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# Implementing Family Unification Rights in American Immigration Law: Proposed Amendments

JOHN GUENDELSBERGER\*

There is something wrong with a law that keeps out — for as long as eight years — the small child of a mother or father who has settled in the United States while a nonrelative or less close relative from another country can come in immediately.<sup>1</sup>

This Article examines the provisions of American immigration law that impede the entry of immediate family members of permanent resident aliens. It focuses particularly on the numerical limitations — the annual ceiling and the per-country ceiling on preference category visas — which force applicants from countries of high immigration demand to wait for long periods of time before visas become available. As a result, spouses and minor children of some permanent resident aliens enter immediately, while those from countries like Mexico or the Philippines must wait as long as eight years.<sup>2</sup> The inequities are exacerbated by the recently passed Immigration Re-

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1. SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, EXECUTIVE SUMMARY OF THE FINAL REPORT AND FINAL RECOMMENDATIONS 1, 15 (1981) [hereinafter SCIRP]. See also Guendelsberger, *The Right to Family Unification in French and United States Immigration Law*, 21 CORNELL INT'L L.J. 1 (1988) (related Article comparing French and American family unification law).

2. 63 INTERPRETER RELEASES 878, 903 (Oct. 10, 1986). See *infra* note 34 and accompanying text.

form and Control Act of 1986 (IRCA),<sup>3</sup> under which as many as two million persons who entered illegally may become legal residents, while spouses or children of resident aliens who remained behind waiting for their visas to become available are afforded no relief.

The first section of this Article analyzes the current provisions of immigration law affecting family unification. The second section examines the constitutionality of the numerical limitations on visa allocation which impede spouses or minor children from joining a permanent resident alien. It concludes that family unity is such an essential component of individual liberty that provisions of immigration law should interfere with that right no more than is necessary to meet compelling national interests. Although the nation has compelling interests in controlling the flow of immigration, analysis of the rationale for the quantitative limitations which cause prolonged separation of immediate family members of permanent resident aliens reveals that the national interests could be protected by means which do not impede family unity.

The final section of the Article advocates that even if the federal courts continue to defer to Congress in their review of immigration laws, Congress should act to amend the current law on humanitarian and constitutional grounds. In particular, Congress should eliminate the numerical ceilings on entry of the spouses and minor children of permanent resident aliens. The full text of proposed amendments is presented in the Appendix to this Article.

#### FAMILY UNIFICATION PROTECTIONS IN AMERICAN IMMIGRATION LAW

Promotion of family unification, provision of refuge for the oppressed, and attention to labor market demands have been the principal concerns that have shaped the selection process in American immigration law since 1952.<sup>4</sup> The relative importance of each of these factors is partially reflected in the numbers of immigrants who enter each year. In 1984, for example, of 544,000 total immigrants, seventy-two percent entered because of family ties to a citizen or permanent resident alien; seventeen percent entered with refugee status; nine percent entered because of a skill that was needed in the workforce; and the remaining two percent belonged to miscellaneous

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3. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified in scattered titles and sections) [hereinafter IRCA]. IRCA establishes penalties for employers who knowingly hire undocumented aliens and provides an opportunity for such aliens who have resided in the country since 1982 to legalize their status and eventually become permanent resident aliens. IRCA also provides certain agricultural workers the opportunity to obtain permanent resident status.

4. SCIRP, *supra* note 1, at 1.

categories.<sup>5</sup>

Of the nearly 400,000 family members who entered in 1984, over forty percent were the spouses, children or parents of United States citizens.<sup>6</sup> These family members are exempt from any numerical limitations.<sup>7</sup> Spouses and children of permanent resident aliens, other relatives of citizens (siblings, married children, or adult children), and those coming to fill workforce needs, however, are selected as immigrants according to a system of preference categories and numerical limits on the number of entrants in any one year from each nation (tables 1 and 2).

After briefly reviewing the historical development of family unification provisions in American immigration law, this section examines in more detail the current preference system for allocating visas and its impact on family unification for permanent resident aliens.

*A Brief History of Family Unification in American Immigration Law — Race, Sex, and Social Class as Determinants*

A review of the history of American immigration law reveals numerous inconsistencies and inequities in the early treatment of family unification. The issue first arose in the context of the Chinese Exclusion Act of 1882 (Exclusion Act) which barred immigration of Chinese laborers but allowed free entry of Chinese members of the merchant class.<sup>8</sup> Although the Exclusion Act was silent in regard to the entry of family members, early court decisions reasoned that the company of one's spouse and children is a "natural right" which should not be deprived "unless the intention of Congress to do so is clear and unmistakable."<sup>9</sup> These initial decisions suggested that the right to family unification was not absolute and could be limited by Congress. Indeed, two early United States Supreme Court decisions upheld the deportation of Chinese wives of American citizens.<sup>10</sup>

Since the early 1920s Congress has imposed numerical limitations on the total number of annual immigrants and upon the number of

5. IMMIGRATION AND NATURALIZATION SERVICE, 1984 STATISTICAL YEARBOOK 10-13 (1984) [hereinafter INS YEARBOOK].

6. *Id.*

7. See Immigration and Nationality Act § 201-03, 8 U.S.C. §§ 1151-1153 (1982) [hereinafter INA]; see also *infra* note 26 and accompanying text.

8. Act of May 6, 1882, ch. 126, § 6, 22 Stat. 58, 60.

9. *In re Chung Toy Ho*, 42 F. 398, 400 (D. Or. 1890).

10. *Yeung How v. North*, 223 U.S. 705 (1911); *Low Wah Suey v. Backus*, 225 U.S. 460 (1912).

immigrants of each nationality.<sup>11</sup> The 1924 Immigration Act (1924 Act) exempted the wives and the unmarried minor children of white citizens from the ceilings imposed upon each nationality group but afforded no preference for relatives of permanent resident aliens.<sup>12</sup> This distinction between treatment of relatives of citizens and relatives of permanent resident aliens remains fundamental in current immigration law. Only in 1952 were the spouses of permanent resident aliens granted preference status within the quotas.<sup>13</sup>

The exemption from the immigration quotas of wives and children of American citizens raised the question of entry of such relatives from Asian countries. In 1925 the Supreme Court held that a Chinese wife of an American citizen was precluded from entry because of a qualitative restriction in the 1924 Act that barred immigration of aliens "ineligible to citizenship," except under specified conditions, none of which included relationship to an American citizen.<sup>14</sup> Thus, the 1924 Act was interpreted and applied to prohibit family unification for American citizens or resident aliens whose spouses or children were of Asian or other "non-white" origin.<sup>15</sup>

Several attempts were made in the late 1920s on behalf of Chinese-Americans to amend the 1924 Act to permit the entry of relatives of citizens from the Asiatic-barred zone and to ease the quota restrictions for other categories of relatives.<sup>16</sup> The national sentiment at the time, however, was not hospitable to easing immigration restrictions, and all such attempts were unsuccessful. Thus, under the

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11. See Act of May 19, 1921, ch. 8, 42 Stat. 5, amended by Act of May 11, 1922, ch. 187, 42 Stat. 540. The 1924 Immigration Act (1924 Act) fixed a definite ceiling of 150,000 immigrants per year and set quotas for each nationality group based on the percentage of that group present in the country in 1890 (later, 1920). Immigration Act of 1924, ch. 190, § 11, 43 Stat. 153, 159.

