DO THE RIGHT THING: A CALL UPON CONGRESS TO ENHANCE THE RIGHTS OF UNACCOMPANIED AND UNDOCUMENTED MEXICAN CHILDREN UNDER THE TVPRA

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Why have so many taken such great risks?
What do they flee?
Why do they fear to return?

I. INTRODUCTION

This Article focuses on one isolated group of unaccompanied and undocumented children in relation to one provision of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"). Section 235 sets forth the procedural and substantive rights of all unaccompanied and undocumented children ("unaccompanied children") who cross a U.S. border without proper papers and without a parent or guardian. Although section 235 of the

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3 See id. In this Article, the term Unaccompanied Alien Child is defined to mean “a child who has no lawful immigration status in the United States; has not attained 18 years of age; and [has] no parent or legal guardian in the United States or available to provide care and physical custody.” 6 U.S.C. § 279(g)(2) (2012 & Supp. II 2014). I have chosen to use the term “unaccompanied child” instead of the acronym “UAC.”
4 See 6 U.S.C. § 279(g)(2); § 235, 122 Stat. at 5074.
TVPRA is but one tiny sliver of an expansive body of immigration law in the United States, it raises legal questions related to the constitutional rights of inadmissible children.\(^5\) This Article explores the legal rights of Mexican unaccompanied children who risk the dangerous trek and are taken into custody at the U.S. southern border by Border Patrol, which is a division of U.S. Customs and Border Protection.\(^6\)

This Article is divided into seven parts. The second Part describes the inequitable treatment of Mexican unaccompanied children. The third Part introduces the controlling statute referred to as the TVPRA. The fourth Part examines the substantive and procedural infirmities related to the treatment of Mexican unaccompanied children under the TVPRA. The fifth Part argues that the TVPRA violates procedural due process. The sixth Part demonstrates that the TVPRA violates the equal protection rights of Mexican unaccompanied children. The seventh Part of this Article calls for statutory reform to eliminate the constitutional infirmities.

\section{Mexican Unaccompanied Children are Entering the Country and are Repatriated Without Proper Screening for Asylum and Trafficking Claims}

Section 235 codifies a separate return procedure for Mexican unaccompanied children.\(^7\) This provision has become particularly relevant given the influx of unaccompanied children across the southern U.S. border over the past several years, rising to levels described by the government as a surge and even as a crisis in 2014.\(^8\) This language,

\(^5\) See infra Parts II-V.
\(^6\) See infra Parts III-V.
typically associated with humanitarian disasters and military intervention, reflects the magnitude of this continuing immigration problem.9

Under section 235 of the TVPRA, when a child is taken into custody by Border Patrol, the agent determines whether the child is from a contiguous country, either Canada or Mexico.10 Once the Border Patrol agent makes an initial determination, all Mexican unaccompanied children are handled according to the process identified in TVPRA section 235(a)(2), which applies to unaccompanied children from contiguous countries.11 In contrast, all other unaccompanied children, including those entering from the Northern Triangle12 or other noncontiguous countries, are handled according to the rules set forth in TVPRA section 235(b).13 This section provides greater substantive and procedural protections to the children arriving from noncontiguous countries by affording to them numerous rights; perhaps the most important of which is the right to a hearing to decide whether the child will be permitted to remain in the United States or must leave.14

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13 See § 235(b), 122 Stat. at 5077.

14 See generally id. § 235(b), 122 Stat. at 5077-82 (describing the process for the care and custody of unaccompanied children from noncontiguous countries by the United States Department of Health and Human Services).
2012, approximately 7,000 unaccompanied children from noncontiguous countries benefitted from this more expansive procedural process and 40% of them qualified for relief from deportation.15

Seeking to escape poverty not only in Mexico, but also in the Northern Triangle, waves of unaccompanied children undertake the perilous journey, many of them crossing several borders, to attempt the final border crossing into the United States.16 Although Mexico has increased the surveillance of its southern borders recently,17 thousands of unaccompanied children continue to attempt the treacherous crossing and are apprehended by the U.S. Border Patrol agents.18 Additionally, Central American and Mexican youth are fleeing gang-related violence in response to governmental inability or unwillingness to secure their physical and economic welfare.19 According to 2014 figures, U.S. immigration officers encountered approximately 68,500 children in 2014.20 Of these unaccompanied children, approximately 15,500 were


16 See Carr, supra note 12.

17 See Maureen Meyer et al., New Developments Along Mexico’s Southern Border: Mexico’s Government Deploys Forces and Requests Funds for Southern Border Security, WOLA (Oct. 1, 2014), http://www.wola.org/commentary/new_developments_along_mexico_s_southern_border (discussing the increase in security by the Mexican government as an effort to strengthen its borders).

18 Cavendish & Cortazar, supra note 10, at 13-17; Bryne & Miller, supra note 15, at 4 (“Up to 15% of unaccompanied minors enter the system as a result of being apprehended ‘internally,’ in the United States (as opposed to at a port of entry).”).

19 See Cavendish & Cortazar, supra note 10, at 13-17; Adreanna Orlang, Note, Clearly Amorphous: Finding a Particular Social Group for Children Resisting Gang Recruitment, 61 CATH. U. L. REV. 621, 623-24 (2012) (“Since the Central American civil wars of the 1980s, street gangs known as maras have established a foothold in countries such as El Salvador, Guatemalan, and Honduras. Central American countries offer gangs a fertile breeding ground as many Salvadoran, Guatemalan, and Honduran communities, still reeling from the devastation created by the civil wars, suffer from widespread poverty, flawed social infrastructures, and pervasive violence.”).

Mexican unaccompanied children.\textsuperscript{21} Thus, in 2014, 23\% of the unaccompanied children crossing the U.S. southern border and taken into custody were Mexican.\textsuperscript{22}

The large number of Mexican unaccompanied children can be explained by examining the social and economic conditions within the borders of Mexico.\textsuperscript{23} Highly organized and heavily armed cartels have displaced gang control over the movement of drugs across broad swaths of the U.S. border.\textsuperscript{24} There is also evidence that some of the Mexican drug cartels have diversified their business interests.\textsuperscript{25} In addition to drug trafficking, some cartels are now involved in human trafficking, organ trafficking, and kidnapping.\textsuperscript{26} While the Mexican government minimizes the danger posed by cartels, the number of deaths along the Mexican border tells a different story.\textsuperscript{27} There is evidence that the Mexican cartels actively recruit Mexican children to carry drugs across the border, to serve as coyotes,\textsuperscript{28} and even to serve as hit men.\textsuperscript{29} There

\begin{itemize}
\item \textsuperscript{21} Id.
\item \textsuperscript{22} See id.
\item \textsuperscript{24} See Ioan Grillo, Mexico’s Drug War Leads to Kidnappings, Vigilante Violence, Time (Jan. 17, 2014), http://world.time.com/2014/01/17/mexico-drug-war-kidnapping/ ("Since 2008, there was an increase in abductions as cartels such as the feared Zetas diversified from smuggling drugs to a wide portfolio of criminal activities, including human trafficking, kidnapping and extortion. In response, Mexican security forces targeted the Zetas as the public enemy No. 1, killing or arresting its leaders in 2012 and 2013."); see also Drug Trafficking Violence in Mexico: Implications for the United States, FED. BUREAU OF INVESTIGATION (May 5, 2010), http://www.fbi.gov/news/testimony/drug-trafficking-violence-in-mexico-implications-for-the-united-states.
\item \textsuperscript{25} See Grillo, supra note 24.
\item \textsuperscript{26} Id.
\item \textsuperscript{28} See John Burnett, Who Is Smuggling Immigrant Children Across The Border?, NPR (July 15, 2014, 8:03 AM), http://www.npr.org/sections/parallels/2014/07/15/33147744
is also evidence that children are recruited to assist in sex trafficking. The U.S. State Department continues to issue tourist advisories for many areas along the Mexican border. Thus, Mexican children are fleeing a country in which impoverished children are particularly vulnerable to persecution at the hands of the cartels, which continue to operate outside the control of the Mexican government, despite the recent crackdown using Mexican military troops. This Article argues that Mexican unaccompanied children need the same degree of protection afforded to children from noncontiguous countries when they are taken into custody after a failed attempt to cross the U.S. border.

7/who-is-smuggling-immigrant-children-across-the-border (defining “coyote” as human smugglers, who help immigrant adults and children cross the U.S. Border); see also UNHCR Report, supra note 23, at 11, 47 (“Mexican children are frequently recruited by organized crime and other criminal actors to work as guides in the human smuggling industry. In addition to their smaller size and greater tolerance for risk taking, it is widely understood that if these children are caught, they will simply be returned to Mexico. A striking 38% of the children from Mexico had been recruited into the human smuggling industry — precisely because of their age and vulnerability.”).

