]

II. ASSESSING THE DOCTRINAL LANDSCAPE OF THE RIGHT TO FAMILY UNITY IN IMMIGRATION CASES

In light of the issues surrounding the right to family unity, this Part examines case law to distill legal doctrine and clarify misunderstandings among

78. De Mercado v. Mukasey, 566 F.3d 810, 816 n.5 (9th Cir. 2009); *see also* Gebhardt v. Nielsen, 879 F.3d 980, 988 (9th Cir. 2018) (holding that "a fundamental right to reside in the United States with . . . noncitizen relatives" would be at odds with "Congress' plenary power over immigration").

79. *See infra* Section II.B.

80. *See infra* Section II.C.

81. 576 U.S. 86, 88 (2015).

82. *Kerry*, 576 U.S. at 101 (plurality opinion); *id.* at 107 (Breyer J., dissenting).

83. *Id.* at 102 (Kennedy, J., concurring).

84. *Id.* at 108 (Breyer, J., dissenting) (citing Wilkinson v. Austin, 545 U.S. 209, 221 (2005)).

85. *See, e.g.*, Wilkinson v. Austin, 545 U.S. 209, 221–25 (2005) (attempting to reconcile the various procedural due process cases involving the alleged "liberty" interest of prison inmates); Motomura, *supra* note 57 (arguing that the inability of courts to recognize substantive due process rights in immigration law due to the plenary power doctrine has caused courts to compensate by instead recognizing procedural due process rights).

scholars. It begins by briefly touching on the scope of "family" before turning to three categories in which the right to family unity is often asserted. The first category involves cases in which courts assess whether family separation would impose an "exceptional hardship" on family members. An analysis of these cases clarifies the central framework courts have used to reason that the right to family unity is not implicated in the vast majority of immigration cases. The second category involves cases in which U.S. citizens petition for family members to enter the United States. These cases demonstrate that, in the admissions context, the right to family unity is circumvented in essentially the same manner as it is in "exceptional hardship" cases. The final category involves cases in which families are separated because family members are held in immigration detention. Scrutinizing these cases further elucidates the rationale used by courts in the other two categories, especially given *Ms. L* is one of the only cases in which the substantive due process right to family unity has been successfully asserted.

A. *The Scope of "Family"*

The Supreme Court has never explicitly defined the family relationships protected by the Constitution.[86] However, the Court laid out an expansive view of "family" in *Moore*,[87] which has raised concerns about cabining the right to family unity. For example, in a section 1983 case, the Seventh Circuit refused to extend the right to sibling relationships because protecting relationships other than those between parents and children would foreclose any "principled way of limiting" the scope of family.[88] Consequently, courts have either categorically excluded certain types of family relationships or implemented a functional approach.[89]

In devising a functional approach, courts have drawn on a rationale laid out in *Moore* to determine the degree to which nontraditional relationships merit constitutional protections. Despite its focus on kinship ties, the Court in *Moore* explained, "[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[90] Subsequent cases established a sliding scale by considering not only *Moore*'s rationale of educational values but also the "creation and sustenance of a family" in marriage and raising children, as well as the "emotional enrichment from close ties with

86. Guendelsberger, *supra* note 21, at 50.

87. Moore v. City of East Cleveland, 431 U.S. 494, 504 (1977) (plurality opinion) ("The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.").

88. Guendelsberger, *supra* note 21, at 52–53 (quoting Bell v. City of Milwaukee, 746 F.2d 1205, 1247 (7th Cir. 1984)).

89. *Id.* at 51–53.

90. *Moore*, 431 U.S. at 503–04.

others."[91] At first glance, the functional approach seems to vastly expand the scope of "family." It can include, for example, a family servant of thirty years[92] but exclude parents who were unable to establish relationships with their children.[93] This kind of exclusion poses a particular danger in the immigration context, where family separation can preclude parent-child bonds.[94]

B. *"Exceptional Hardship" upon a Family Member*

Although defining the scope of "family" merits further study, most cases involve uncontroversial status relationships such as marriage and parent-child relationships. Immigration laws explicitly safeguard these traditional relationships through provisions that offer protections for immigrants who can demonstrate their departure from the United States will render "exceptional hardship" upon a child or spouse.[95] These laws can be understood as a functional approach that uses the hardship caused by separation as a proxy for assessing the strength of family ties.[96] The right to family unity is frequently asserted in two types of these cases: those involving "cancellation of removal" under the INA and those seeking waiver of the J-1 visa's two-year foreign residency requirement.

1. Cancellation of Removal

Immigrants in deportation proceedings can seek "cancellation of removal" as a form of relief.[97] In order to qualify for this relief, a nonpermanent resident must establish, among other factors, that they have been physically present in the United States for a continuous period of at least ten years and that removal would cause "exceptional and extremely unusual hardship to the alien's spouse, parent, or child [who is either a citizen or permanent resident]."[98] This hardship requirement is difficult to meet, as individuals must

91. Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984); Patel v. Searles, 305 F.3d 130, 136 (2d Cir. 2002) ("We agree that *Roberts* established a sliding scale for determining the amount of constitutional protection an association deserves."); *see also* Guendelsberger, *supra* note 21, at 51–52.

92. Guendelsberger, *supra* note 21, at 54 n.400.

93. *Id.* at 51–52.

94. *Id.* at 53; *see, e.g.*, Caitlin Dickerson, *The Youngest Child Separated from His Family at the Border Was 4 Months Old*, N.Y. TIMES (June 16, 2019), https://www.nytimes.com/2019/06/16/us/baby-constantine-romania-migrants.html [perma.cc/K7EG-GSAR] ("She handed the baby to his mother, but he screamed and reached back in the other direction, his face crumpling into a knot of terror.").

95. *See infra* notes 98, 121 and accompanying text.

96. Guendelsberger, *supra* note 21, at 53–54.

97. 8 U.S.C. § 1229b.