12. Immigration Act of 1924, ch. 190, § 4(A), 43 Stat. at 155. Section 6(a) of the 1924 Act provided preference within the established quotas to "the unmarried child under 21 years of age, the father, the mother, the husband, or the wife of a citizen of the United States who is 21 years of age or over." *Id.* § 6(a), 43 Stat. at 155.

13. Act of June 27, 1952, Pub. L. No. 82-414, § 101(a)(27), 66 Stat. 163, 169. Under the 1924 Act, Western Hemisphere nations (Canada, Mexico, and other independent countries of Central and South America) were exempted from numerical limitations. This remained the case until 1965 when an annual quota of 120,000 was set for the Western Hemisphere. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911. The annual quota of 120,000 took effect in 1968 and remained in place until 1978 when a unified world quota was established. Act of Oct. 5, 1978, Pub. L. No. 95-412, § 201(a), 92 Stat. 907. Immigration from the continent of Asia and its adjacent islands (the Asiatic Barred Zone) was precluded from 1917 until after World War II. See *supra* note 11.

14. *Chang v. Nagle*, 268 U.S. 346, 352 (1925).

15. The Immigration Act of 1924, ch. 190, § 13(c), 43 Stat. at 162, barred from admission those aliens who were "ineligible to citizenship." *Id.* The non-white wife of an American citizen did not qualify under any of the exceptions to this section. See also *Chung Fook v. White*, 264 U.S. 443 (1924).

16. See, e.g., *Hearing on H.R. 7089 Before the Comm. on Immigration and Naturalization*, 69th Cong., 1st Sess. (1926) (proposing non-quota status for husbands, children and parents of all American citizens).

1924 Act, the opportunity for family unification was afforded to a few favored classes of wives and children of citizens. Not until after World War II did significant amendments gradually expand the range of citizens and residents entitled to family unification and the circle of relatives who might enter to join them.

Elimination of some of the major disparities in the quota system began in 1943 with the repeal of the Exclusion Act<sup>17</sup> as a gesture of solidarity with China in the war effort. Not until 1965, however, were Asian nations afforded annual ceilings of 20,000 immigrants, equivalent to those of European nations.<sup>18</sup> In the same year, an annual ceiling of 120,000 was placed on total Western Hemisphere immigration.<sup>19</sup> Finally, in 1980, a world quota was set at 270,000 with ceilings of 20,000 for each nation and a separate quota of 50,000 for refugees.<sup>20</sup>

Family unification opportunities also were equalized and expanded by eliminating the distinctions based on sex. Entering husbands as well as entering wives of citizens were exempted from quota limits and granted preference status within the quotas for spouses of permanent resident aliens.<sup>21</sup>

Since 1965, immigration law has specifically prohibited discrimination based on "race, sex, nationality, place of birth, or place of residence."<sup>22</sup> This prohibition is immediately qualified, however, by a proviso approving distinctions based on relationship to a citizen, place of birth, or residence in allocation of visas according to the numerical limitations.<sup>23</sup>

Today, no serious consideration would be given to a proposal to return to racial or sexual distinctions in family unification. Immigra-

17. Act of Dec. 17, 1943, ch. 344, 57 Stat. 600. This Act repealed the Chinese exclusion laws, making the Chinese eligible for immigration and naturalization. In 1952 the Asian ban was lifted and replaced by an overall ceiling of 2000 immigrants per year for the entire Eastern Hemisphere. See Act of June 27, 1952, ch. 1, § 202(e), 66 Stat. at 178.

18. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911.

19. Western Hemisphere immigrants also were required to meet qualitative requirements and obtain labor certification. *Id.*

20. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. §§ 1151-57 (1982)).

21. Act of June 27, 1952, ch. 1, § 203(a)(3), 66 Stat. at 178. *Id.* § 27(a), 66 Stat. at 169.

22. INA § 202(a), 8 U.S.C. § 1152(a).

23. See INA § 101(a)(27), 8 U.S.C. § 1101(a)(27) (defining "special immigrants;"); *Id.* § 201(b), 8 U.S.C. § 1151(b) (defining "immediate relatives;"); and *Id.* § 203(a), 8 U.S.C. § 1153(a) (allocating immigrant visas according to preference categories). These sections are specifically excepted from the anti-discrimination provisions.

tion law is no more above the constitutional protection of racial and sexual equality than any other area of the law. Developments in the recognition of individual rights in matters concerning the family also should limit linedrawing by Congress that might cause or prolong separation of immediate family members on the basis of national origin. The current system for visa allocation to the spouses and children of permanent resident aliens, although greatly improved from the earlier system, continues to operate inequitably for resident aliens from countries of high immigration demand. The adverse impact of the current visa allocation system on some families of permanent resident aliens is discussed below.

### *The Current Preference System for Allocating Visas*

Under current immigration law, certain “immediate relatives” of American citizens (defined to include unmarried children under the age of twenty-one, spouses, and the parents of citizens over the age of twenty-one) may obtain immigration visas without regard to numerical limitations or labor certification requirements.<sup>24</sup> “Immediate relatives” must not, however, be otherwise excludable under the qualitative restrictions applicable to all entering aliens.<sup>25</sup>

Relatives of citizens other than “immediate relatives” and all relatives of resident aliens must enter subject to the annual numerical limits: 270,000 visas worldwide and 20,000 visas per nation.<sup>26</sup> These 270,000 visas are issued within the framework of a six-tiered preference system.<sup>27</sup> Four of the six tiers allocate eighty percent of the 270,000 total preference visas on the basis of relationship to a family member in the United States. The other two tiers allocate the remaining twenty percent of preference visas according to labor needs.

The chart below illustrates the allocation of visas under the six preference categories:

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24. INA § 201(b), 8 U.S.C. § 1151(b). The labor certificate requirement of 8 U.S.C. § 1182(a)(14) limits entry of laborers, skilled or unskilled, in situations where sufficient workers already are available or where the employment of such aliens could adversely affect wages and working conditions. *Id.* § 212, 8 U.S.C. § 1182(a)(14).

25. *Id.* § 212, 8 U.S.C. § 1182(a).

26. *Id.* §§ 201, 202, 8 U.S.C. §§ 1151, 1152(a).

27. *Id.* § 203, 8 U.S.C. § 1153.