29 See Cavendish & Cortazar, supra note 10, at 16; Oswald Alonso & Katherine Cororan, ‘El Ponchis’: Child Assassin Arrested By Mexican Army, HUFFINGTON POST (May 25, 2011, 6:15 PM), http://www.huffingtonpost.com/2010/12/03/el-ponchis-child-killer_n_791600.html; see also Mexican Drug War Fast Facts, supra note 27 (identifying a fourteen-year-old boy suspected of having connections with the cartels who was found guilty of killing at least four individuals); UNHCR Report, supra note 23, at 37-38.

30 See Cavendish & Cortazar, supra note 10, at 16; see also UNHCR Report, supra note 23, at 11, 47.


32 See Cavendish & Cortazar, supra 10, at 15-16; Mexican Drug War Fast Facts, supra note 27 (discussing the Mexican crackdown on the major cartels in Mexico, who have increased violence along the border).

33 See infra Parts III-VIII. Although there is some scholarship in this area, this Article is the first to examine in detail the substantive due process and equal protection rights
III. THE TVPRA CREATES A SEPARATE AND INEQUITABLE PROCESS FOR MEXICAN CHILDREN

In 2008, with bipartisan support, Congress enacted the TVPRA.\(^{34}\) For the first time, Congress passed special immigration provisions, recognizing that unaccompanied children who unsuccessfullly attempt to enter the country without documentation and are subsequently taken into custody, require special protections.\(^{35}\) Since

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\(^{35}\) Deborah Lee et al., Update on Legal Relief Options for Unaccompanied Alien Children Following the Enactment of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, A.I.L.A. InfoNet at 2, 7-8, Doc. No. 09021830 (Feb. 19, 2009), http://www.ilrc.org/files/235_tvpra_practice_advisory.infonet.pdf ("With the exception of children arriving from contiguous countries,
then, unaccompanied children from noncontiguous countries who are subject to removal proceedings are placed "under the care and custody of the Office of Refugee Resettlement ("ORR"), within the Department of Unaccompanied Children Services ("DUCS")." The Department of Health and Human Services ("DHHS") supervises these offices.

The purposes of the TVPRA are to, "combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims." The legislative findings and intent expressly note:

Trafficking in persons is increasingly perpetrated by organized, sophisticated criminal enterprises. Such trafficking is the fastest growing source of profits for organized criminal enterprises worldwide. Profits from the trafficking industry contribute to the expansion of organized crime in the United States and worldwide. Trafficking in persons is often aided by official corruption in countries of origin, transit, and destination, thereby threatening the rule of law.

The phrase "severe forms of trafficking" is defined to include, "the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery." unaccompanied alien children apprehended by immigration authorities and subject to removal from the United States are afforded expanded rights, including being placed in removal proceedings under Immigration and Nationality Act ("INA") § 240."); see also 154 Cong. Rec. S10886-87 (2008) (explaining that the TVPRA includes a provision to "ensure that unaccompanied children receive humane and appropriate treatment while in the custody of the U.S. Government.").

37 Id.
39 Id. § 102(b)(8), 114 Stat. at 1467.
The statute further defines involuntary servitude as "a condition of servitude induced by means of—any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint . . . ."41 Despite evidence that individuals from Mexico are among those most often trafficked in the United States, the TVPRA expressly discriminates against children from countries contiguous to the United States and all other children.42

The disparate treatment of these two groups of children includes the following differences in treatment: (1) Mexican unaccompanied children are screened by the U.S. Border Patrol, not ORR;43 (2) Mexican unaccompanied children undergo a screening process and are not immediately placed into a formal removal process;44 and (3) so long

may include many Mexican unaccompanied children because 95% of Mexican children between the ages of 12-17 "are employed at some level—although most are not paid a salary—and nearly 15 percent work more than 45 hours per week." Recent Reviews of U.S. Policy on Unaccompanied Children, CTR. FOR PUB. POL’Y PRIORITIES (2014), http://forabettertexas.org/images/2014_ChildAloneandWithoutPapers_Backgrounders.pdf. Additionally, a recent Congressional Service Report indicates that individuals from Mexico are among those most often trafficked. ALISON SISKIN & LIANA S. WYLER, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 1, 23 n.104, (2013), http://fas.org/sgp/crs/row/RL34317.pdf. “In FY2010, aliens from [thirty-two] countries were granted continued presence due to human trafficking. Most victims were from Thailand, Mexico, Honduras, and the Philippines.” Id.

42 See Cavendish & Cortazar, supra note 10, at 32. A recent Congressional Service Report indicates that individuals from Mexico are among those most often trafficked. ALISON SISKIN & LIANA S. WYLER, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 1, 23 n.104, (2013), http://fas.org/sgp/crs/row/RL34317.pdf. “In FY2010, aliens from [thirty-two] countries were granted continued presence due to human trafficking. Most victims were from Thailand, Mexico, Honduras, and the Philippines.” Id. at 32.
43 Compare TVPRA, Pub. L. No. 110-457, § 235(a)(2), 122 Stat. 5044, 5075 (current version at 8 U.S.C. § 1232(a)(2) (2012 & Supp. II 2014) (explaining that Mexican unaccompanied children, under the law, are subjected to immediate return by Customs and Border Patrol after withdrawing their admission into the United States), with id. § 235(b), 122 Stat. at 5077 (describing that all other unaccompanied children from noncontiguous countries are placed under the authority of DHHS’s custody for formal immigration removal proceedings).
44 Compare id. § 235(a)(2), 122 Stat. at 5075 (explaining that Mexican unaccompanied children, under the law, are subjected to immediate return by Customs
as Mexican unaccompanied children remain outside the formal removal process, they are not entitled under the TVPRA to notice of the right to counsel, the opportunity to have a guardian appointed, or the right to advance asylum of trafficking claims before the U.S. Citizenship and Immigration Services. Moreover, once in the custody of ORR, the unaccompanied children are entitled to placement in a home-like setting, and appropriate services are provided, including education and medical care while the process unfolds.  

IV. MEXICAN CHILDREN RECEIVE DISPARATE AND LESS ROBUST TVPRA PROTECTION THAN THEIR COUNTERPARTS

TVPRA section 235 develops policies and procedures to ensure that unaccompanied children are safely repatriated to their country. The statute applies to unaccompanied children who are taken into custody by an immigration officer at a border or port of entry. If the child is from Canada or Mexico, the Border Patrol agent follows the expedited return process, which includes a screening process. The screening, as mandated by Congress, is comprised of a three-part inquiry designed to identify children who are trafficking victims, children who have an asylum claim based upon a credible fear of persecution, and children insufficiently mature to make a voluntary decision to withdraw their application for admission to the United States. Section 235 (a)(2)(A) provides as follows:

Any unaccompanied alien child who is a national or habitual resident of a country that is contiguous with the

and Border Patrol after withdrawing their admission into the United States), with id. § 235(b), 122 Stat. at 5077 (describing that all other unaccompanied children from noncontiguous countries are placed under the authority of DHHS’s custody for formal immigration removal proceedings).


46 See § 235(a)(1), 122 Stat. at 5074.

47 See id. § 235(a)(2)(B), 122 Stat. at 5075.

48 See id. § 235(a)(2)(A)-(B); Cavendish & Cortazar, supra note 10, at 32.
United States shall be treated in accordance with subparagraph (B), if the Secretary of Homeland Security determines, *on a case-by-case basis*, that—

(i) such child has not been a victim of a severe form of trafficking in persons, and there is *no credible evidence* that such child is at risk of being trafficked upon return to the child’s country of nationality or of last habitual residence;

(ii) such child does not have a fear of returning to the child’s country of nationality or of last habitual residence owing to *a credible fear of persecution*; and

(iii) the child is able to make an independent decision to withdraw the child’s application for admission to the United States.49

In addition to the TVPRA screening procedure, Mexican unaccompanied children also are entitled to the protection of the rules predating the TVPRA.50 Under the terms of an ongoing injunction,51 Mexican unaccompanied children must receive notice of the procedural rights guaranteed to them by law.52 This notice is accomplished by presenting the child with Form I-770, entitled, “Notice of Rights and Request for Disposition.”53 It sets forth three basic rights: (1) the right to use the telephone to call a parent, adult relative or adult friend; (2) the right to be represented by an attorney who can fully explain the child’s rights; and (3) the right to a hearing before the immigration judge who will decide whether the child must leave or whether the child may stay in the United States.54

50 See infra notes 51-55 and accompanying text.
52 Perez-Funez, 619 F. Supp. at 660.
53 Somers, supra note 33, at 193.
54 Id.; 8 C.F.R. §§ 236.3(g)-(h), 236.4(b). Allegations arose that Customs and Board Patrol officials coerced unaccompanied children into “unknowingly and involuntarily selecting voluntary departure, thereby waiving their rights to a deportation hearing or any other form of relief.” First Amended Complaint ¶ 155 at 47, Lopez-Venegas v.
deportation hearing, a right automatically extended to unaccompanied children from noncontiguous countries, Mexican unaccompanied children are expressly authorized to withdraw his or her application for admission to the United States.55 Assuming the child elects to voluntarily withdraw the implied application for admission and elects to be returned to Mexico, the Mexican child is screened to determine if grounds for trafficking protection or asylum exist.56 The statute does not designate the entity responsible for this screening.57 To date it has been conducted by Border Patrol agents, rather than by ORR or DUCS.58 According to the applicable law, if the Border Patrol agent discovers evidence of trafficking, persecution, or insufficient maturity, the child should be transferred to the custody of DHHS and is entitled to the protections afforded to other unaccompanied children from noncontiguous countries.59