98. *Id.* § 1229b(b)(1).

establish hardship that is "substantially different from, or beyond, that which would normally be expected" by an instance of family separation.[99]

Numerous scholars have addressed cancellation of removal and "de facto deportation," which describes the situation of U.S. citizen children who are forced to follow their noncitizen parents out of the country.[100] While the case law is well established, the doctrine remains a subject of controversy because it circumvents entirely the right to family unity and the right for citizens to remain in the United States. Even though every federal circuit court that has reached the issue has found that de facto deportation does not violate the Constitution, the fact that U.S. citizen children are unable to grow up in and reap the benefits of their home country is manifestly unjust.[101]

A particularly notable voice of opposition was Judge Harry Pregerson of the Ninth Circuit, who dissented 139 times in cases on this issue, once characterizing removal in such instances as turning an immigrant family's "American dream into a nightmare."[102] Judge Pregerson believed these cases imposed two unconstitutional alternatives, stating, "[t]he government's conduct violates due process by forcing the children to accept de facto expulsion from their native land or give up their constitutionally protected right to remain with their parents."[103] Scholars have also attempted to undermine the supposed constitutionality of de facto deportation, arguing, for example, that courts have failed to recognize that citizen children, despite their young age, have the capacity to exercise their right to remain in the United States.[104] While Judge Pregerson and these scholars may be correct in their moral indignation toward cancellation of removal doctrine, their arguments confuse the relationship between the right of a U.S. citizen to remain in the country and the right to family unity. They also fail to address the crucial doctrinal point that it is, in Judge Pregerson's own words, the "*government's* conduct" that must infringe fundamental rights for there to be a violation of due process.

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99. Monreal-Aguinaga, 23 I. & N. Dec. 56, 65 (B.I.A. 2001) (noting Congress established a "high level of hardship"); *see also* J-J-G-, 27 I. & N. Dec. 808, 813–14 (B.I.A. 2020) (discussing *Monreal* and other cases).

100. *See, e.g.*, Thronson, *supra* note 77; Alison M. Osterberg, Comment, *Removing the Dead Hand on the Future: Recognizing Citizen Children's Rights Against Parental Deportation*, 13 LEWIS & CLARK L. REV. 751 (2009); Susan Hazeldean, *Anchoring More than Babies: Children's Rights After* Obergefell v. Hodges, 38 CARDOZO L. REV. 1397 (2017); Lori A. Nessel, *Deporting America's Children: The Demise of Discretion and Family Values in Immigration Law*, 61 ARIZ. L. REV. 605 (2019).

101. Nessel, *supra* note 100, at 622–23.

102. Memije v. Gonzales, 481 F.3d 1163, 1165 (9th Cir. 2007) (Pregerson, J., dissenting); Osterberg, *supra* note 100, at 764.

103. *Memije*, 481 F.3d at 1164 (Pregerson, J., dissenting).

104. Nessel, *supra* note 100, at 623–24; Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 56 HARV. C.R.-C.L. L. REV. 267, 293 (2021).

The confusion can arguably be traced to *Acosta v. Gaffney*.[105] There, the District of New Jersey initially held that the de facto deportation of a five-month-old U.S. citizen was a result "repugnant to the Constitution," noting that the parent's "choice" to either take the child or leave her "virtually at the boarding gate" was not a choice the law should recognize as "any alternative at all."[106] The Third Circuit reversed, holding that because the child, Lina Acosta, could not make a "conscious choice of residence," her parents must make the decision for her.[107] Consequently, Lina's right to remain in the United States was not violated because it was not governmental action that compelled her to leave but her parents, who decided on her behalf.

The Third Circuit's holding, however, is muddied by its emphasis on Lina's right to return to the United States when she becomes an adult. In what is arguably dicta, the court explained that, while Lina had a right to choose whether to live in the United States or Colombia, the right was "purely theoretical" because she was, as an infant, too young to exercise it.[108] The court explained that Lina's departure would "merely postpone, but not bar, her residence in the United States if she should ultimately choose to live here."[109] The inessential nature of this reasoning is demonstrated by the fact that subsequent cases have not reiterated it, emphasizing instead the lack of governmental action and a concern for creating a loophole for undocumented parents seeking to avoid removal.[110]

It is important to note that the courts in *Acosta* were concerned not with the right to family unity but with a citizen's right to remain in the United States.[111] Setting aside the possibility that the right to family unity is inherently integrated with the rights of citizenship (as in, children cannot enjoy the benefits of being a citizen without their parents),[112] it is the right to remain in the United States that creates a geographic anchor. After all, the right to family unity is not the right to be with one's family in a specific country. Consequently, courts can make a normatively unsatisfying argument that, although immigration law imposes difficult choices upon family members, the right to family unity is not violated when families remain united in other countries.[113]

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105. 558 F.2d 1153, 1158 (3d Cir. 1977).

106. Acosta v. Gaffney, 413 F. Supp. 827, 832–33 (D.N.J. 1976), *overruled by* Acosta v. Gaffney, 558 F.2d 1153 (3d Cir. 1977).

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

108. *Id.* at 1157.

109. *Id.* at 1158.

110. Thronson, *supra* note 77, at 1194–96; Nessel, *supra* note 100, at 624–25.

111. While the plaintiffs raised Lina's "right to have her parents with her in this country," it was framed as being violated by discrimination on the basis of national origin. The district court rejected this argument, and the Third Circuit did not address it. *Acosta*, 413 F. Supp. at 830. But cases involving the right to family unity (as opposed to solely the right to remain in the United States) have held similarly. *See, e.g.*, Cooper Butt *ex rel.* Q.T.R. v. Barr, 954 F.3d 901, 907 (6th Cir. 2020).

112. *See* Osterberg, *supra* note 100, at 760.

113. *See* Thronson, *supra* note 77, at 1196–97.