TABLE 1<sup>28</sup>

<u>Preference Category</u>	<u>Visas Reserved Annually</u>	
1. Unmarried Sons or Daughters (over the age of twenty-one) of Citizens .....	54,000	20%
2. Spouses and Unmarried Sons or Daughters of Permanent Residents .....	70,200	26%
3. (Certain Workers) .....	27,000	10%
4. Married Sons or Daughters of Citizens .....	27,000	10%
5. Brothers or Sisters of Adult Citizens .....	64,800	24%
6. (Certain workers) .....	<u>27,000</u>	<u>10%</u>
	270,000	100%

Visas are issued to eligible aliens within the six preference groups in the order in which visa petitions are filed on their behalf.<sup>29</sup> Up to 54,000 visas (twenty percent of the total number for the fiscal year) are available to the first preference group, that is, unmarried adult sons or daughters of citizens.<sup>30</sup> If, as usual, the number of visas reserved for the first preference category is greater than the demand, unused first preference visas are added to those available for the second preference group — spouses and unmarried sons and daughters of permanent resident aliens. The allocation process continues similarly through the remaining four preference groups except that unused visas, if any, from the second preference group pass to the fourth preference group rather than to the third.<sup>31</sup> The allocation of

28. Statistics drawn from INA § 201, 8 U.S.C. § 1151 and INA § 208, 8 U.S.C. § 1153.

29. *Id.* § 203, 8 U.S.C. § 1153(a)(8). This section provides that a spouse or child may enter without the necessity of a separate visa petition and may be given the same order of consideration as the principal immigrant. *See* 8 C.F.R. § 204.1(a) (1987). The family members also may remain behind temporarily and later follow to join the preference immigrant at any time after he acquires lawful residence status. *See* 22 C.F.R. § 1 (1987). The unification problem confronts spouses or children acquired after the grant of permanent residence to the principal alien. These relatives cannot be regarded as accompanying or following him or her and thus must await the availability of second preference visas. *See* 6 C. GORDEN & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE, § 42.1 n.5 at 32-355 (1985) (reprint of Foreign Affairs Manual). Nor may relatives who precede the preference immigrant to the United States be regarded as "accompanying or following to join" the principal immigrant. *See* *Santiago v. INS*, 526 F.2d 448, 490 (9th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976).

30. Since a citizen's child who is unmarried and under 21 years of age is an "immediate family member" exempt from number limits on entry, the first preference group includes only those unmarried sons and daughters over 21 years of age. *See* INA § 203, 8 U.S.C. § 1153(a)(2).

31. *See* INA § 203, 8 U.S.C. § 1153(a).



visas for both the exempt and the preference categories of immigrants for 1984 is shown in Table 2 below.<sup>32</sup>

While only the second preference category promotes family unification for permanent resident aliens, it limits entry to spouses and unmarried sons or daughters. The quota limitations of 20,000 for each country may require spouses and children of a permanent resident alien to wait many years before second preference visas become available. A Mexican spouse or child, for example, must wait an estimated eight years after application before a visa becomes available.<sup>33</sup> While the immediate family members of permanent resident aliens wait for visas, twenty-four percent of the total visas are reserved for the siblings of citizens.<sup>34</sup>

In 1981 nearly seventy percent of the one million persons waiting for preference visas were relatives of United States citizens or of permanent resident aliens.<sup>35</sup> This backlog could be reduced partially by eliminating the per-nation ceilings, at least for spouses and minor children of permanent resident aliens, while retaining an overall limit to be filled on a first-come, first-served basis. The total number of annual preference visas also might be increased until the backlog is absorbed.<sup>36</sup> Unless and until these or similar suggestions are implemented, the waiting list will continue to expand rapidly as a result of IRCA.

IRCA establishes sanctions against employers who hire illegal aliens and provides a program allowing certain aliens to attain permanent resident status.<sup>37</sup> The impact of this Act on the numbers of

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32. When a country has used its total allocation of 20,000 visas, in the following year only 20% (4,000) of the visas allotted to that country may be issued to first preference category applicants from that country, 26% (5,200) to second preference category applicants, 10% (2,000) to third, fourth and sixth preference applicants, respectively, and 24% (4,800) to fifth preference applicants. INA § 202, 8 U.S.C. § 1152(e).

33. 63 INTERPRETER RELEASES 878, 903 (Oct. 10, 1986). In November 1986, second category preference visas became available to those from Mexico who applied prior to August 1977, those from the Philippines who applied prior to October 1980, and those from Hong Kong who applied prior to July 1979.

34. INA § 203, 8 U.S.C. §§ 1153(a)(2), (5). The fifth preference category, which currently accounts for an immigration backlog of 1.5 million visa applications, has been criticized for taking family unification too far and for leading to a potential mushrooming of preference eligibility. On the other hand, the admission of siblings has been defended as an integral part of the family unification concept for Italians and other ethnic groups. See *The Preference System: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. of the Judiciary, 97th Cong., 1st Sess.* (1981) (testimony of Rev. Joseph Coga).

35. SCIRP, *supra* note 1, at 14-15.

36. *Id.*

37. Under IRCA, three distinct groups of aliens may obtain permanent resident status after a period of temporary resident status:

- (1) Aliens who resided illegally in this country since before January 1, 1982.
- (2) Aliens who worked at least 90 days in agriculture between May 1, 1985, and May 1, 1986.
- (3) Aliens who can prove they worked 90 days a year in United States agricul-

persons from Mexico and Central American countries on the waiting list for second preference visas, although difficult to estimate, will depend upon two countervailing factors. The waiting list will be shorter to the extent that some aliens, having lived in the United States since January 1, 1982, will qualify for amnesty.<sup>38</sup> On the other hand, the backlog will increase to the extent that clandestine aliens, having obtained permanent resident status through the amnesty program, petition for entry of their immediate family members. IRCA compounds the injustice for those who have waited in their countries of origin for visas to become available.<sup>39</sup>

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ture for the last three years and resided in the United States.

See IRCA § 201(a), 100 Stat. at 3394 (codified at 8 U.S.C. § 1255a).

38. *Id.* There may be a considerable overlap in the categories of those who may qualify for amnesty and those whose names are now on the visa-preference waiting list: "85 percent are already here. When their number is called, they go back [to Mexico] to get it and come back into the United States." 132 CONG. REC. S16889 (daily ed. Oct. 17, 1986) (statement of Sen. Simpson).

39. As one Congressman expressed it, [h]usbands, wives, and unmarried children of immigrants from Mexico have been waiting for over 9 years to come to America . . . and with one fell swoop we are about to legalize all those . . . who have been here illegally residing and who have preempted the legal immigration of those who are trying to obey our laws.