If the child is not from Mexico or Canada, the Border Patrol agent follows a completely different procedure.60 For these children, the officer apprehending an unaccompanied child must notify the Secretary of Health and Human Services and is obligated to transfer custody to DHHS within seventy-two hours.61 The DHHS is obligated to place the child “in the least restrictive setting that is in the [child’s] best interests.”62 Before releasing the child to any individual, the DHHS determines “that the proposed custodian is capable of providing for the child’s physical and mental well-being.”63 The DHHS must


57 Cavendish & Cortazar, supra note 10, at 23.

58 Id. at 2, 24.

59 Id. at 24.

60 See § 235(a)(3), (b), 122 Stat. at 5075, 5077.

61 Id. § 235(b)(2)-(3), 122 Stat. at 5077.

62 Id. § 235(c)(2), 122 Stat. at 5078.

63 Id. § 235(c)(3)(A).
impress upon the custodian the importance of ensuring "the child's appearance at all immigration proceedings." The Secretary of Health and Human Services is required to use its best efforts to ensure that unaccompanied children “[have] counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking.” If available, the court appoints an independent child advocate on behalf of the unaccompanied child. Under this scenario, an unaccompanied child is entitled to a removal proceeding under 8 U.S.C. § 1229(a); has a right to a nonadversarial hearing according to the rules established by the U.S. Citizenship and Immigration Services; and ultimately has a right to a hearing before an immigration judge.

The TVPRA framework expressly discriminates against unaccompanied children based upon national origin and alienage. Whether such discrimination is constitutional presents a question of first impression for judicial consideration. No U.S. court has yet determined whether the TVPRA violates the rights of Mexican unaccompanied children. Given the constellation of rights created by the TVPRA, viewed through the lens of the Fifth Amendment, Mexican unaccompanied children might assert three different claims for relief: (1) section 235(a) violates substantive due process rights; (2) section

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64 Id. § 235(c)(4), 122 Stat. at 5079.
65 Id. § 235(c)(5).
66 Id. § 235(c)(6).
69 See, e.g., § 235(a)-(c), 122 Stat. at 5074-79; see infra Part VII.
70 Compare First Amended Complaint, supra note 54, at 56-7 (stating claims for multiple violations of substantive due process and procedural due process rights for Mexican unaccompanied children), with Perez-Funez v. Dist. Dir., I.N.S., 611 F. Supp. 990, 992 (1984) (stating claims of violations of due process by unaccompanied children from El Salvador, a noncontiguous country), and Hernandez v. Holder, 412 Fed. Appx. 155, 156, 158 (10th Cir. 2011) (holding that there was no Fifth Amendment violation against Hernandez, an adult Mexican alien).
71 See generally First Amended Complaint, supra note 54, at 54-7 (stating causes of actions for a Fifth Amendment due process violations, but does not discuss an equal protection violation).
235(a) denies sufficient procedural due process protections;72 and (3) section 235(a) violates equal protection precepts.73

V. THROUGH SECTION 235 OF THE TVPRA, CONGRESS CREATED A SUBSTANTIAL LIBERTY INTEREST TRIGGERING CONSTITUTIONAL PROTECTIONS

Interpreting congressional legislation regarding immigration to create constitutionally protected interests is, perhaps, a foolhardy task.74 In structuring the argument, an advocate must acknowledge the near-plenary power ceded to Congress75 in this area according to the Supreme Court’s interpretation of the Constitution.76 Nevertheless, courts recognize that the legislative protections afforded to inadmissible aliens may create substantive rights.77 The Supreme Court made clear in Board of Regents of State Colleges v. Roth that “property” interests subject to procedural due process protection are not limited by a few

72 See id. (regarding Customs and Border Patrol’s failure to properly implement removal process). Clearly, the process devised by Congress for screening Mexican unaccompanied children has not been properly implemented by Customs and Border Patrol given the recent Settlement Agreement, requiring numerous changes to the current practices. Id. at 49-52; see also Perez-Funez, 611 F. Supp. at 1003 (“Having determined that most members of the plaintiff class waive rights which they could not know of when they consent to voluntary departure, it follows that these waivers of rights, because they are not made voluntarily, intelligently, and knowingly, are ineffective. The natural result is that the implementation of voluntary departure pursuant to ineffective waivers affects a de facto deprivation of these minors’ constitutional rights. Thus, plaintiffs are likely to succeed on the merits of their claim that the procedures currently employed by the INS when implementing voluntary departure in the case of an unaccompanied minor are constitutionally defective.”).

73 See Bolling v. Sharpe, 347 U.S. 497, 498-99 (1954) (holding that due process and equal protection are not mutually exclusive, and establishing the theory of reverse incorporation of the equal protection precepts to the Fifth Amendment due process); Cavendish & Cortazar, supra note 10, at 22-23.


75 Id.

76 See Chae Chan Ping v. United States, 130 U.S. 581, 606-07, 609-11 (1889) (holding that Congress has the constitutional power to exclude aliens or prevent their return into this country whenever it deems necessary); see also Tamra M. Boyd, Keeping the Constitution’s Promise: An Argument for Greater Judicial Scrutiny of Federal Alienage Classifications, 54 STAN. L. REV. 319, 321 (2001).

77 See infra Sections V.A-C.
rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." Whether a statute creates a liberty or a property interest giving rise to due process protections is often unclear.

A. Identifying the Substantial Liberty Interest of Aliens Generally

Because this Article addresses the rights of unaccompanied children taken into custody at the border, we must determine the source and extent of their liberty or property interests, if any. Historically, courts divide immigrants into two separate categories: lawful permanent residents (immigrants granted permission to live and work in the United States), and inadmissible aliens (noncitizens who entered the country without authorization or who are otherwise ineligible to enter the country or remain). The government typically grants lawful permanent residents greater rights and privileges than those granted to inadmissible aliens.

Historically, the rights of inadmissible aliens, also referred to as "aliens on the threshold" of admission, were strictly limited to those determined by Congress in the immigration statute, based upon a

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79 Id.
80 See, e.g., Bishop v. Wood, 426 U.S. 341, 344-47 (1976) (holding that a person's discharge from their municipal employer did not deprive that person of a property interest protected by the Fourteenth Amendment's due process clause); Arnett v. Kennedy, 416 U.S. 134, 151-55 (1974) (holding that federal law did not create, and the due process clause did not grant, a property interest in job retention to federal employees).
81 See infra notes 82-102 and accompanying text.
83 Id.
84 Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212-13 (1953) (stating that resident aliens cannot be deprived of constitutional rights to procedural due process, whereas aliens on threshold of entry stand on different footing for constitutional purposes).
85 United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543-44 (1950) ("Whatever the [removal] procedure authorized by Congress is, it is [Fifth Amendment] due process as far as an alien denied entry is concerned.").
fiction developed by the Supreme Court called the "entry fiction."\textsuperscript{86} Under this fiction, an inadmissible alien taken into custody at the border received less protection than an individual who successfully entered the country without documentation.\textsuperscript{87} Congress cured this disparity by enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.\textsuperscript{88} Thus, under the current removal law, Congress eliminated the legal distinction between those who successfully evade detection and those who are taken into custody attempting to enter the country.\textsuperscript{89} Currently, both types of entry lead to a uniform deportation procedure, reflecting a preference for equal treatment of similarly situated individuals.\textsuperscript{90}

The movement toward uniform treatment with a focus on procedural rights reflects some diminution of Congress' extraordinarily broad plenary power to exclude aliens, and thereby to deprive them of "all constitutional rights."\textsuperscript{91} Some courts have adopted a more measured rule and have begun to cabin the plenary power of Congress over immigration within the confines of the Constitution.\textsuperscript{92} These courts have recognized the dangers associated with summary process regarding liberty interests and have granted relief in service of this interest.\textsuperscript{93}

\textsuperscript{87} See 1 IMMIGRATION LAW AND DEFENSE § 5:26 (2015) ("Prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, aliens in \textit{exclusion} proceedings faced a hearing procedure significantly different from that faced by aliens who had made an 'entry' into the United States and were alleged by the INS to be \textit{deportable}. ").
\textsuperscript{89} Id. § 301, 110 Stat. at 3009-575 to -579.
\textsuperscript{90} Id.
\textsuperscript{91} Landon v. Plasencia, 459 U.S. 21, 33 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.").
\textsuperscript{93} Villa-Anguiano v. Holder, 727 F.3d 873, 881 (9th Cir. 2014) ("Due process, in turn, entitles an unlawfully present alien to consideration of issues relevant to the exercise
Despite a line of cases upholding the indefinite detention of inadmissible aliens,\textsuperscript{94} in 2005, the Supreme Court granted review in a habeas corpus case in which an inadmissible alien challenged the constitutionality of the federal statute permitting the state to detain him indefinitely.\textsuperscript{95} The Court rejected the argument that the law permitted indefinite detention.\textsuperscript{96} Instead, the Court implied a reasonable time period into the federal detention statute.\textsuperscript{97} In reflecting on the breadth of congressional plenary power in the area of immigration law, the Court commented: “[b]ut that power is subject to important constitutional limitations.”\textsuperscript{98} The Court ruled that habeas corpus is a fundamental right owed to all persons detained indefinitely by the state and judicial review was proper.\textsuperscript{99} The potential for indefinite detention violated the liberty interest of the petitioner.\textsuperscript{100} This 2005 decision demonstrates that inadmissible aliens enjoy some Fifth Amendment due process protections, including the right to a habeas corpus hearing and the right to be free from indefinite detention, even if Congress had

\textsuperscript{94} See Clark v. Martinez, 543 U.S. 371, 389 (2005) (Thomas, J., dissenting) (“[C]onstitutional questions raised by detaining inadmissible aliens are different from those raised by detaining admitted aliens.”) (emphasis omitted); see also Johnson v. Eisentrager, 339 U.S. 763, 770 (1950) (“The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights.”).