Two rights, however, are not better than one when they are circumvented in the exact same manner. To clarify *Acosta*'s central framework, recall Judge Pregerson viewed de facto deportation as unconstitutional because he understood the government as "forcing" citizen children to either join their parents abroad or stay in the United States apart from them.[114] He did not see the children as having a legally cognizable "choice" between alternatives but instead argued the *government* directly violated either the right to remain in the United States in the former scenario or the right to family unity in the latter. In contrast, the Third Circuit in *Acosta* recognized a genuine choice and pinned it on the *parents*, who had to decide, on behalf of the child, whether the child would leave or stay in the United States. Understanding the government's conduct as merely constraining—rather than extinguishing—discretion, the framework circumvents both rights by attributing the ultimate choice to the parents rather than to the government.[115] Any indirect burden the government's action might have on constitutional rights is further absolved by the plenary power doctrine.[116]

In light of *Acosta*'s central holding that separations caused by family choices rather than governmental action do not implicate the right to family unity, scholars' arguments against the constitutionality of de facto deportation are misplaced. Scholars who argue the right to family unity should prevail because constitutional protections are afforded to even undocumented children in the equal protection context overlook the fact that these cases involved direct government benefits.[117] Similarly, scholars who focus their arguments on rebutting the presumed incapacity of children to assert their constitutional rights are misguided, targeting what is essentially dicta. By focusing on an assertion of the right before identifying the governmental action the right is being asserted against, these scholars put the cart before the horse.[118] The inapplicability of these arguments is further demonstrated by the fact that citizen adults with full capacity to exercise their rights nonetheless fail to bring noncitizen spouses into the country.[119]

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114. *See supra* note 103 and accompanying text.

115. Thronson, *supra* note 77, at 1194–95; Keh Tong Chen v. Att'y Gen. of the U.S., 546 F. Supp. 1060, 1067 (D.D.C. 1982) ("Courts have upheld the constitutionality of [Immigration and Naturalization Service] decisions which result in 'de facto deportation' of citizens on the grounds that 'de facto deportation' is not a necessary result of government action, but rather an indirect consequence of the citizen's choice between alternatives.").

116. *E.g.*, Martial-Emanuel v. Holder, 523 F. App'x 345, 349–50 (6th Cir. 2013).

117. *See* Nessel, *supra* note 100, at 626 (public education); Hazeldean, *supra* note 100, at 1435–39 (Medicaid benefits).

118. *See* Nessel, *supra* note 100, at 627 ("Legal theorists have described the difference between having a right and enjoying that right."); Hazeldean, *supra* note 100, at 1441 (arguing children have constitutional rights that can be exercised with the aid of their parents); Osterberg, *supra* note 100, at 772 (arguing the right to remain in the United States should be defined as a negative right, as opposed to an affirmative one); Trivedi, *supra* note 104, at 292–93 (suggesting children might secure more favorable outcomes in immigration proceedings if they could assert their own rights, as opposed to only those of their parents).

119. *See infra* Section II.C.

2. Waiving the J-1 Visa's Two-Year Foreign Residency Requirement

J-1 visas are typically provided to immigrants who come to the United States to pursue graduate studies and require recipients to return to their home countries for two years before applying for a visa for permanent residence.[120] The attorney general can waive this foreign residency requirement if the individual can demonstrate it would impose "exceptional hardship upon the alien's spouse or child [who is a U.S. citizen or lawful resident]."[121] While an "exceptional hardship" seems easier to demonstrate than "exceptional and extremely unusual hardship" for "cancellation of removal," courts have defined these standards similarly.[122]

Although cases involving the waiver of the J-1 visa's two-year foreign residency requirement typically involve claims brought under the Administrative Procedure Act (APA), recent cases have also simultaneously brought due process claims.[123] Furthermore, where due process claims are not brought in tandem with APA claims, evaluation of agency action can still require consideration of constitutional issues because of the constitutional avoidance canon. That is, in determining the exact procedure the agency was required to follow, the court must rule out interpretations of the statute that would violate the Constitution.[124] Consequently, such cases can rely on, and even clarify, the doctrine set forth in *Acosta*.[125] These cases also demonstrate how the right to family can, by looming in the background, exert force in affording procedural protections.

Two cases demonstrate these points. In an earlier case, the District Court for the District of Columbia clarified how the holding in *Acosta* should be applied. In that case, the then Immigration and Naturalization Service denied waiver of the two-year foreign residence requirement after determining the applicant's family would not face "exceptional hardship" were they to accompany him to Taiwan.[126] Citing *Acosta* with regard to the constitutional avoidance canon, the court found this decision arbitrary and capricious because the agency only considered one scenario: whether the applicant's spouse and child would suffer "exceptional hardship" if they were to accompany him to Taiwan.[127] The agency failed to consider another scenario: whether they would suffer "exceptional hardship" if they were to remain in the United States apart

120. 8 U.S.C. § 1182(e).

121. *Id.*

122. *See* Teleanu v. Koumans, 480 F. Supp. 3d 567, 574 (S.D.N.Y 2020) (discussing the standard and finding that the hardship must be "greater than the anxiety, loneliness, and altered financial circumstances ordinarily anticipated from a two-year sojourn abroad" (quoting Keh Tong Chen v. Att'y Gen. of the U.S., 546 F. Supp. 1060, 1064 (D.D.C. 1982))).

123. *See, e.g.*, Abdo v. Pompeo, No. BPG-17-1053, 2020 WL 2614773, at *2–3 (D. Md. May 22, 2020).

124. *See* Keh Tong Chen v. Att'y Gen. of the U.S., 546 F. Supp. 1060, 1067 (D.D.C. 1982).

125. *Id.*

126. *Id.* at 1062.

127. *Id.* at 1067–68.

from him. This decision clarifies *Acosta* by demonstrating that the circumvention of the right to family unity cannot be articulated in theory only. Rather, the framework procedurally requires a close examination of both of the immigrant's particular alternatives to determine whether the immigrant is truly free to exercise discretion.