132 CONG. REC. H10594 (daily ed. Oct. 15, 1986) (statement of Rep. Daub).

TABLE 2<sup>40</sup>

## 1984 - United States Immigration By Category

Exempt Status:

Spouses, Children, and Parents of Citizens .....	177,783
Refugees .....	92,127
Others .....	9,987
<u>Total Exempt</u> .....	<u>281,887</u>

Preference Status:

	<u>Preference Visas</u>	
	<u>Issued</u>	<u>Reserved</u>
1st Unmarried Sons or Daughters of U.S. Citizens ...	7,569 (3%)	54,000 (20%)
2nd Spouses and Unmarried Sons or Daughters of Permanent Residents .....	112,309 (42%)	70,200 (26%)
3rd Professional or Highly Skilled Workers .....	24,852 (9%)	27,000 (10%)
4th Married Sons or Daughters of U.S. Citizens .....	14,681 (6%)	27,000 (10%)
5th Brothers or Sisters of U.S. Citizens .....	77,765 (30%)	64,800 (24%)
6th Needed Workers .....	24,669 (9%)	27,000 (10%)
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Total Preference .....	262,016 (100%)	270,000 (100%)
Total Immigrants .....	543,903	

### CONSTITUTIONAL PROTECTION OF FAMILY UNIFICATION RIGHTS OF PERMANENT RESIDENT ALIENS

Neither the family nor immigration is mentioned in the United States Constitution. Nevertheless, the Supreme Court has afforded considerable constitutional protection to the family from governmental intrusion. The Court also has identified immigration regulation as a fundamental sovereign attribute, a responsibility of the political branches that is almost immune from judicial control. Thus, the issue of family rights in the context of immigration law mixes areas in

40. INS YEARBOOK, *supra* note 5, at 11-12. The figures provided in the Preference Visas Issued column total 261,845, not 262,016. The resulting discrepancy (171) represents miscellaneous visas issued to suspension of deportation entrants (161), foreign government officials (6), and for private law adjustments (4).

which the Court has been most active on the one hand and most deferential on the other in its exercise of judicial review of legislation.

### *Constitutional Protection of Family Rights*

The Supreme Court repeatedly has declared the rights of an individual to "establish a home and bring up children" as protected rights within the guarantees of liberty in the fourteenth amendment due process clause.<sup>41</sup> Decisions involving freedom to marry also have been grounded in the fourteenth amendment protection of liberty.<sup>42</sup> In determining that miscegenation statutes violate equal protection and due process, the Court, for example, referred to the freedom to marry as a fundamental freedom, "one of the vital personal rights essential to the orderly pursuit of happiness by free men[,] . . . one of the 'basic civil rights of man,' fundamental to our very existence and survival."<sup>43</sup> Significantly, these decisions stressed not only the aspect of individual rights but also the importance of the family to society.<sup>44</sup>

In 1976, in *Moore v. City of East Cleveland*,<sup>45</sup> the Supreme Court issued its strongest decision to date regarding the constitutional protection of family rights. In a plurality opinion, the Court relied squarely on substantive due process in invalidating a zoning regulation which interfered with the integrity of an established family unit.<sup>46</sup> The zoning provision, which restricted occupancy of single family dwellings to the immediate nuclear family, had been applied to prohibit a grandmother from living with her two grandsons.<sup>47</sup> Clearly in *Moore* the burden on the family could have been characterized as indirect. The city zoning did not force a dissolution of the family unit. The family could have remained together by moving to

41. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). In each of these decisions the Court affirmed the right of parents to assume the primary role in decisions concerning the rearing of their children.

42. See *Loving v. Virginia*, 388 U.S. 1 (1967).

43. *Id.* at 12.

44. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

45. 431 U.S. 494 (1977).

46. *Id.*

47. *Id.* at 496-97. The grandmother was criminally prosecuted, assessed a fine, and sentenced to a term of imprisonment for violation of the zoning ordinance that restricted "family" by definition to a married couple, the couple's childless unmarried children, and one dependent child with children.

a location in which their living arrangement would have been tolerated by the zoning law. Similar reasoning had been used in response to arguments presented in immigration cases that deportation of a family member destroyed the family unit.<sup>48</sup> In *Moore*, however, the Court rejected an approach which would force the family to seek other accommodations.<sup>49</sup>

Relying on its early decisions involving parental authority, the *Moore* Court concluded that the importance of the family as the institution through which we “inculcate and pass down many of our most cherished values, moral and cultural” requires that regulations that interfere with family integrity undergo heightened judicial scrutiny.<sup>50</sup> Thus, the impact of the regulation on the family required an examination of “the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.”<sup>51</sup>

Since the decision in *Moore*, the issue of a constitutional right to familial association also has arisen in the context of section 1983<sup>52</sup> actions seeking redress for deprivations resulting from state interference with family relationships.<sup>53</sup> Most courts that have considered this issue have relied upon cases such as *Moore* in recognizing a constitutional right to association of close family members.<sup>54</sup>

If “family” relationships are to be constitutionally protected from unwarranted state interference, defining the term “family” becomes crucial. The circle of family members who should be constitutionally entitled to family unification under immigration law must be identified.

### *Defining “Family” for Purposes of Constitutional Protection of Family Unification*

The Supreme Court has never defined “family” for purposes of substantive due process protection. Nevertheless, the Court’s decisions give some guidance as to which family relationships are entitled to constitutional protection from state interference. Essentially,

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48. See *infra* text accompanying notes 66-67.

49. *Moore v. City of East Cleveland*, 431 U.S. at 500.

50. *Id.* at 503-4.

51. *Id.* at 499.

52. 42 U.S.C. § 1983 (1982).

53. See generally Note, *Section 1983 Actions by Family Members Based on Deprivation of the Constitutional Right to “Family Association” Resulting from Wrongful Death: Who has Standing?*, 14 *FORDHAM URB. L.J.* 441 (1986).

54. See, e.g., *Bell v. City of Milwaukee*, 746 F.2d 1205, 1245 (7th Cir. 1984). See also *Kelson v. City of Springfield*, 767 F.2d 651 (9th Cir. 1985) (court recognized that parents possess a constitutionally protected liberty interest in the companionship and society of their children); *Myres v. Rask*, 602 F. Supp. 210, 213 (D. Colo. 1985) (motion to dismiss a section 1983 claim for violation of constitutional rights to family association brought by parents whose child was killed during a struggle with police officers).

the decisions emphasize traditional concepts of "family" — persons bound together by marriage and kinship ties.<sup>55</sup> Most instructive is the *Moore* decision, in which the Court utilized a functional approach in finding that a grandmother filling the role of a parent is a constitutionally protected member of the family.

In the sense that constitutionally protected family relationships may include de facto parent-child ties, the functional approach is expansive. On the other hand, this approach may exclude some parent-child biological relationships which lack the associational element. As the Court explained in a recent case involving a natural father's procedural due process rights to notification of proceedings for his child's adoption, the extent of constitutional protection of the parent-child relationship depends upon the degree to which the parent accepts some measure of responsibility for the child's future.<sup>56</sup> Arguably, only parents who actually have participated in the responsibilities of parenthood should benefit from the constitutional protection of family unification.

Although perhaps most consistent with the reasons for affording constitutional protection to family relationships, the functional test presents several difficulties. First of all, analysis of the quality of the parent-child relationship is necessarily so subjective that even-handed administration becomes a problem. Secondly, such a test would add a significant administrative burden to the Immigration and Naturalization Service (INS) workload. Finally, in exclusion cases, the immigration laws themselves may have been a barrier to development of the parent-child bond. For these reasons, in exclusion situations, if a parent has not lost custody of a child, the relationship should be constitutionally protected in order to provide the opportunity for the development of the emotional attachment that derives only from the intimacy of living together as a family unit. At least in situations in which a parent petitions for entry of a minor child, the biological tie should be sufficient to bring the relationship within those that are constitutionally protected. When the issue concerns deportation of a family member, however, the constitutional significance of the relationship may vary depending upon whether close family ties exist. The current immigration law takes a similar approach by requiring a showing of "extreme hardship" to family

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55. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974); B. YORBURG, *THE CHANGING FAMILY* (1973).