\textsuperscript{95} Clark, 543 U.S. at 378-80, 386 (majority opinion) (holding that the government may not detain inadmissible aliens indefinitely).

\textsuperscript{96} Id. at 386.

\textsuperscript{97} Id.

\textsuperscript{98} Zadvydas v. Davis, 533 U.S. 678, 695 (2001); see Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 941-42 (1983) (finding that Congress must choose “a constitutionally permissible means of implementing” its broad immigration power); see also Chae Chan Ping v. United States, 130 U.S. 581, 604 (1889) (finding that congressional authority is limited “by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations.”).

\textsuperscript{99} See Clark, 543 U.S. at 386-87.

\textsuperscript{100} See id.
Thus, the Court placed some constitutional restrictions on the congressional power to strip inadmissible aliens of rights otherwise guaranteed to all persons under the habeas corpus provision of the Constitution. Therefore, the Court placed some constitutional restrictions on the congressional power to strip inadmissible aliens of rights otherwise guaranteed to all persons under the habeas corpus provision of the Constitution.

B. Other Sources of Authority Creating a Protected Liberty Interest

In addition to the Clark v. Martinez decision, signaling the Supreme Court’s willingness to extend habeas rights to inadmissible aliens, Mexican unaccompanied children may also look to federal asylum law as an express source of a fundamental right afforded to inadmissible aliens. In 1968, the United States became a signatory to the 1967 United Nations Protocol Relating to the Status of Refugees. This Protocol expressly incorporates article 33 of the 1951 Convention Relating to the Status of Refugees. It prohibits the deportation of a refugee “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.” The obligations under the Protocol and Convention were eventually codified by Congress in the Refugee Act of 1980. The Act outlines a detailed procedure to admit refugees into the United States. Congress identified the goal underlying the Refugee Act of 1980 to be: “the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands.”

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101 See id.
102 See id.; see also U.S. CONST. art. 1 § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).
103 See supra notes 91-102 and accompanying text; infra notes 104-09 and accompanying text.
106 See id. at 2.
108 Id. § 202-09, 94 Stat. at 103-05.
109 See id. § 101(a), 94 Stat. at 102; see also Fitzpatrick, supra note 105, at 1.
In order to comply with the United States’ obligations under the Refugee Act of 1980, Congress enacted section 208 of the Immigration and Nationality Act.\(^\text{110}\) Section 208 authorizes the Attorney General to “establish a procedure for an alien physically present in the United States... to apply for asylum.”\(^\text{111}\) This provision is designed to identify inadmissible aliens with a colorable asylum claim to ensure that they are notified of the right to seek asylum.\(^\text{112}\)

Shortly after Congress passed the Refugee Act of 1980, federal courts were called upon to determine whether the Act created a fundamental right and, if so, how to adequately protect that right.\(^\text{113}\) In addressing the class action filed on behalf of Guatemalans and Salvadorians detained in a Texas center, the Texas district court in *Nunez v. Boldin*,\(^\text{114}\) addressed the issue of whether inadmissible aliens were entitled to notice from the INS officials of the right to claim political asylum.\(^\text{115}\) The *Nunez* court began by identifying the source of the fundamental right at issue.\(^\text{116}\) According to the court, the right springs from the United States’ obligation as a member of the international community.\(^\text{117}\) Although the government argued that no

\(^{110}\) See § 208, 94 Stat. at 105.

\(^{111}\) Id.

\(^{112}\) Id.

\(^{113}\) See Orantes-Hernandez v. Smith, 541 F. Supp. 351, 375 (C.D. Cal. 1989) (“Because the Refugee Act specifically confers the right to apply for political asylum, the Court is compelled to reject defendants’ argument that notice of that right is not required.”); see also Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1506 (C.D. Cal. 1983) (“Notification of the right to apply for asylum and for relief from deportation is mandated by the Refugee Act, which confers these rights. Notice is required in order to fully effectuate the intent behind the Refugee Act.”); Yiu Sing Chun v. Sava, 708 F.2d 869, 877 (2d Cir. 1983) (“A refugee who has a ‘well-founded fear of persecution’ in his homeland has a protectable interest recognized by both treaty and statute.”); *Nunez v. Boldin*, 537 F. Supp. 578, 583-84 (S.D. Tex. 1982).

\(^{114}\) *Nunez*, 537 F. Supp. at 580, appeal dismissed, 692 F.2d 755 (5th Cir. 1982). The *Nunez* district court relied upon the housing rights procedural due process case, Holbrook v. Pitt, 643 F.2d 1261 (7th Cir. 1981), and a social security due process case, Finberg v. Sullivan, 634 F.2d 50 (3d Cir. 1980) (en banc), to rule that the INS was obligated to notify aliens in detention of the right to seek asylum to support its decision that inadmissible aliens enjoy a constitutionally protected right to notice of the right to request an asylum process. *Nunez*, 537 F. Supp. at 586.

\(^{115}\) *Nunez*, 537 F. Supp. at 583.

\(^{116}\) Id.

\(^{117}\) Id.
regulation required such notice, the court flatly rejected this argument:

What is obvious to the court at this point is that the United States has, by treaty, statute, and regulations, manifested its intention of hearing the pleas of aliens who come to this country claiming a fear of being persecuted in their homelands. The intention is not necessarily stated as granting the privilege of asylum to all who come to this country but of hearing those pleas.

As submitted by plaintiffs, the failure of the Immigration Service to notify detainees of the right to apply for asylum may effectively render the treaties and statutes discussed above, as well as the intentions behind them, virtually non-existent for the majority of persons who might claim their benefits.

The Nunez court implied a duty of notice of the asylum process into federal immigration law. The court observed that the protections created under U.S. asylum law recognized the basic human right to be free from state persecution and further recognized the United States' obligation to open its borders to those fleeing persecution. The right is rendered meaningless unless the undocumented person is informed of the asylum hearing process and is permitted to invoke it. Notice provides the key to permit undocumented people access to judicial relief from deportation.

The Nunez court next addressed whether this right was sufficiently important to be entitled to procedural due process protection. Although the INS argued that the right to an asylum hearing did not rise to the level of a constitutionally protected

\[118 \text{ Id. at } 584.\]
\[119 \text{ Id.}\]
\[120 \text{ Id. at } 583.\]
\[121 \text{ Id.}\]
\[122 \text{ Id. at } 584.\]
\[123 \text{ Id. at } 586.\]
\[124 \text{ Id. at } 584.\]
interest, the court disagreed. The court characterized the absence of notice as casting the "specter of truly severe deprivations of life, liberty, and property; in this case . . . torture and death." Having found a fundamental right, the deprivation of which could have severe and irreversible consequences, the court observed that the process in place did not adequately ensure that genuine asylum claims would be heard to avoid returning refugees to the country persecuting them.