Beyond clarifying *Acosta*, this earlier case and a more recent one[128] (also conducting arbitrary and capricious review) embellish their holdings with what is almost quasi-procedural due process language. The opinions reason beyond the standards for arbitrary and capricious review by citing constitutional rights cases like *Moore*.[129] In further justifying a more stringent procedural assessment of applicants' cases, the courts argued that to hold otherwise would "needlessly violate our nation's family tradition."[130]

These cases are significant because of the inconsistency between courts' approach to APA claims and due process claims. Whereas courts have, in cases involving arbitrary and capricious review, interpreted *Acosta* as requiring explicit explanation for whether either of the immigrant's two alternatives imposes "exceptional hardship," they have routinely dismissed substantive due process claims without adhering to this procedural requirement.[131] This discrepancy and the fact that courts have viewed the right to family unity as meriting additional procedural protections support Part III's recommendations for a more nuanced doctrinal framework and recognition of family unity as a liberty interest.

C. *Petitioning for Family Member Admissions into the United States*

Given that the right to family unity fails to protect U.S. citizens from effective deportation, it is unsurprising that noncitizens cannot assert this right to gain entry into the United States. The Hart-Celler Act of 1965, passed by much of the same legislature that passed the Civil Rights Act of 1964, aimed to end discrimination in immigration laws and, among other goals, reunify families.[132] This reform enabled petitioners to sponsor qualifying relatives, but the process has since become overburdened and defined by extremely long wait times.[133] Today, U.S. citizens and lawful permanent residents can file an I-130 form with the U.S. Citizenship and Immigration Services to petition for a noncitizen family member's admission into the United States.[134] Family members have appealed denials of these petitions by arguing that they violate

128. Teleanu v. Koumans, 480 F. Supp. 3d 567 (S.D.N.Y. 2020).

129. *See, e.g.*, *Keh Tong Chen*, 546 F. Supp. at 1064.

130. *Id.*; *see also Teleanu*, 480 F. Supp. 3d at 581–82.

131. *See, e.g.*, Beltran Prado v. Nielsen, 379 F. Supp. 3d 1161, 1168 (W.D. Wash. 2019).

132. Hart-Celler Act, Pub. L. No. 89-236, 79 Stat. 911 (1965). However, the termination of the Bracero Program the year prior to the Hart-Celler Act denied opportunities for Mexican workers to temporarily enter and leave the United States. Lee, *supra* note 8, at 2338.

133. Lee, *supra* note 8, at 2337–38.

134. *I-130, Petition for Alien Relative*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/i-130 [perma.cc/K553-JPYT] (last updated Aug. 1, 2022).

the right to family unity, but courts have employed the reasoning from *Acosta* to reject such challenges.

The fact that these cases involve admissions, as opposed to deportations, poses no barrier to applying the framework developed in *Acosta*. In fact, *Swartz v. Rogers*,[135] a case often cited in admission cases,[136] is actually a deportation case. Relying on reasoning similar to that in *Acosta*, the D.C. Circuit in *Swartz* held that neither the right to marriage nor the right to remain in the United States could prevent a husband's deportation because the wife could accompany the husband abroad.[137] Although the court recognized that "deportation would put burdens upon the marriage," it found that the conversion of a marriage into a long-distance relationship would not destroy the marital bond.[138] Subsequent I-130 cases citing *Swartz* have similarly emphasized that, regardless of whether the case is about deportations or admissions, there is no constitutional violation because it is not the government but the family member who makes the ultimate decision to remain in or depart from the United States.[139]

While the implication of a substantive due process right has been firmly rejected in admissions cases, it is unsettled whether the right to family unity constitutes a procedural due process liberty interest. The issue is consistently raised in admissions cases because a threshold question in challenges of I-130 petition denials is whether a familial right is implicated.[140] Since the Supreme Court's fractured opinion in *Din*,[141] courts have splintered on this issue. Moreover, courts can easily avoid the issue altogether by concluding that, even if a liberty interest were implicated, the petitioner received due process.[142]

Khachatryan v. Blinken,[143] a recent Ninth Circuit case, illustrates this confusion. After its opinion was reversed by the Supreme Court in *Din*, the Ninth Circuit adopted Justice Kennedy's concurrence as the controlling precedent and held undisturbed its prior holding that marriage constitutes a procedural due process liberty interest.[144] But in *Khachatryan*, the circuit court held that,

135. 254 F.2d 338 (D.C. Cir. 1958).

136. *E.g.*, Colindres v. U.S. Dep't of State, 575 F. Supp. 3d 121, 133–34 (D.D.C. 2021).

137. *Swartz*, 254 F.2d at 339.

138. *Id.*

139. *See, e.g.*, Mostofi v. Napolitano, 841 F. Supp. 2d 208, 212–13 (D.D.C. 2012) (rejecting plaintiff's attempt to distinguish *Swartz* by arguing the case involved deportations rather than admissions, emphasizing that, following the denial of the visa, the plaintiff "faced precisely the same choice as the wife in *Swartz*").

140. This is due to the doctrine of consular nonreviewability, which is rooted in the plenary power doctrine. Khachatryan v. Blinken, 4 F.4th 841, 849 (9th Cir. 2021).

141. Kerry v. Din, 576 U.S. 86 (2015). For an overview of the competing opinions in *Din*, see *supra* Section I.B.3.

142. *See Khachatryan*, 4 F.4th at 850–51.

143. 4 F.4th 841.

144. *See id.* at 862–63 (Presnell, J., dissenting).

unlike marriage, the relationship between a U.S.-citizen, adult child and a noncitizen parent did not implicate a liberty interest.[145]

Although the plaintiff invoked the broad scope of family articulated in *Moore*, the court rejected the argument by narrowly interpreting the precedent. *Moore*'s holding was sharply restricted to apply only to family members "who are already in the United States choosing to live together."[146] By framing the liberty interest as rooted not in the right to family unity but in a new compound right (that is, the adult child's "asserted right to bring his father from Russia to the United States"[147]), the court also circumvented precedent that had previously recognized family unity as a liberty interest. Judge Presnell, in dissent, argued this was contradictory because the circuit had not limited the liberty interest in marriage by "redefining it as a separate, previously unrecognized right to bring one's spouse into the United States."[148]

This lack of clarity, as well as the conflation of substantive and procedural due process inquiries, can be traced back to the height of the plenary power doctrine.[149] Recent admissions cases have continued to blur the line between substance and procedure by, for example, relying on *Swartz* to find there is no constitutional right implicated to trigger judicial review.[150] Others have reached a similar conclusion by relying on Justice Scalia's plurality opinion in *Din*.[151]

D. *Placing Family Members in Immigration Detention*

One of the only cases in which an immigrant successfully asserted a substantive due process right to family unity was the high-profile case of *Ms. L v. ICE*, which held it was unconstitutional for the government to separate migrant parents from their children while they were both held in immigration detention.[152] *Ms. L* should not be mistaken as a one-off case decided favorably due to the public outcry against the Trump Administration's family separation policies. In fact, the case is almost a perfectly crafted hypothetical that nullifies the reasoning in *Acosta* and *Swartz*.