56. *Lehr v. Robertson*, 463 U.S. 248, 262 (1983); see also *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1977).

members who would be left behind before granting relief from an order of deportation.<sup>57</sup>

The problem remains one of determining whether the parent-child tie loses constitutional significance as the child matures, and if so, where to draw the line. If it is the child-rearing function that distinguishes the parent-child relationship from all others, it is reasonable that the dependent status of the child effects the constitutional protection. Thus, as in other areas of governmental regulation, a line may be drawn at the age of majority to limit those parent-child relationships that are protected.<sup>58</sup>

Constitutional protection of family integrity for family ties other than the parent-child or spousal relationship is more problematic. In rejecting a minor sibling's claimed deprivation of a right to association with his brother, the Seventh Circuit recently concluded that the bond between siblings, in contrast to that between parent and child, implicates no constitutional protection.<sup>59</sup> The court noted frankly that recognition of constitutional significance in family ties beyond that of the parent-child relationship would preclude any "principled way of limiting" the range of family relationships protected by the Constitution.<sup>60</sup> In sum, in implementing a constitutional right to family unification in immigration law, the parent-minor child and spousal relationships should be singled out as those entitled to constitutional protection from state interference.

### *Supreme Court Response to Claims of a Constitutional Right to Family Unification in the Context of Immigration Law*

The Supreme Court's analysis in decisions reviewing immigration law typically begins with the observation that "over no conceivable subject is the legislative power of Congress more complete."<sup>61</sup> The most convincing explanation for judicial deference in the immigration area is the political nature of the decisions and their potential impact on foreign relations.<sup>62</sup> The Court, however, has invalidated legislation involving the war power, denial of passports, and other

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57. See Note, *Judicial Review of "Extreme Hardship" in Suspension of Deportation Cases*, 34 AM. U.L. REV. 175 (1984). But see *INS v. Hector*, 107 S. Ct. 379 (1986) (improper to consider hardship in an aunt-niece relationship).

58. See, e.g., *Ginsberg v. New York*, 390 U.S. 629 (1968).

59. *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984). But see *Trujillo v. Board of City Comm'rs of City of Santa Fe*, 768 F.2d 1186 (10th Cir. 1985) (recognizing constitutionally protected interest of sister in brother who died while incarcerated in county jail).

60. *Bell*, 746 F.2d at 1247-48 (citing *Sanchez v. Marquez*, 457 F. Supp. 359, 362 (D. Colo. 1978)).

61. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

62. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952).

matters involving foreign relations or national security.<sup>63</sup> For example, the Court has invalidated a statute making it a criminal offense for employees in defense facilities to be members of the Communist Party.<sup>64</sup> At least when individual freedoms of Americans are at stake, the Court has not blindly deferred to the political branches.<sup>65</sup> The level of scrutiny, however, has been minimal for issues involving immigration.

Not until the 1950s were constitutional claims to family unity squarely presented to the federal courts. These claims thus far have been uniformly rejected with little analysis. In *United States ex rel. Knauff v. Shaughnessy*,<sup>66</sup> the Court held that immigration authorities could exclude without a hearing the spouse of an American citizen on unspecified grounds allegedly related to national security.<sup>67</sup> The Court, however, overlooked the rights of the American citizen spouse situated in the United States.

A 1958 federal court of appeals decision was the first to directly address whether the fifth amendment due process clause provides protection from deportation that potentially would destroy the marriage relationship.<sup>68</sup> Rejecting this argument, the court reasoned that deportation might burden a marriage but "would not in any way destroy the legal union which the marriage created."<sup>69</sup> It was enough for the court that the wife could, if she wished, accompany her deported husband.<sup>70</sup>

In a 1975 decision, the Second Circuit Court of Appeals rejected an equal protection challenge to a statutory distinction between the treatment under the preference system of aliens married to citizens and those married to permanent resident aliens.<sup>71</sup> The court held that the wives, as resident aliens, had no constitutional right to keep their alien husbands, who were awaiting visas, in this country under a family integrity theory. The decision distinguished the line of cases

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63. *United States v. Robel*, 389 U.S. 258 (1967) (national security); *Aptheker v. Secretary of State*, 378 U.S. 500 (1965) (passports); *Schneider v. Rusk*, 377 U.S. 163 (1964) (passports).

64. *Robel*, 389 U.S. 258.

65. *Id.* at 264.

66. 338 U.S. 537 (1950).

67. *Id.* at 543-44.

68. *Swartz v. Rogers*, 254 F.2d 338 (D.C. Cir. 1958).

69. *Id.* at 339. See also *Silverman v. Rogers*, 437 F.2d 102 (1st Cir. 1970), *cert. denied*, 402 U.S. 983 (1971).

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

71. *Noel v. Chapman*, 508 F.2d 1023 (2d Cir.), *cert. denied*, 423 U.S. 824 (1975).



establishing a fundamental right to marry on grounds that those cases involved a more substantial interference by the state with the right to marry.<sup>72</sup> Additionally, the court found that the statute had a rational and substantial relationship to the purpose for which it was enacted — to protect the American economy by discouraging the arrival of aliens who were coming “in large numbers and remaining illegally in the expectation of a marriage which would assure their continuing residence here.”<sup>73</sup>

These few decisions, along with the 1977 Supreme Court decision in *Fiallo v. Bell*,<sup>74</sup> are the major cases analyzing the family unity issue. They have resolved the tension between the constitutional protection of the family and the deference to the political branches in the immigration area by upholding the limitations on family unity. This has been accomplished only by discounting both the importance of the individual interests involved and the extent of the interference with the family unit.

At some point, however, the Court's deference to the political branches must give way to the necessity of protecting fundamental individual rights of resident aliens and citizens from unnecessary governmental intrusion under the immigration law. As an extreme example, a law that allowed family unification only for citizens of the white race presumably would violate the fifth amendment both because of the invidiousness of the classification and because of the interference with the substantive due process rights of non-white citizens and resident aliens to live a normal life.<sup>75</sup> Likewise, the exclusion of people of a particular national origin should be strictly scrutinized by the Court. Even if aliens outside the United States have no cognizable claim to a violation of constitutional rights,<sup>76</sup> American citizens or resident aliens of the same race or national origin as those excluded would be so stigmatized that they should have standing to challenge such legislation.<sup>77</sup>

Recent lower federal court decisions, including some which rely on principles of international law in cases involving the rights of aliens

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72. *Id.* at 1027.

73. *Id.* at 1029.

74. 430 U.S. 787 (1977). The Court considered a challenge to a provision of the immigration law exempting illegitimate alien children from the numerical limitations if they were coming to join their citizen-mothers but denying that same exemption to illegitimate children wishing to join their citizen-fathers. The Court rejected equal protection claims that the statute impermissibly discriminated on the grounds of gender or that it interfered with the right to raise one's natural children.

75. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 326.

76. *But see* *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387 (10th Cir. 1981)(recognizing the constitutional claims of alien pending determination of admissibility).

77. Rosberg, *supra* note 75, at 327.

seeking asylum and freedom from arbitrary detention, may signal a move toward a more active review of immigration law.<sup>78</sup> The Supreme Court decision in *Plyler v. Doe*<sup>79</sup> also may have implications for review of immigration legislation that impacts upon the family unit. In invalidating state legislation denying a free public education to undocumented alien school children, the Court reasoned that the deprivation of education to these children would merely assure that a percentage of our residents would remain illiterate and uneducated, leading to grave problems in the future.<sup>80</sup> Attention to the social impact of the legislation also may be a significant factor in the review of immigration law that affects the family.

In the family unification cases, both the individual and the societal interests involved are at their height. The importance of these interests, and the extent to which they are harmed by immigration regulations, has been discounted by the courts with the observation that the affected family members may relocate as a unit in order to avoid the disruption. Since the *Moore* decision, however, this analysis appears seriously flawed. In *Moore* the Court did not require the family to move even though the relocation would have been to another city rather than another country.<sup>81</sup>

As discussed below, the necessity (or at least the rationality) of limitations on family unification should be examined by the Court. Such analysis would reveal that the goals of the current numerical limitations could be accomplished by means that do not limit the rights of resident aliens to be joined by their spouses and minor children.

### *Constitutionality of Numerical Limits on Family Unification*

Many resident aliens seeking family unification are faced with long delays before this goal is realized. Current treatment of resident aliens who petition for entry of their spouses or minor children (second preference category immigrants) might be challenged on constitutional grounds in several respects: (1) resident aliens are treated less favorably than citizens; (2) treatment of resident aliens varies depending upon the national origin of the relatives seeking entry;

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78. See, e.g., *Rodriguez-Fernandez*, 505 F. Supp. 787 (D. Kan. 1980), *aff'd*, 654 F.2d 1382 (10th Cir. 1981) (recognizing the constitutional claims of alien pending determination of admissibility).

79. 457 U.S. 202 (1982).

80. *Id.* at 230.

81. 431 U.S. 494 (1977); see *supra* notes 45-54 and accompanying text.

and (3) the delays, in and of themselves, violate substantive constitutional rights of permanent resident aliens to lead normal family lives.

The first challenge, the equal protection claim based on the distinction between citizens and permanent resident aliens, is weak. No doubt resident aliens are protected by the Constitution.<sup>82</sup> Distinctions in the treatment of aliens and citizens are suspect for most purposes if contained in state legislation.<sup>83</sup> Such distinctions, however, have not been treated as suspect in federal legislation where, as the Court has noted, "a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributions and benefits for one class not accorded to the other."<sup>84</sup> For example, in upholding a five year residency requirement for participation by aliens in the federal Medicare program, the Court noted that Congress could decide that the strength of claims to benefits increases over time as an alien's ties to the country grow stronger.<sup>85</sup> Congress also might presume that the generally stronger ties of most citizens to this country, when compared to those of most resident aliens, justify a distinction in treatment for purposes of family unification. In general, aliens as a class may experience less hardship in relocating to the country in which the relatives reside than would citizens. Additionally, Congress could decide that the easier access to family unification for citizens might serve as an inducement to aliens to become citizens. Thus, the classification would likely withstand a test of rationality, and the equal protection challenge based on the citizen-resident dichotomy would fail.

The disparity in treatment of resident aliens based on national origin is much more difficult to justify. The individual's right to family unification should not vary depending upon the national origin of the spouse or minor child. Fundamental fairness dictates that permanent resident aliens who are in like circumstances but for irrelevant and fortuitous factors be treated in a like manner when fundamental rights are at stake.<sup>86</sup> The right to family unification is neither a political right dependent upon citizenship nor a mere economic right. At issue is one of the most critical aspects of the personal liberty

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82. Aliens are "persons" within the meaning of that term in the fourteenth amendment, *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), and in the fifth amendment. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

83. In reviewing state classifications based on citizenship, the Court has treated alienage as a suspect class and employed strict scrutiny. *Graham v. Richardson*, 403 U.S. 365, 372 (1971). The Court, however, has used the rational basis test when the classification relates to state governmental functions. *Ambach v. Norwick*, 441 U.S. 68, 74 (1979).

84. *Mathews v. Diaz*, 426 U.S. 67, 78 n.12 (1976).

85. *Id.* at 80.

86. *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) (invalidating a distinction that limited those who could petition for discretionary relief from deportation, INA § 212, 8 U.S.C. § 1182(c), on equal protection grounds).

interest. Though the federal government may have a legitimate interest in limiting some benefits to aliens, the right to family unification is a basic human right which should be neither denied nor excessively delayed because of the national origin of the relatives involved. Numerous international conventions and declarations of human rights have identified a right to protection of family life from unnecessary state interference.<sup>87</sup> The French Conseil d'Etat has recognized that the French Constitution affords foreign residents legally residing in France a right to lead a normal family life, including the right to be joined by a spouse or minor child.<sup>88</sup>

Whether the numerical limitations violate substantive constitutional rights of permanent resident aliens to lead a normal family life depends, first of all, on the legitimacy and the importance of the governmental objectives to be achieved. The legislative history of the 1965 Immigration and Nationality Act (INA) indicates that, while "reunification of families is to be the foremost consideration," an annual quota should limit immigration "within what is believed to be the present absorptive capacity of this country."<sup>89</sup> The INA also reveals that the annual ceilings for preference category immigrants from each nation were "designed to prevent an unreasonable allocation of visa numbers to any one foreign state."<sup>90</sup> Therefore, immigration from countries of high demand is limited to avoid an imbalance in the numbers of immigrants from a few nations. Thus, the major objectives of the numerical limitations are: (1) establishment of an overall annual limit to preference category immigration; (2) prevention of monopolization of immigration visas by a few countries; and (3) a corresponding interest in achieving cultural diversity.

The crucial issue is whether these goals justify the interference with family unification of resident aliens whose relatives reside in countries of high immigration demand.<sup>91</sup> Not even national security goals justify an unchecked exercise of governmental authority that

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87. See, e.g., Universal Declaration of Human Rights of 1948, art. 16, 1948 U.N.Y.B. 446, U.N. Sales No. E.67.I.29 "The family is the natural and fundamental group unit of society and is entitled to protection by society and the state."

88. Conseil d'Etat, Dec. 8, 1978, Rec. 493, *Groupe d'Information et de Soutien des Travailleurs Immigres et Autres (GISTI)*; 1979 *Droit social* 57, concl comm. govt. Dondoux; M. LONG, P. WEIL & G. BRAIBANT, *LES GRANDS ARRETS DE LA JURISPRUDENCE ADMINISTRATIVE* 587 (Sirey 8th ed. 1984).