The court next considered the burden of false claims and extended removal periods associated with providing additional due process rights. After analyzing the competing interests, the court concluded that the interests of the petitioners in requesting an asylum hearing outweighed the added costs to the state. In upholding an inadmissible person’s right to notice of the right to an asylum hearing, the court concluded: “[p]roviding refuge to those facing persecution in their homeland, however, goes to the very heart of the principles and moral precepts upon which this country was founded.” Since Nunez was decided, a split among the federal circuit courts has arisen regarding whether an inadmissible alien has a constitutional right to notice of the right to request an asylum hearing. The division among

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125 Id.
126 Id. at 586.
127 Id. at 584 (citing Haitian Refugee Ctr. v. Civiletti, 503 F. Supp. 422, 455 (S.D. Fla. 1980)).
128 Id. at 586.
129 Id.
130 Id. at 587.
131 Id.
132 Compare Augustin v. Sava, 735 F.2d 32, 36 (2d Cir. 1984) (holding that the absence of adequate translation of asylum proceedings violated the procedural due process rights of a Haitian refugee because the Refugee Act of 1980 granted a statutory, not constitutional right, to any asylum proceedings), and Maldonado-Perez v. INS, 865 F.2d 328, 332 (D.C. Cir. 1989) (recognizing that an alien had a procedural due process right to petition the government for political asylum), with Jean v. Nelson, 727 F.2d 957, 984 (11th Cir. 1984) (holding that aliens had no constitutional rights to their applications for asylum and no statutory rights for notice of opportunity to apply for asylum), and Amanullah v. Nelson, 811 F.2d 1, 9 (1st Cir. 1987) (explaining that aliens have no constitutional rights to admission or exclusion procedures). See also Kendall Coffey, The Due Process Right to Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy, 19 YALE L. & POL’Y REV. 303, 315-24 (2001).
the courts remains unresolved. Thus, the Supreme Court has recognized that aliens are entitled to some procedural and substantive rights, the scope of which is evolving through judicial interpretation.

C. Framing the Mexican Unaccompanied Children's Fundamental Liberty Interest

In structuring a procedural due process claim on behalf of Mexican unaccompanied children, a litigant must provide a "careful description of the asserted fundamental liberty interest" to minimize the subjectivity inherent in judicial review of due process. A fundamental right has been defined as a right that is "objectively, 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,' such 'that neither liberty nor justice would exist if [it] were sacrificed.'" For Mexican unaccompanied children, the fundamental liberty interest is the right to a hearing to establish a claim for asylum or a hearing to qualify for protection as a victim of human trafficking.

This right is embodied in section 240 of the Immigration and Nationality Act and in section 235(a) of the TVPRA. The line of cases previously discussed establishes the vital importance of notice of the right to a hearing before an impartial tribunal before the alien is deported, which in many instances would result in returning the alien to the oppressive conditions from which the refugee fled in the first

133 Coffey, supra note 132, at 327.
134 Id. at 320 (discussing how in Jean v. Nelson, the Supreme Court never resolved the Fifth Amendment issue that was split among the Circuit Courts, but found valid claims "raised against the INS based on statutory and regulatory criteria").
136 Id. at 722.
137 Id. at 720-21 (citation omitted).
140 See § 235(a), 122 Stat. at 5075.
141 See sources cited supra note 113.
In addition to recognizing the vital importance of asylum screening, section 235 also creates protections for victims of human trafficking. Here, Congress has mandated a screening process designed to identify children who may qualify for asylum or special visas. This screening process, as earlier described, is a prerequisite for receiving the additional protection of a full and fair hearing, on matters related to asylum and trafficking. By creating these two separate types of protected status, which permit inadmissible children to remain legally in the United States, Congress has created a liberty interest. Thus, adequate procedures to protect these liberty rights must be implemented. As the Nunez court observed, protecting individuals from persecution in their homeland is at "the very heart" of the U.S. Constitution. Here, the question is whether the truncated process afforded to Mexican unaccompanied children deprives them of their fundamental right to notice of the right to a hearing to establish grounds for asylum or of the right to a hearing to prove that the child is a victim of human trafficking.

VI. TVPRA SECTION 235(A) DEPRIVES MEXICAN UNACCOMPANIED CHILDREN OF PROCEDURAL DUE PROCESS

Assuming that a court is willing to recognize that inadmissible Mexican unaccompanied children enjoy a fundamental right to the protections afforded by the Refugee Act of 1980 and under the

142 See sources cited supra note 113.
143 See § 235(b)-(c), 122 Stat. at 5077-79.
144 Id. § 235(a)(4), 122 Stat. at 5077.
146 See Nunez v. Boldin, 537 F. Supp. 578, 584-85 (S.D. Tex. 1982) (“[The] United States has, by treaty, statute, and regulations” has recognized the life and liberty interests of an alien ‘who fears to return to his homeland because of persecution.’”) (internal citation omitted).
147 See, e.g., id. (quoting Haitian Refugee Ctr. v. Civiletti, 503 F. Supp. 442, 455 (S.D. Fla. 1980)).
148 See id. at 587.
149 See infra Part VI.
TVPRA, the question becomes whether the process afforded under section 235(a)(2) is sufficiently protective according to procedural due process precedent.\textsuperscript{151} The Supreme Court has held that the essence of due process is "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"\textsuperscript{152} Two cases, emanating from the Supreme Court, help to shape the procedural due process analysis available to Mexican unaccompanied children to determine whether the procedure in place is sufficiently protective.\textsuperscript{153}

The first case, vital to a thorough understanding of a procedural due process analysis, is \textit{Goldberg v. Kelly}.\textsuperscript{154} Here, the Supreme Court addressed the narrow question of whether a pre-termination hearing was required as a matter of procedural due process before New York could terminate welfare benefits of certain recipients.\textsuperscript{155} In concluding affirmatively, the Court observed that "[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."\textsuperscript{156}

In considering whether the right to a pre-termination hearing extended to an individual receiving worker's compensation, the \textit{Mathews v. Eldridge} Court further developed the test emerging from the \textit{Goldberg} case.\textsuperscript{157} Because procedural due process lacks a fixed legal

\textsuperscript{152} Id. at 333 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).
\textsuperscript{153} See infra notes 154-64.
\textsuperscript{154} See Goldberg v. Kelly, 397 U.S. 254, 266-71 (1970) (holding that welfare benefits are a property interest, and a pre-termination evidentiary hearing is necessary to provide sufficient procedural due process).
\textsuperscript{155} See id. at 255.
\textsuperscript{156} Id. at 262-63 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)) (citation omitted).
\textsuperscript{157} Mathews, 424 U.S. at 319, 331, 335. The \textit{Mathews} Court reasoned that because "[a] claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained as a postdeprivation hearing," due process requires consideration of three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or
rule and changes depending upon the surrounding circumstances, both the private interests and the governmental interests at stake must be considered. Procedural due process protections advance each party’s interest in obtaining “an accurate and just decision,” particularly with respect to the fact-finding process. To achieve these goals the Mathews Court devised a three-part analysis. First, a court must consider the nature of the private interest that will be affected by the official action. Second, a court must assess the risk of erroneous deprivation of the interest, through the procedures in place, and the probable value, if any, of additional or substitute procedural safeguards. Finally, a court should assess the state’s interest, including the function involved, the monetary costs, and the administrative burdens that the additional or substitute procedural requirement would entail.

A. The Process Provided by Congress is Insufficiently Protective

To assess the constitutional sufficiency of section 235(a), a court would apply the three-part test set forth in Mathews, beginning with an analysis of the nature of the private interest in relationship to the procedure in place. Under section 235(a), the interest at stake for substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. (citation omitted).

158 Id. at 334-35.


160 Mathews, 424 U.S. at 334-35.

161 Id. at 335.

162 Id.


164 Santosky, 455 U.S. at 754.

165 Id. at 754-55.
Mexican unaccompanied children is personal liberty.\textsuperscript{166} The procedure afforded to them based upon constitutional principles will have a permanent and life-altering effect on them.\textsuperscript{167} Certainly, the fact-finding process at the screening stage should be sufficiently detailed to ensure that no child otherwise entitled to an asylum or trafficking hearing is approved for voluntary departure and improperly returned to the dangerous and inhumane conditions that satisfy the legal standards associated with persecution or human trafficking.\textsuperscript{168} Thus, the interest at issue is one associated with personhood and is informed by the international condemnation of child maltreatment.\textsuperscript{169} At this point in time, the interests of the state and of the children entitled to protection coincide to favor “error-reducing procedures.”\textsuperscript{170}

Clearly, under the second prong of the \textit{Mathews} test, the risks of erroneous deprivation through the screening process in place are weighty, raising the question of whether additional protective procedures might reduce the risk of erroneously returning Mexican unaccompanied children to the dangerous and inhumane circumstances causing them to flee in the first instance.\textsuperscript{171} Once again, the interests of the children entitled to relief and the state coincide at this fact-finding stage to be certain that the decision, which triggers either return or access to additional procedural protections, is well made.\textsuperscript{172}

Under the existing screening process, the risk of error is quite

\begin{itemize}
\item\textsuperscript{167} See, e.g., Zamora, supra note 145 (explaining the procedural effects of asylums and human trafficking on Mexican unaccompanied children).
\item\textsuperscript{168} See, e.g., id.
\item\textsuperscript{169} See, e.g., INT'L SOC'Y FOR PREVENTION OF CHILD ABUSE & NEGLECT, WORLD PERSPECTIVES ON CHILD ABUSE 5 (Deborah Daro ed., 8th ed. 2008) http://c.ymcdn.com/sites/www.ispcan.org/resource/resmgr/world_perspectives/world_persp_2008_-_final.pdf (“All of these efforts have sought to bring attention and understanding to the worldwide problem of child abuse and neglect and to highlight key differences across national policies in this area.”).
\item\textsuperscript{170} Santosky, 455 U.S. at 761.
\item\textsuperscript{171} See supra notes 41-44 and accompanying text.
\item\textsuperscript{172} See supra notes 167-69 and accompanying text.
\end{itemize}
high for three reasons. First, the children are screened very quickly, suggesting that insufficient time is allocated to each individual child to determine, on a case-by-case basis, whether grounds for asylum or trafficking protections exist. Second, the children are often frightened, many suffering from the trauma associated with the dangerous passage over the border. They do not speak English in most cases, they do not understand the purpose of the initial Customs and Border Patrol interview, and they do not have any adult to rely upon to advance their interests. Finally, while the screening form seems to afford no room for error, the flawed decision to use Border Patrol agents to conduct the screening under the conditions described above results in the determination that 98% of Mexican unaccompanied children are eligible for voluntary departure. The risk of the erroneous return of Mexican unaccompanied children with valid claims under the TVPRA can truly be a matter of life and death. A screening process that fails to ascertain potential claimants is a failed process.