Before turning to *Ms. L*, it is necessary to clarify the relationship between the reasoning employed in substantive and procedural due process cases. While courts in substantive due process cases can use the *Acosta* and *Swartz*

145. *Id.* at 862.

146. *Id.* at 860 (emphasis omitted).

147. *Id.* at 862.

148. *Id.* at 864 (Presnell, J., dissenting).

149. *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 551–52 (1950) (Jackson, J., dissenting) ("The menace to the security of this country, be it great as it may, from *this girl's admission* is as nothing compared to the menace of free institutions inherent in *procedures* of this pattern." (emphasis added)).

150. *See, e.g.*, Mostofi v. Napolitano, 841 F. Supp. 2d 208, 213 (D.D.C. 2012).

151. *See, e.g.*, Moralez v. Blinken, No. 21-cv-05726, 2021 WL 5356081, at *5 (D.N.J. Nov. 17, 2021).

152. 302 F. Supp. 3d 1149 (S.D. Cal. 2018).

framework[153] to recognize the right to family unity but nonetheless find it is not implicated, courts in procedural due process cases arguably do not have such freedom. Because a procedural due process inquiry involves the categorical question of whether there is a valid liberty interest at stake, it is likely that courts in these cases must either recognize family unity as a liberty interest or directly narrow the circumstances in which it can be recognized as such an interest.

But in notable contrast, courts adjudicating substantive due process cases *can* import the reasoning of procedural due process cases to narrowly define the substantive right and deem it "not implicated" in an immigration context. The substantive result may be the same, but the right to family unity is eroded in a manner that it would not be if the court had instead applied the *Acosta* and *Swartz* framework.

To see more clearly both how the fact pattern in *Ms. L* is exceptional and how procedural due process reasoning can be dangerously imported into adjudication of substantive rights, it is helpful to begin with two cases in which separation was caused by the holding of only one family member in immigration detention.

In *Reyna ex rel. J.F.G. v. Hott*, detained noncitizen parents argued that their transfer to an out-of-state Immigration and Customs Enforcement detention facility violated the right to family unity.[154] The court could have applied the *Acosta* and *Swartz* framework to dismiss the case, given that the children (or their appointed guardians, who could exercise discretion on their behalf) maintained mobility. The Fourth Circuit instead chose to directly narrow the scope of the right to family unity. The court acknowledged the right but concluded that family privacy cases "hardly support the asserted right to be detained in the same state as one's children, the right to be visited by children while in detention, or a general right to 'family unity' *in the context of detention*."[155] Just as the court in *Khachatryan* narrowly interpreted *Moore*, the court in *Reyna* limited the scope of *Meyer*, another landmark family privacy case, by holding the right to childrearing does not extend to cases involving detention. The crucial difference is that *Khachatryan* was a procedural due process case that necessitated such restriction of precedent. *Reyna* not only unnecessarily circumscribed the substantive right to family unity but also further blurred due process inquiries by hastily extrapolating from its substantive due process analysis that no procedural due process liberty interest was implicated.[156]

In *Qadar v. Mayorkas*, a noncitizen from the United Kingdom was incarcerated in New York, and his noncitizen wife and children applied for visas to

153. The reasoning articulated in *Acosta* and *Swartz* will be subsequently referred to as the "*Acosta* and *Swartz* framework."

154. 921 F.3d 204, 206 (4th Cir. 2019).

155. *Reyna*, 921 F.3d at 210–11 (emphasis added).

156. *Id.* at 211.

visit him.[157] When these visas were denied, the family brought a procedural due process challenge asserting family unity as a liberty interest.[158] The court rejected the challenge, concluding that, in this circumstance, the right of an incarcerated noncitizen to receive visits from his family member was a tenuous one.[159] As in *Din* and *Khachatryan*, the interests in marriage and the relationship between adult children and their parents were both unavailing.[160] The opinion also added that "courts generally have not recognized a constitutional liberty interest held by prisoners in 'access to a particular visitor.' "[161] This holding, in conjunction with *Reyna*'s emphasis on detention, suggests that the right to family unity does not prevent family separation in cases involving what resembles, or actually involves, criminal incarceration.[162]

Compared to these cases, *Ms. L* is distinctive because it involved a scenario where *both* the migrant parents and children were detained. This scenario directly contravenes the *Acosta* and *Swartz* framework because neither family member could make a choice to separate or stay united with the other. The decision in *Ms. L* emphasized that "the practice alleged here 'is not a necessary incident of detention; it is the result of an *unnecessary* governmental action intended to separate family units who were arrested *together*.' "[163] In the absence of a reasonable justification, such as a determination of unfitness on behalf of the parent, separation was unlawful.[164]

An aspect of the case that can be lost in the high-profile nature of its victory is that when the right to family unity is recognized, as opposed to circumvented, it must also be limited. Stressing that substantive due process analysis is highly context-dependent, the opinion emphasized the importance of the plaintiffs' status as asylum seekers.[165] Because due process is concerned with "ordered liberty" and "fundamental fairness," it was significant that the migrant families were "seeking *sanctuary* from persecution."[166] Consequently, the court was troubled with the idea that, by separating children from their parents, the government had, "in fact, become their persecutors."[167] In a manner similar to *Reyna*'s holding that there was no right to family unity in the

157. No. 18 Civ. 6817, 2021 WL 1143851, at *1 (S.D.N.Y. Mar. 24, 2021).

158. *Qadar*, 2021 WL 1143851, at *6.