89. S. REP. NO. 78, 89th Cong., 1st Sess., reprinted in 1965 U.S. CODE CONG. & ADMIN. NEWS 3328, 3332.

90. *Id.*

91. See *Aptheker v. Secretary of State*, 378 U.S. 500, 508-09 (1964); *NAACP v. Alabama*, 377 U.S. 288, 307 (1964).

curtails fundamental rights.<sup>92</sup> When fundamental constitutional liberties are at stake, Congress must achieve its goals by means that have the least possible adverse impact on the rights involved.<sup>93</sup> “Even the war power does not remove constitutional limitations safeguarding essential liberties.”<sup>94</sup>

In the family unification situation, both the national interest and the individual interest involved are at their strongest. Rather than determining which of the two interests is paramount, however, the Court’s inquiry should be limited to analyzing whether Congress has adopted the least drastic means of achieving its goals.<sup>95</sup> This requires a test of the validity of the means adopted against both the goal sought and the individual rights at stake.<sup>96</sup> Prophylactic measures, such as keeping immigration within manageable limits, should not be achieved by means that interfere with protected rights when less intrusive means are available.

The goals which were the motivation for the current immigration ceilings could be accomplished by means that do not infringe on rights to unification with immediate family members. For example, Congress could limit total annual immigration by establishing an overall ceiling within which current second preference category immigrants would be afforded the same treatment as the spouses and minor children of citizens. Cultural diversity could be maintained in large part by reducing the visas available under the other five preference categories according to the numbers of those who enter from each nation as immediate relatives. Alternatively, Congress could raise the ceilings for particular countries or regions in order to assure cultural diversity, as it did for Western Europe in IRCA.<sup>97</sup>

It is the role of Congress to determine the absorptive capacity of the country and the overall balance to be drawn among the numbers of workers, refugees or family members who enter as immigrants. Judicial recognition of a constitutional right to family unification, however, would not necessarily involve a drastic reevaluation of immigration policy. Only the second of the six preference categories falls within the scope of the constitutionally protected “family.” Protection of fundamental rights in this area merely would require exemption of second preference category spouses and minor children

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92. *See, e.g., Robel*, 389 U.S. 258, 264 (1967) (First amendment right of association protected despite important congressional goal of furthering national defense).

93. *Id.* at 268.

94. *Id.* at 264 (quoting *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 426 (1934)).

95. *See Robel*, 389 U.S. at 268.

96. *Id.*

97. IRCA § 314(a), 100 Stat. at 3439 (codified at 8 U.S.C. § 1153), made available 5000 additional visas for European nations in each of the fiscal years 1987 and 1988.

from the current numerical limits. The other five categories of the preference system and the overall plan for immigration would remain essentially intact.

#### PROPOSED AMENDMENTS TO THE IMMIGRATION LAW TO PROTECT FAMILY UNIFICATION

As discussed above, the purposes of the current numerical limitations could be accomplished by means which less drastically intrude upon the rights of resident aliens to be joined by their spouses and minor children. This section outlines a proposal for legislative amendments that would simplify the visa preference system while protecting the constitutional right of permanent resident aliens to family unification. The full text of these proposed amendments is attached as an Appendix.

The crucial change suggested is that the definition in INA section 201(b)<sup>98</sup> of "immediate relatives" exempt from numerical limits, which currently includes the "children, spouses, and parents of a citizen of the United States," be expanded to include the spouses and minor children (under the age of eighteen) of permanent resident aliens.<sup>99</sup> The second major change is to revise INA section 203(a) preference categories to provide for separate treatment of family and worker immigration.<sup>100</sup> The worker ceiling, dependent as it is upon labor market demand, should be adjusted independently from that for family immigration.

The revised preference system would retain the four family unification categories. The first preference category, adult unmarried sons or daughters of citizens, would remain unchanged. The second

98. INA § 201(b), 8 U.S.C. § 1151.

99. INA section 201(b) should be amended to read as follows with proposed changes to the text indicated in italics:

The "immediate relatives" referred to in subsection (a) of this section shall mean (1) the children, spouses, and parents of a citizen of the United States: [Provided, t]hat in the case of parents, such citizen must be at least twenty-one years of age, and (2) *the children under eighteen years of age and spouses of an alien lawfully admitted for permanent residence*. The immediate relatives specified in this subsection who are otherwise qualified for admission as immigrants shall be admitted as such, without regard to the numerical limitations in this Act.

INA § 201(b), 8 U.S.C. § 1151. Note that a broader range of relatives of citizens than of permanent resident aliens would remain exempt from the numerical limitations.

100. INA § 203(a), 8 U.S.C. § 1153. See S. REP. NO. 62, 98th Cong., 1st Sess. 15 (1983) (proposing amendments which would divide immigrants into two broad categories: family unification immigrants and independent immigrants). See also S. 1611, 100th Cong., 1st Sess. (1987) (similar proposals introduced by Senator Kennedy).

category would include only those unmarried sons and daughters of permanent resident aliens who do not qualify for exempt status under the proposed amendments, that is, those eighteen years of age or older. The current third preference category for workers would be eliminated, while the fourth preference category, married sons and daughters of citizens, would remain unchanged. The fifth preference category, brothers and sisters of citizens, (the category with by far the greatest demand for visas), would be narrowed to include only the unmarried brothers and sisters of adult United States citizens.<sup>101</sup> The backlog of active petitions for this category in 1983 was over 700,000 visas.<sup>102</sup> Over half of these were for the family members of married brothers and sisters of citizens who already had established families of their own.<sup>103</sup> The narrowing of this category to unmarried brothers and sisters would reduce considerably the backlog problem in the future.

Congress could adjust the percentage of visas available to each preference category. For the sake of simplicity the amendments propose that twenty-five percent of visas be reserved for each category.

The amended system for allocation of preference visas would be as follows:

<u>Preference Category</u>	<u>Visa Allocations</u>
1. Unmarried sons and daughters (over the age of twenty-one) of United States citizens.	25% of available visas plus any unused visas from the fourth preference category.
2. Unmarried sons (over the age of eighteen) and unmarried daughters (over the age of eighteen) of permanent resident aliens.	25% of available visas plus any unused visas from the first preference category.
3. Married sons and daughters of United States citizens.	25% of available visas plus any unused visas from the first and second preference categories.
4. Unmarried brothers and sisters of adult United States citizens and married brothers and sisters of United States citizens whose visa petitions were filed before the date of enactment.	25% of available visas plus any unused visas from the first, second or third preference categories.

As indicated, unused visas in each preference category would continue to be recycled until all were consumed.

Under the current law, the number of visas issued to "immediate relatives" is not offset against the number of visas available under the preference categories.<sup>104</sup> As a result, although the world ceiling for preference visas is set at 270,000, nearly 400,000 relatives en-

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101. S. REP. NO. 62, *supra* note 100, at 16.

102. *Id.* at 43.