Finally, under the third prong of Mathews, a court should assess the state’s “interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural

174 See generally id. (stating that the screening process and determination all must be done within seventy-two hours, implying too swift of a process).
177 Id. at 13, 16-17. This statistic is derived as follows: Border Patrol reported apprehending approximately 15,540 Mexican unaccompanied children. Id. at 17. A Mexican governmental agency, DIF, reported that same year that Mexican authorities took back 15,534 Mexican unaccompanied children. Id. The number of unaccompanied children returned to Mexico divided by the number of Mexican unaccompanied children apprehended by Border Patrol determines that Customs and Border Patrol returned approximately 99% of Mexican unaccompanied children that year. See id.
178 See id. at 13-16.
179 See id. at 16-19, 40-44.
requirement [might] entail." Here, the state has a parens patriae interest in the welfare of unaccompanied children taken into state custody. Thus, it shares, along with Mexican unaccompanied children, a strong interest in prompt and accurate screening. Additionally, the state has an interest in reducing the cost and burdens of the immigration process. One alternative is to eliminate the disparate treatment of Mexican unaccompanied children and adopt the sorting process already in place for other unaccompanied children. Thus, the infrastructure for more accurate screening already exists. While the additional process will demand additional resources, the sorting process of Mexican unaccompanied children is not sufficiently protective and additional costs will be associated to redress the risk of erroneous deprivation.

In summary, the Mexican unaccompanied children have an express liberty interest in receiving a fair screening to identify grounds for TVPRA protections. The congressional decision—to separate Mexican unaccompanied children from others crossing the southern border and to imbue them with lesser protections—deprives them of a

181 Reno v. Flores, 507 U.S. 292, 304 (1993) ("[C]hild-care institutions operated by the State in the exercise of its parens patriae authority are not constitutionally required to be funded at such a level as to provide the best schooling or the best health care."). Following this ruling in favor of the INS, upon remand, the INS entered into the Flores Settlement Agreement to resolve the lawsuit. Rebeca M. Lopez, Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody, 95 MARQUETTE L. REV. 1635, 1642 (2012). Despite the settlement, immigrant children in detention continued to be detained in prison-like conditions. Id. at 1658.
183 Lopez, supra note 181, at 1676.
184 Cavendish & Cortazar, supra note 10, at 33-34.
186 See Cavendish & Cortazar, supra note 10, at 6-7, 9 (identifying inadequacies of TVPRA screening for Mexican unaccompanied children and providing recommendations for improvement).
187 Shea, supra note 173, at 157, 157 n.43.
188 See § 235(a)(2), 122 Stat. at 5075.
fair and just fact-finding process. Although the fiscal and administrative burdens would require the DHHS in association with ORR to deal with approximately 24% more unaccompanied children, the transfer of responsibility would relieve the Border Patrol agents of this obligation. Section 235 (a)(2) denies Mexican unaccompanied children procedural due process sufficient to protect their liberty interest in asylum and TVPRA protections. Under the forgoing Mathews analysis, Mexican unaccompanied children, require additional procedural protections—given the importance of the private interest and the potentially irreparable consequences of an erroneous determination. The Mathews test favors a more robust screening procedure to accurately identify children with valid visa claims. Both of these policy interests justify the economic cost of providing additional procedural protections.

B. The TVPRA Process, as Mandated, is Not Being Properly Implemented

Alternatively, even if the screening process under section 235 as to Mexican unaccompanied children is deemed sufficient under the Mathews three-part test, there remains the pressing concern that the limited screening process in place is not being implemented properly. The Department of Homeland Security, through its spokespersons and its handling of these cases, has expressed a preference for streamlined voluntary departure of all unaccompanied children. This overt

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189 Cavendish & Cortazar, supra note 10, at 31-33, 39-42.
190 See id. at 49.
191 See id.
192 See § 235(a)(2), 122 Stat. at 5074-75 (discussing the inadequate procedures that the Mexican unaccompanied children are subjected to under the law); see also supra notes 165-88 and accompanying text.
193 See supra notes 164-92 and accompanying text.
194 See Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976); see also supra notes 164-92 and accompanying text. See generally § 235(a)-(c), 122 Stat. at 5074-75 (detailing how Mexican unaccompanied children are repatriated without due process).
195 Mathews, 424 U.S. at 334-35.
197 Press Release, U.S. Dep’t of Homeland Sec. Press Office, Statement by Sec’y of
goal\textsuperscript{198} of prompt repatriation contravenes the screening process designed by Congress and embodied in TVPRA protections.\textsuperscript{199}

Several independent sources describe the process actually implemented upon apprehending Mexican unaccompanied children as woefully insufficient. Upon apprehension at the border, unaccompanied children are divided into two groups—those from contiguous countries and those from all other countries.\textsuperscript{200} Once sorted according to this alienage-based criteria, the Border Patrol agents treat the Mexican unaccompanied children’s attempt to enter the United States as an informal application for entry into the United States.\textsuperscript{201} When processed, the Border Patrol agent presents the Mexican unaccompanied child with a Form I-770.\textsuperscript{202}

This form presents a stark choice to each child: either demand a hearing or return voluntarily to Mexico.\textsuperscript{203} Once signed, the form serves to formally withdraw what is construed as an “informal application” for admission to the United States.\textsuperscript{204} The form provides as follows: “I am in the United States illegally and ask that I be returned to my country which is named below.”\textsuperscript{205} In 2008, the TVPRA was amended to add greater protection for Mexican unaccompanied children by mandating a screening test for those unaccompanied children who


\textsuperscript{199} See, e.g., Cavendish & Cortazar, supra note 10, at 1, 24.

\textsuperscript{200} See id at 21. This also raises equal protection concerns. See infra Part VII.

\textsuperscript{201} See, e.g., Cavendish & Cortazar, supra note 10, at 1, 21.

\textsuperscript{202} See id.

\textsuperscript{203} See id.

\textsuperscript{204} Id.

\textsuperscript{205} Id. at 24.
An unaccompanied Mexican child must be transferred to the custody of ORR or DUCS if at least one of the following criteria is met during the child’s interview: (1) the child’s answers indicate the child may be a victim of trafficking, (2) the child’s answers indicate a potential basis for asylum, or (3) the child is too immature to permit elective repatriation.\textsuperscript{208} Congress requires a “case-by-case” analysis to determine if repatriation is safe and if the child has sufficient capacity to make an “independent decision.”\textsuperscript{209} If the interview is not conducted within the first forty-eight hours, custody of the child must be transferred to ORR or DUCS.\textsuperscript{210} Although Border Patrol is the initial screening agency, these agents receive insufficient proficiency training to interview and interact with children.\textsuperscript{211}

Proper training is extremely important because the language of the statute does not impose a bright-line test but requires screeners to exercise discretion on a case-by-case approach.\textsuperscript{212} While this terminology is quite familiar to judges, lawyers, and students of the law, it may not be entirely clear to Border Patrol agents dealing with children.\textsuperscript{213} This term demands a careful review of each child’s individualized and distinct experiences.\textsuperscript{214} It is often described as a “totality of the circumstances approach”\textsuperscript{215} and denotes a high degree of

\textsuperscript{206} See id. at 23. The agreement itself is at best voidable under U.S. law, which protects minors from the consequences of entering contracts due to their immaturity. Simmons by Grenell v. Parkette Nat. Gymnastic Training Ctr., 670 F. Supp. 140, 144 (E.D. Pa. 1987).

\textsuperscript{207} See Cavendish & Cortazar, supra note 10, at 21.

\textsuperscript{208} See id. at 24.

\textsuperscript{209} Id. at 23, 44.

\textsuperscript{210} See id. at 24.

\textsuperscript{211} See id. at 19-20. One of Appleseed’s recommendations stressed the vital importance of developing “specialized training in consultation with child welfare experts.” Id. at 7.


\textsuperscript{213} See Cavendish & Cortazar, supra note 10, at 44 (discussing how Border Patrol agents are provided minimal training on how to satisfy the Congressional mandates included in the TVPRA).