159. *Id.* at *7–8.

160. *Id.*; *see also supra* notes 140–142.

161. *Qadar*, 2021 WL 1143851, at *7–8 (citing Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 461 (1989)).

162. For a brief introduction to the relationship between the right to family unity and criminal law, see Trivedi, *supra* note 104, at 293–95.

163. Ms. L. v. U.S. Immigr. & Customs Enf't, 302 F. Supp. 3d 1149, 1162–63 (S.D. Cal. 2018).

164. *Ms. L*, 302 F. Supp. at 1166–67.

165. *Id.* at 1164.

166. *Id.*

167. *Id.* at 1166.

context of detention, the court in *Ms. L*, despite finding in favor of the plaintiffs, also narrowed the scope of the right.

III. JUDICIAL RECOMMENDATIONS FOR RECOGNIZING THE RIGHT TO FAMILY UNITY

Immigration cases in which the right to family unity is asserted reveal three overarching problems. The first is the dissonance between the logic of the *Acosta* and *Swartz* framework and the normative view that the "choice" forced upon immigrant families is morally repugnant. The second is the unsettled question of whether the right to family unity should be recognized as a procedural due process liberty interest. This uncertainty contributes to the third problem of courts' blurring the line between procedural and substantive due process inquiries, often importing the logic used in one analysis into the other.

This Part offers two modest solutions for the courts' procedural failure to properly recognize the right to family unity. The first solution would resolve the latter two problems, whereas the second solution would address the first. Section III.A begins with a seemingly simple recommendation: courts should more clearly delineate between procedural and substantive due process analyses and leave open the possibility that family unity could be recognized as a liberty interest. Section III.B lays out a more ambitious proposal: courts should replace the *Acosta* and *Swartz* framework in substantive due process cases with an "undue burden" standard akin to that used in abortion and other family privacy cases. Even if this standard yields identical results in most cases, the approach would require formal acknowledgment of the family values that some courts have already observed as being burdened by immigration policies.[168]

The overview of immigration cases and operative legal doctrine demonstrates there are very few circumstances in which the substantive due process right to family unity can be successfully asserted. Therefore, it is highly unlikely there is a judicial solution that would reunite vast numbers of immigrant families.[169] Acknowledging this challenge is most readily resolvable by the legislative and executive branches, I propose solutions that will enable the judiciary to vindicate the dignitary interests of immigrant families and limit legislative and executive attempts to blame outcomes on courts. Increasing recognition of the right to family unity for immigrant families will serve dignitary aims, resolve the dissonance between legal doctrine and moral concerns, and signal to the judiciary's coequal branches that they should live up to the principle of family unity that is supposed to undergird our immigration system.

168. *See infra* notes 195–198 and accompanying text.

169. For example, various attempts to reason around *Acosta* so as to achieve more family reunifications rely on a misreading of the case. *See supra* note 118 and accompanying text.

A. *Separating Procedural and Substantive Due Process Analyses*

Courts should separate procedural from substantive due process analysis and avoid applying the logic of one inquiry to the other. We have already observed how the Fourth Circuit unnecessarily limited the scope of the right to family unity by importing the procedural due process approach into a substantive due process case.[170] In substantive due process cases, courts should either apply the *Acosta* and *Swartz* framework to recognize the right to family unity's existence but conclude it is not implicated or adopt the "undue burden" standard laid out in Section III.B.

The converse situation—where courts import the substantive due process approach to a procedural due process case—is more complicated. Post-*Din*,[171] some lower courts have followed Justice Scalia's plurality opinion to conclude that, because there is no infringement of a substantive due process right, there is also no liberty interest.[172] Whereas the violation of a substantive due process right frequently gives rise to procedural due process protections, it does not follow that the lack of a substantive due process violation precludes the implication of a liberty interest.[173] In addition to substantive due process rights, other liberty interests that qualify for procedural due process protections include natural liberty and natural law interests, as well as hybrid variations of the three.[174] Among the hybrid rights are parental rights and the right to retain citizenship.[175]

However, some courts in immigration cases have nonetheless hastily drawn the conclusion that there is no liberty interest where there is no violation of a substantive right.[176] Such reasoning is not entirely unwarranted. As in the prison context, liberty interests in immigration cases are de-emphasized because granting procedural protections to vast numbers of inmates or immigrants raises significant administrability concerns.[177] Immigration cases additionally raise the factor of national security, which can also cut against prioritizing a liberty interest.[178]

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170. *See supra* notes 154–156 and accompanying text.

171. For an overview of the competing opinions in *Din*, see *supra* notes 81–85 and accompanying text.

172. *See, e.g.*, Qadar v. Mayorkas, No. 18 Civ. 6817, 2021 WL 1143851, at *7 (S.D.N.Y. Mar. 24, 2021).

173. Ann Woolhandler, *Procedural Due Process Liberty Interests*, 43 HASTINGS CONST. L.Q. 811, 837–38 (2016).

174. *Id.* at 840–41 ("By contrast, procedural due process requirements for deprivations of natural liberty and other natural law interests extend to assuring governmental compliance with *nonconstitutional*, as well as constitutional, law." (emphasis added)).

175. *Id.* at 840.

176. *See, e.g.*, Reyna *ex rel.* J.F.G. v. Hott, 921 F.3d 204, 211 (4th Cir. 2019); Mostofi v. Napolitano, 841 F. Supp. 2d 208, 212–13 (D.D.C. 2012).

177. Woolhandler, *supra* note 173, at 848, 858.

178. *See* Kerry Abrams, *The Rights of Marriage:* Obergefell*,* Din*, and the Future of Constitutional Family Law*, 103 CORNELL L. REV. 501, 548 (2018).