\textsuperscript{214} See § 235(c)(2)(A), 122 Stat. at 5075.

\textsuperscript{215} See Xiu Xia Lin v. Mukasey, 534 F.3d 162, 167 (2d Cir. 2008).
discretion\textsuperscript{216} in the fact-finder, specifically because of the difficulty of imposing a bright-line rule.\textsuperscript{217} The generality of the three-factor screening test demands that the state educate and train its screeners regarding the relevant criteria to consider in exercising this discretion.\textsuperscript{218}

With respect to the first two determinations regarding asylum and TVPRA protections, the screener should have a thorough understanding of the claims available to the child and of the evidentiary burdens, which vary.\textsuperscript{219} For example, asylum may be granted based upon a well-founded fear of future persecution based upon race, religion, nationality, membership in a particular social group, or political opinion.\textsuperscript{220} The burden of proof associated with future persecution is described as showing "a well-founded fear that a reasonable person in his or her circumstances would fear persecution."\textsuperscript{221} It is viewed as a relatively light burden and may be satisfied even if there is only "a slight, though discernable, chance of persecution."\textsuperscript{222} The child must also establish membership in a "discrete group" to qualify for asylum.\textsuperscript{223} Additionally, the burden of proof to establish grounds for a T-visa requires,

\textsuperscript{216} See, e.g., Baires v. INS, 856 F.2d 89, 91 (9th Cir. 1988). Judges have determined that it is difficult to impose bright-line rules in immigration proceedings. See id.

\textsuperscript{217} Id.

\textsuperscript{218} Cavendish & Cortazar, supra note 10, at 23, 38.

\textsuperscript{219} See Manzoor v. U.S. Justice Dep't., 254 F.3d 342, 347 (1st Cir. 2001). After the applicant proves he is a refugee, the burden shifts to INS to rebut, by a preponderance of the evidence, the presumption that if an applicant was the victim of past persecution, then the applicant has a well-founded fear of future persecution. See id. While the petitioner’s evidentiary burden to obtain a hearing may enjoy a very low likelihood of success, the burden to successfully establish asylum is a preponderance of the evidence. See INS v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987).


\textsuperscript{221} See Cardoza-Fonseca, 480 U.S. at 431 (discussing the possibility that even a one-in-ten chance of suffering persecution may qualify as a well-founded fear).

\textsuperscript{222} Diallo v. INS, 232 F.3d 279, 284 (2d Cir. 2000).

(1) that the alien applicant is or has been a victim of a severe form of human trafficking; (2) that the victim is physically present in the U.S. . . . on account of human trafficking; . . . (3) that the alien (and certain immediate family members) would suffer extreme hardship involving unusual and severe harm upon removal.  

Screening for both types of protections requires specialized knowledge of both legal standards.  

Ideally, this specialized screening would be accomplished by a team comprised of an immigration lawyer representing the child, a child welfare expert, and a translator if needed.  

Sadly, while the language of the statute requires specialized fact-finding, it is silent as to how such fact-finding shall be accomplished.  

The screening is accomplished in approximately ten minutes.  

A disproportionately small fraction of the Mexican unaccompanied children are transferred to DUCS.  

The current approach results in the immediate repatriation of almost all of the Mexican unaccompanied children.  

Thus, the Customs and Border Patrol’s failure to properly screen Mexican unaccompanied children results in the deprivation of procedural due process because Mexican

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225 See Young & McKenna, supra note 33, at 259.  
226 Id. at 258; Linda A. Piwowarczyk, Our Responsibility to Unaccompanied and Separated Children in the United States: A Helping Hand, 15 B.U. PUB. INT. L. J. 263, 276-78, 292-94 (2006) (finding an advocate who understands the proceedings becomes particularly important given the likelihood of a language barrier, the special language of the law and the lack of brain development that typifies youth).  
229 Cavendish & Cortazar, supra note 10, at 17. This is problematic because all unaccompanied children in DUCS custody receive a hearing, and many are deemed entitled to some degree of protection, which permits them to remain in the United States. See id. The deprivation of a hearing creates inequality among unaccompanied children from Mexico and those from other countries. See supra Section III.C.  
230 Cavendish & Cortazar, supra note 10, at 55 (finding 98% repatriation rate).
unaccompanied children are summarily returned to their country of origin, despite the risk of severe harm associated with the type of trafficking and persecution section 235 is designed to identify in order to extend sanctuary.\textsuperscript{231}

VII. **SECTION 235 OF THE TVPRA DEPRIVES MEXICAN UNACCOMPANIED CHILDREN OF EQUAL PROTECTION UNDER THE FIFTH AMENDMENT**

The summary and disparate treatment described above also deprives Mexican unaccompanied children of the fundamental right to equal protection under the Fifth Amendment.\textsuperscript{232} The Supreme Court has interpreted the Due Process Clause of the Fifth Amendment to contain the same guarantee of equal protection under the law as that provided by the Fourteenth Amendment, which contains an express equal protection clause.\textsuperscript{233} In *Bolling v. Sharpe*, the Court clarified one important distinction between the guarantee of equal protection under the Fifth and the Fourteenth Amendments with respect to alienage classifications.\textsuperscript{234} While state legislative alienage classifications may trigger strict scrutiny, “the Fourteenth Amendment’s limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization.”\textsuperscript{235} That is so, because “it is the business of the political branches of the Federal Government, rather than that of . . . the States . . . to regulate the conditions of entry and residence of aliens.”\textsuperscript{236} Thus, in deference to Congress’ plenary power in the area of immigration, courts typically apply rational basis review to facially discriminatory immigration laws that, if enacted by a state, would trigger strict scrutiny.\textsuperscript{237}

When tested by the rising tide of Chinese immigrants during the

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\textsuperscript{231} See id. at 23-25, 48-50.
\textsuperscript{232} See supra Parts I-IV.
\textsuperscript{234} Id.
\textsuperscript{236} Id. at 84-85.
gold rush,\textsuperscript{238} anti-Japanese sentiments during World War II,\textsuperscript{239} and the flow of Cuban immigrants during the Muriel Boat Lift,\textsuperscript{240} Congress has repeatedly resorted to facially discriminatory immigration laws to achieve its goals.\textsuperscript{241} Similarly, the Supreme Court has consistently upheld the national origin stratifications.\textsuperscript{242} However, a trend preferring neutrality in deportation criteria is emerging.\textsuperscript{243}

Most recently, in \textit{Jean v. Nelson},\textsuperscript{244} a certified class of Haitians sued on the grounds that the INS policy to detain all Haitians, instead of preferring parole as in all other cases, violated their constitutional rights.\textsuperscript{245} The action was deemed moot by the time it reached the Court because the INS had promulgated facially neutral rules implementing Congress' neutral parole law.\textsuperscript{246} The majority observed, "The INS has adopted nationality-based criteria in a number of regulations. These criteria are noticeably absent from the parole regulations, a fact consistent with the position of both respondents and petitioners that INS parole decisions must be neutral as to race or national origin."\textsuperscript{247}

Dissatisfied with the majority's willingness to avoid the constitutional question, the dissent argued that the mere silence of Congress on the issue of discriminating based on alienage in parole decisions did not sufficiently bind the Attorney General and those

\textsuperscript{238} See \textit{Chae Chan Ping v. United States}, 130 U.S. 581, 606, 609-10 (1889) (upholding power of Congress to exclude Chinese workers from reentering the country relying upon the power of the government to exclude foreigners from its borders in the interests of public welfare).

\textsuperscript{239} See \textit{Korematsu v. United States}, 323 U.S. 214, 217-18 (1944). Here, the Court applied strict scrutiny to uphold federal exclusion and internment order and ruled, "we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did." \textit{Id.}


\textsuperscript{241} See \textit{id.} at 855-57; \textit{Korematsu}, 323 U.S. at 217-18; \textit{Chae Chan Ping}, 130 U.S. at 609.

\textsuperscript{242} See \textit{Jean}, 472 U.S. at 855-57; \textit{Korematsu}, 323 U.S. at 217-18; \textit{Chae Chan Ping}, 130 U.S. at 609.

\textsuperscript{243} See \textit{Jean}, 472 U.S. at 850-51.

\textsuperscript{244} See \textit{id.} at 850-52.

\textsuperscript{245} \textit{Id.} at 849.

\textsuperscript{246} See \textit{id.} at 850-51.

\textsuperscript{247} \textit{Id.} at 856.
The narrow question presented by this case is whether, in deciding which aliens will be paroled into the United States pending the determination of their admissibility, the Government may discriminate on the basis of race and national origin even in the absence of any reasons closely related to immigration concerns. To my mind, the Constitution clearly provides that it may not. I would therefore reverse the judgment of the Court of Appeals and remand for a determination of the scope of petitioners' equal protection rights.

Here, the dissent recognizes a legal distinction between entry standards, which fall within Congress' broad plenary power, and the statutory removal process, which should not distinguish as to alienage and national origin.