Although Justice Scalia's plurality opinion in *Din* addresses the possibility of nonconstitutional liberty interests raised in Justice Breyer's dissent, much of his reasoning focuses on finding there is no implication of a substantive due process right.[179] In holding marriage does not constitute a liberty interest, Justice Scalia echoes the *Acosta* and *Swartz* framework by emphasizing that, because Din is free to live with her husband abroad, there is no direct government intrusion upon their marriage.[180] At least one court has invoked Justice Scalia's opinion in *Din*, a procedural due process case, to find there is no substantive due process right to family unity.[181]

Professor Kerry Abrams, cited by Justice Scalia in *Din*,[182] has criticized the plurality opinion. She argues Justice Scalia interpreted Din's claim "more expansively than she articulated it" and focused on a fundamental rights inquiry rather than the "narrower" question of "procedural justice."[183] Abrams takes particular issue with Justice Scalia's finding that a history of regulating spousal immigration precludes Din's constitutional claim.[184] Abrams, whose work is cited for this proposition, contends this argument carefully cherry-picks the historical record and notes that there is substantially more evidence in favor of, rather than against, a finding of the right to family unity.[185] Whereas I have argued more broadly that Justice Scalia's approach is dubious because of its myopic focus on substantive due process rights in a procedural due process case, Abrams argues that the plurality opinion is questionable even in its substantive due process analysis.[186]

Justice Breyer's dissent and Justice Kennedy's concurrence offer better alternative approaches. Justice Breyer's view is supported not only by my analysis of J-1 visa cases involving arbitrary and capricious review[187] but also by the fact that at least one court adjudicating an I-130 petition case has found a liberty interest in "living with one's immediate family."[188] Additionally, *Kleindienst v. Mandel*,[189] an important immigration case with regard to the decline of the plenary power doctrine, supports the finding of a liberty interest and undermines Justice Scalia's approach. In *Mandel*, U.S. citizen academics challenged the denial of a Marxist scholar who sought admission into the

179. Kerry v. Din, 576 U.S. 86, 92–100 (2015) (plurality opinion).

180. *Id.* at 101.

181. Alharbi v. Miller, 368 F. Supp. 3d 527, 570 (E.D.N.Y. 2019) ("Although *Kerry v. Din* concerned procedural, and not substantive, due process, the overarching rationale of the plurality opinion is still persuasive here, because of the similar approach plaintiffs take to defining their asserted constitutional rights.").

182. *Din*, 576 U.S. at 96.

183. Abrams, *supra* note 178, at 541.

184. *Din*, 576 U.S. at 95.

185. Abrams, *supra* note 178, at 544.

186. *Id.*

187. *See supra* Section II.B.2.

188. Singh v. Cissna, No. 18-cv-00782, 2019 WL 3412324, at *9 (E.D. Cal. July 29, 2019).

189. 408 U.S. 753 (1972).

United States to participate in an academic conference.[190] Although the Court affirmed the denial because it found sufficient procedural protections were provided, the Court recognized that the U.S. citizen academics had a First Amendment interest in associating with Mandel.[191]

The underlying logic in recognizing this interest, however, is entirely at odds with the *Acosta* and *Swartz* framework. In *Mandel*, the Court rejected the government's argument that the First Amendment right was not implicated because "appellees have free access to Mandel's ideas through his books and speeches" and technological advancements can "readily supplant his physical presence."[192] The Court stated, "we are loath to hold on this record that *existence of other alternatives* extinguishes altogether any constitutional interest on the part of the appellees in this particular form of access."[193] This statement is completely at odds with Justice Scalia's use of what is essentially the *Acosta* and *Swartz* framework to find there is no liberty interest.

At minimum, courts should adopt the approach of Justice Kennedy's concurrence. As discussed in Section II.C, the Ninth Circuit has adopted this view.[194] The Ninth Circuit assumes there is a liberty interest and then assesses whether sufficient procedural protections were provided.[195] If sufficient procedural protections are provided, then there is no need to reach whether there is, in fact, a liberty interest.[196] At the very least, this approach allows courts to leave open the possibility that family unity could constitute a valid liberty interest. At most, adopting this opinion could sow the seeds for recognition of the right to marriage as a liberty interest in other circumstances involving family separation.[197]

Lastly, recognizing family unity as a liberty interest would not realize the fear of significant administrative burdens. There is little practical difference between recognizing the liberty interest but nonetheless finding sufficient procedural protections were provided and reaching the same conclusion while leaving unaddressed the question of whether there is a liberty interest. As such, courts would ideally replicate Justice Breyer's approach of recognizing the liberty interest and minimize reliance on Justice Scalia's plurality opinion, which essentially conflates substantive and procedural due process inquiries.

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190. *Mandel*, 408 U.S. at 756–60.

191. *Id.* at 769–70.

192. *Id.* at 765.

193. *Id.* (emphasis added).

194. *See supra* note 144 and accompanying text.

195. Khachatryan v. Blinken, 4 F.4th 841, 852–55 (9th Cir. 2021).

196. *See* Kerry v. Din, 576 U.S. 86, 102 (2015) (Kennedy, J., concurring).

197. This is supported by the incongruity Abrams observes between Justice Kennedy's majority opinion in *Obergefell* and his concurrence in *Din*, which were issued within weeks of each other. Whereas his language regarding marriage soars in the former, it is noticeably muted in the latter. For an analysis reconciling this inconsistency and an argument that Justice Kennedy's *Din* concurrence may be read more expansively, see Abrams, *supra* note 178, at 545–61.