For purposes of the equal protection analysis, the relevant classifications are those among persons similarly situated. For our purposes, the relevant comparison is between unaccompanied children generally who receive the protections under section 235(b) and Mexican unaccompanied children who receive less protection under section 235(a). Although statutory distinctions based upon nationality may be common with respect to entry criteria to advance national immigration policy, rules related to the process for removing or deporting inadmissible aliens should be neutral as to national origin. Clearly, if removal proceedings are required, section 235 fails immediately.

Assuming that the government may discriminate on the basis of

248 See id. at 881-82 (Marshall, J., dissenting).
249 Id.
250 See id.
254 See Jean, 472 U.S. at 881 (Marshall, J., dissenting).
national origin when legislating removal proceedings, the distinction must satisfy rational basis.\textsuperscript{255} Rational basis scrutiny requires that the individual challenging the statutory classification must show that it is not rationally related to achieving a legitimate state interest.\textsuperscript{256} In identifying these legitimate state interests at work, the statutory purposes section provides insight into the purpose advanced by the statute.\textsuperscript{257}

Section 7101 of the TVPRA provides, “The purposes of this chapter are to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.”\textsuperscript{258} The findings in support of the legislation identify the need for special protection of victims of trafficking because they are unfamiliar with “the laws, cultures, and languages of the countries into which they have been trafficked,” and “because they often fear retribution and forcible removal to countries in which they will face retribution or other hardship, these victims often find it difficult or impossible to report the crimes committed against them . . . .”\textsuperscript{259} These dangers face all unaccompanied children, not just those from countries that do not share a border with the United States.\textsuperscript{260}

The distinction between Mexican unaccompanied children and all other unaccompanied children must be questioned.\textsuperscript{261} Is it rationally related to achieving the express and protective goals of the statute? Arguably, it is not. The alienage of the child is entirely irrelevant as to

\textsuperscript{255} Gabriel J. Chin, Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration, 46 U.C.L.A. L. REV. 1, 11-12 (1998). Congress has historically used alienage classifications in immigration law based on precepts of national security, international law, and the view that the constitutional protections did not reach beyond U.S. borders to noncitizens. \textit{Id.}

\textsuperscript{256} Plyer, 457 U.S. at 208, 216.


\textsuperscript{258} \textit{Id.}

\textsuperscript{259} \textit{Id.} For the purpose of this Article, the relevant comparison is between unaccompanied children generally, who receive the protections under section 235(b) and unaccompanied children from contiguous countries who receive less protection under section 235 (a). See § 235(a)-(b), 122 Stat. at 5074-82.

\textsuperscript{260} See Cavendish & Cortazar, \textit{supra} note 10, at 30-31.

\textsuperscript{261} See generally \textit{Id.} (finding that Mexican unaccompanied children face immediate repatriation unlike all other unaccompanied children).
the child's status as a victim of trafficking or their status as a refugee entitled to asylum. In fact, many of the trafficking victims present in the United States are of Mexican descent. Thus, Mexican unaccompanied children are equally at risk of becoming trafficked when compared to children from other countries.

By relying upon the characteristic of national origin, a trait entirely outside the control of the child, to decide which group receives more extensive screening and representation from TVPRA protections, Mexican unaccompanied children—otherwise entitled to TVPRA protections that trigger constitutional rights afforded to other unaccompanied children—suffer potentially life-threatening harm due to the irrational decision to treat them differently under the TVPRA. The separate screening process applicable to Mexican unaccompanied children deprives them of sufficient time to recover from the arduous journey, to develop some degree of trust with the individual interviewing them, and to grasp the import of the rights afforded to them by the TVPRA. The public interest of protecting children who may be victims of trafficking and children who are entitled to notice of the right to seek asylum in a disparate manner is irrational and inhumane.

In summary, "national-origin classifications have a stronger claim to constitutionality when they are employed in connection with decisions that lie at the heart of immigration policy," when "central immigration concerns are not at stake," individualized decisions should be made to reach fair and just results. Mexican unaccompanied children are equally as deserving of the more robust protections

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262 Id. at 11.
263 Meyer et al., supra note 17.
264 See generally Cavendish & Cortazar, supra note 10, at 16, 85 (discussing how human trafficking in Mexico crosses the U.S. border).
265 See supra Part I.
266 See supra notes 172-80 and accompanying text.
267 See supra notes 182-94 and accompanying text.
268 Jean v. Nelson, 472 U.S. 846, 881 (1985) (Marshall, J., dissenting) ("Due process requires that [an agency's] decision to impose [a] deprivation of an important liberty ... be justified by reasons which are properly the concern of that agency.") (quoting Hampton v. Mow Sun Wong, 426 U.S. 88, 116 (1976)).
269 Id.
afforded to children from noncontiguous countries.\textsuperscript{270} The disparate treatment of this group is entirely irrational and thus, unconstitutional.\textsuperscript{271}

\textbf{VIII. CONGRESS SHOULD AMEND THE TVPRA TO ELIMINATE THE DISTINCTION AMONG UNACCOMPANIED CHILDREN}

The TVPRA violates the procedural due process rights and the equal protection rights of Mexican unaccompanied children.\textsuperscript{272} The statutory distinction between Mexican unaccompanied children and other unaccompanied children is irrational and should be eliminated in order to afford appropriate procedural protections to all children and to eliminate the baseless national origin distinction in the statute.\textsuperscript{273} Some legislators have proposed laws to eliminate the core protection of the TVPRA in response to the influx of unaccompanied children from Central America—testing the rule of law in the United States and the willingness of the public to continue the TVPRA protections afforded to children from noncontiguous countries.\textsuperscript{274} Instead of affording to all children the special protections of the TVPRA, the sponsors of this legislation seek to eliminate these special protections by exposing all unaccompanied children to screening by Border Patrol agents with a focus upon expedited “voluntary” return.\textsuperscript{275}

For example, the House considered, and the Senate is currently considering, a bill entitled the “Secure our Southwest Border Act” to amend the TVPRA by eliminating the requirement of determining whether a child is capable of making “an independent decision to withdraw” (the fictional application for admission before voluntarily returning the child to the child’s country of origin).\textsuperscript{276} This change would require any child who successfully claims protection as a victim

\textsuperscript{270} See supra Section II.A.
\textsuperscript{271} See supra notes 188-94 and accompanying text.
\textsuperscript{272} See supra Part V; see also supra Section IV.A.
\textsuperscript{273} See supra notes 251-60 and accompanying text.
\textsuperscript{276} H.R. 5230, § 101(1)(B)(iv); see also supra notes 45-48 and accompanying text.
of trafficking, or who seeks asylum, to attend a mandatory hearing within fourteen days of screening, and it also imposes mandatory detention during this two week period.\textsuperscript{277}

This type of legislation is short-sighted and contravenes the duty of the United States to comply with the Refugee Act of 1980, the vision of the TVPRA to combat the trafficking of children, and our role as an international leader on both fronts. Congress would do well to pursue an alternative agenda of progressive reform to treat all children equally under the TVPRA.\textsuperscript{278} Such an agenda should maintain a dual focus upon identifying the best interests of the child through a screening, conducted by child welfare agents and upon insuring the due process rights of unaccompanied children.\textsuperscript{279} In this way, Congress allows the United States to assume a leadership role in the international community by adopting a child-centered model to respond to the influx of unaccompanied children across international borders.

\textbf{IX. CONCLUSION}

In 2014, the U.S. Border Patrol agents took approximately 15,500 Mexican children into custody, and almost all of them were summarily returned to Mexico following a cursory interview process.\textsuperscript{280} This interview process may comply with the written words of section 235 of the TVPRA but does not comply with its spirit, given the failure to identify and protect those Mexican unaccompanied children who are victims of trafficking.\textsuperscript{281} All other unaccompanied children from noncontiguous countries are transferred to the custody of ORR or DUCS and receive a case-by-case screening by trained child welfare agents to determine if grounds for trafficking or sanctuary exist.\textsuperscript{282} This disparate treatment based on national origin and the disparate

\textsuperscript{277} H.R. 5230, § 101(2)(B).
\textsuperscript{279} \textit{Id.} at 13-14.
\textsuperscript{280} \textit{Id.} at 1.
\textsuperscript{281} \textit{Id.} at 5.
\textsuperscript{282} \textit{Id.}
procedural protections afforded to the two distinct classes violates the Equal Protection guarantee of the Fifth Amendment by treating one group of similarly situated children more favorably than another, without a rational reason for doing so and by affording less robust procedural protections to the disfavored class. This unjustified disparate legal and procedural treatment harms Mexican unaccompanied children by summarily returning them to Mexico without properly screening them for asylum and trafficking claims that would afford to them the right to remain in the United States legally. Currently, many lawmakers have called for reform to reduce the protections afforded to all unaccompanied children. For all of the reasons explored in this Article, Congress should amend the TVPRA to afford to all unaccompanied children who cross the U.S. border the full protections of the TVPRA.

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283 *See id.*

284 *Id.*

285 *Id.; see also supra* notes 279-81 and accompanying text.