B. *An "Undue Burden" Standard for the Substantive Right to Family Unity*

Courts should also replace the *Acosta* and *Swartz* framework with an "undue burden" standard of the sort that has been used in a growing number of family privacy cases.[198] Critics have found morally unjustifiable the framework's assumption that incidental government intrusion is not any governmental action at all.[199] Courts also often acknowledge such normative reservations.[200] But the current approach to cases involving the right to family unity does not require consideration of the various burdens placed on immigrant families. This has put U.S. immigration law at odds with international human rights law, under which balancing tests are often used to weigh factors such as the age at which the noncitizen immigrated to the host country, the length of their residency, and the extent of the noncitizen's ties to their country of origin.[201] Despite not being required to do so, some courts have weighed these and other burdens.[202]

The life-altering consequences of immigration policies that separate family members offer a strong example of the fact that direct violations of rights are not necessarily more severe than indirect ones.[203] The distinction between direct and indirect violations exists to prevent a flood of litigation over every kind of governmental action.[204] In striking a balance, Professor Michael Dorf argues that only government action that imposes "substantial" incidental burdens should be subject to heightened scrutiny.[205] He observes this approach could be applied in family unity cases such as *Moore*.[206] Although strict scrutiny warrants assessment of whether an immigration law is narrowly tailored to promote a significant government interest, courts typically have not done

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198. While perhaps best known for its implementation in the abortion context, similar approaches can be found in Dormant Commerce Clause, First Amendment, and Establishment Clause doctrine. *See* Gillian E. Metzger, Note, *Unburdening the Undue Burden Standard: Orienting* Casey *in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2025 (1994); Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1219 (1996). A similar standard has also been applied more specifically in voter registration cases. *See* Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?*, 35 HASTINGS CONST. L.Q. 643, 654–55 (2008).

199. *See supra* Section II.B.1.

200. *E.g.*, Fiallo v. Levi, 406 F. Supp. 162, 168 (E.D.N.Y. 1975) ("*While we are not unmindful of plaintiffs' plight*, we have held in the past that such *incidental* impact on the family as the operation of the immigration laws may have is not violative of the Constitution." (emphasis added)).

201. David B. Thronson, *Closing the Gap: DACA, DAPA, and U.S. Compliance with International Human Rights Law*, 48 CASE W. RSRV. J. INT'L L. 127, 132–33 (2016).

202. *See, e.g.*, Urbano de Malaluan v. Immigr. & Naturalization Serv., 577 F.2d 589, 593 (9th Cir. 1978); Manwani v. U.S. Dep't of Just. Immigr. & Naturalization Serv., 736 F. Supp. 1367, 1384 (W.D.N.C. 1990).

203. Dorf, *supra* note 198, at 1177.

204. *Id.* at 1178.

205. *Id.* at 1179.

206. *Id.* at 1232.

so in cases involving the right to family unity.[207] Similarly, courts have not engaged in the less rigorous analysis of whether an immigration law imposes an "undue burden" on the right. While one could argue the *Acosta* and *Swartz* framework presumes the absence of a significant burden, this presumption is inconsistent with *Moore*, where the Court found a constitutional violation even though Ms. Moore could have relocated with her family to another city.[208]

Although the "undue burden" standard was initially used in abortion cases, the Court has also shifted away from strict scrutiny and toward a less rigorous yet more nuanced balancing test in cases involving other privacy rights.[209] Professor David Meyer argues that this is because strict scrutiny is designed to protect single individual plaintiffs, such that it is "much too blunt an instrument to be calibrated to '[t]he almost infinite variety of family relationships' " implicated in cases involving family rights.[210] Applying the "undue burden" standard to cases in which the right to family unity is asserted in the immigration context will allow courts to more thoroughly examine the numerous, often overlapping interests at stake.[211] Even if the substantive outcome of denying family unity is the same, requiring courts to articulate the burdens imposed by immigration law will vindicate the dignitary interests of immigrant families. Adopting an "undue burden" standard would also enable practitioners to raise the arguments proposed by scholars that defenders of the *Acosta* and *Swartz* framework choose to ignore.[212]

Exactly how the "undue burden" standard would apply in cases involving immigrant families is unclear, but this is precisely the reason why the Court has followed a similar approach in other privacy rights cases.[213] The standard is meant to provide a "fluid balancing" of the government's interest against families' interests in remaining together.[214] Although adoption of this standard will impose an administrative cost on the judiciary, it is outweighed by the efficiency gained from reducing disagreement between judges and the dignitary interest in recognizing and giving a voice to family members whose lives are permanently disrupted. Adopting the "undue burden" standard will reconcile doctrine with normative moral judgments and signal to the legislature

207. *See* Guendelsberger, *supra* note 21, at 66.

208. *Id.*; *see also* Dorf, *supra* note 198, at 1232.

209. David D. Meyer, Lochner *Redeemed: Family Privacy After* Troxel *and* Carhart, 48 UCLA L. REV. 1125, 1134–35 (2001).

210. *Id.* at 1155 (quoting Troxel v. Granville, 530 U.S. 57, 90 (2000)).

211. *Id.* at 1179.

212. *See supra* note 118 and accompanying text.

213. Meyer, *supra* note 209, at 1153 ("Rather than invalidate statutes across the board, disrupting vast numbers of visiting relationships between children and grandparents, siblings, and others, the plurality wished to ensure that future constitutional lines would be drawn slowly, against the background of actual families.").

214. *Id.* at 1161.

that the right to family unity is constantly burdened, if not possibly violated, by its immigration policies.

CONCLUSION

The separation of immigrant families did not begin or end with the Trump Administration. While the right to family unity has been recognized in the face of invidious policies, there has been persistent debate over its contours. Following the end of the Trump Administration's "zero tolerance" policy, it is easy to believe the harms of family separation have been fully addressed.[215] Despite the "spectacle" of family separation at the U.S.-Mexico border, the routine separation of families that pervades our immigration system is easily forgotten.[216] Although our immigration system espouses a principle of family reunification,[217] case law demonstrates family separation is not an exception but the rule.

The law must address the dissonance between the legal doctrine surrounding the right to family unity and the normative view that the separation of families is an infringement of a fundamental right. Courts can begin to harmonize this discrepancy by clearly distinguishing between procedural and substantive due process inquiries and by adopting the more nuanced "undue burden" standard for cases involving the substantive right to family unity. If the right to family unity is like the "wind that blows where it wills and can be heard," [218] a fuller recognition of the right requires courts to give shape to it. The judiciary can make legible the stories of immigrant families by articulating the burdens placed on them. In doing so, the language of these opinions will call the legislative and executive branches to recognize the right to family unity and thereby reexamine the constitutionality of their policies.

215. Lee, *supra* note 8, at 2324.

216. *Id.*

217. Maddali, *supra* note 13, at 110–11.

218. Patel v. Searles, 305 F.3d 130, 133 (2d Cir. 2002).