103. *Id.*

104. INA § 201(b), 8 U.S.C. § 1151.

tered in 1984 when exempted "immediate relatives" are taken into consideration. The proposed amendments would set a ceiling of 400,000 preference visas to be reduced by the number of "immediate relative" visas issued in the prior year. The annual number of visas available for the revised preference categories thus would be determined by subtracting from 400,000 the number of visas issued in the prior year to "immediate relatives" as defined in section 201(b).<sup>105</sup> Therefore, any increase in the number of exempt relatives will be offset by a reduction in the numbers of visas available for the preference categories. For example, should more than 400,000 "immediate relatives" enter in any one year, no preference visas would be available in the subsequent year. This would give the immediate family members of citizens and permanent resident aliens (those entitled to constitutional protection) priority over more distant relatives of citizens while the total of all family immigrants would be kept approximately at current levels by linking the availability of preference visas to the demand for entry by exempt relatives. This system would protect family unification rights of citizens and permanent resident aliens while allowing the administration a firmer control over the total number of immigrants.

While the annual ceilings for preference visas would remain at 20,000 for each country, these ceilings would be offset by the number of visas issued to "immediate relatives" admitted from that country in the prior year.<sup>106</sup> No visas would be available in the preference categories for those countries from which over 20,000 "immediate relatives" were admitted in the previous year.<sup>107</sup> These changes would assure cultural diversity and prevent monopolization of prefer-

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105. S. REP. NO. 62, *supra* note 100, at 16, similarly suggested reducing the number of visas available for the preference categories by the number of visas issued to "immediate relatives" during the prior year. If more than 400,000 "immediate relatives" entered in one year, no preference visas would be available in the following year.

106. *Id.*

107. Section 202(a) should be amended to read as follows, with proposed additions indicated in italics and proposed deletions indicated by strikeouts:

No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence, except as specifically provided in sections 101(a)(27), 1101(a)(27), 1151(b), and 1153, *and section XXX [new categories for workers]*: [Provided, t]hat the total number of immigrant visas made available to the natives of any single foreign state under paragraphs (1) through 7 of section 203(a) ~~shall not exceed 20,000 in any fiscal year: 4 of section 203(a) shall be determined by subtracting from 20,000 the number of "immediate relative" visas issued to natives of the same foreign state during the previous fiscal year.~~ . . .

INA § 202(a), 8 U.S.C. § 1152.



ence visas by particular countries while protecting family unification rights.

### CONCLUSION

A constitutional right to family unification for members of the nuclear family (parents and their minor children) should be recognized and implemented in the area of immigration law. While no state has the obligation to admit aliens into its territory, once it does admit them as permanent residents, it must afford them basic human rights and the full protection of the Constitution. This should include the protection of the permanent resident alien's right to live a normal family life. Implementation of a right to family unification would require the removal of the numerical limitations that now impede entry of the spouses and minor children of permanent resident aliens.

While discriminatory provisions based on race, sex, social class and legitimacy have been gradually eliminated over the course of the last century from the family unification provisions of American immigration law, national origin has become a critical factor in determining the entry of immediate family members. In the absence of compelling circumstances, however, national origin should not be a legitimate basis for denying or excessively delaying family unification to permanent resident aliens.

Ideally, the courts in this country should recognize and enforce a constitutional right to family unification based on the premise that each person admitted as a permanent resident possesses a basic human right to live a normal family life. Any limitation of that right should be justified only by extremely important state interests such as the protection of national security.

While the Supreme Court has allowed the political branches nearly unfettered discretion in controlling immigration, its line of decisions protecting the family from governmental intrusions provides a basis for the recognition of a constitutional right to family unification. If that right were to be explicitly recognized, it would require a more exacting standard of judicial review than currently applied to immigration law.

Undoubtedly, implementation of a right to family unification would have a pervasive impact. The numbers of annual entrants initially would increase for several reasons. First, the second preference category waiting list contains the names of over 280,000 aliens who now await visas to join spouses or parents in the United States.<sup>108</sup> The right to family unification proposed in this paper would require that these relatives be granted entry without waiting for as long as ten years. One also could expect that many spouses or minor chil-

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108. 61 INTERPRETER RELEASES 399 (1984).

dren whose names currently are not on the waiting list would request entry should such a right be recognized. Second, those aliens who become permanent residents through the legalization process of IRCA also would be entitled to be joined by their spouses and minor children, at least after the eighteen month period of temporary residence.<sup>109</sup> Finally, the preference system allows citizens to petition for the entry of a wide range of relatives such that the entry of each resident alien as a spouse or minor child in turn could lead to multiple petitions for entry by parents, adult brothers and sisters and their family members when these resident aliens obtain citizenship status after five years.

Quite simply, the base of the foreign population with a potential for bringing in other relatives is rapidly expanding. For these reasons, the recognition of a constitutional right to family unification in the United States, especially coming on the heels of the 1986 amnesty provision, would significantly increase the demand for family unification. One step that could be taken to avoid the chain reaction in the demand for entry by family members would be to narrow the range of relatives of citizens who now enter under the preference categories. Limiting entry of brothers and sisters of citizens to those who are unmarried would significantly reduce demand under that preference category. Eventually, the scope of relatives who qualify for entry might be reduced to those within the constitutionally protected family — spouses and minor children and those who functionally are members of the nuclear family unit.

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109. IRCA § 303(c), 100 Stat. at 3431 (codified at 8 U.S.C. § 1255(a)).

## APPENDIX

### PROPOSED FAMILY UNIFICATION AMENDMENTS (WITH ADDITIONS TO THE LEGISLATION INDICATED IN ITALICS AND DELETIONS INDICATED BY STRIKEOUTS).

#### CHAPTER 1 — SELECTION SYSTEM NUMERICAL LIMITATIONS

INA § 201, 8 U.S.C. § 1151 (1982):

(a) . . . Exclusive of special immigrants defined in section 1101(a)(27) of this title, immediate relatives specified in subsection (b) of this section, ~~and~~ aliens who are admitted or granted asylum under section[s] 1157 or 1158 of this title, *aliens whose status is adjusted to that of lawful permanent resident under the legalization provisions of section 245 (1986 amendments), and independent immigrants specified in section xxx (new categories for workers)*, the number of aliens born in any foreign state or dependent area who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence, ~~shall not in any of the first three quarters of any fiscal year exceed a total of seventy-two thousand and shall not in any fiscal year exceed two hundred and seventy thousand~~ *be limited to family unification immigrants as defined in section 1153(a) of this title in a number not to exceed in any fiscal year the number equal to 400,000 reduced by the number of immediate relatives as defined in subsection (b) of this section who in the previous fiscal year were issued an immigrant visa or who otherwise acquired the status of lawful permanent resident. . . .*

(b) . . . The “immediate relatives” referred to in subsection (a) of this section shall mean (1) the children, spouses, and parents of a citizen of the United States: [Provided, t]hat in the case of parents, such citizen must be at least twenty-one years of age, *and (2) the children under eighteen years of age and spouses of an alien lawfully admitted for permanent residence.* The immediate relatives specified in this subsection who are otherwise qualified for admission as immigrants shall be admitted as such, without regard to the numerical limitations in this Act.

INA § 202, 8 U.S.C. § 1152:

(a) . . . No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence, except as specifically provided in sections 1101(a)(27), 1151(b), section 201(b), ~~and~~ 1153 of this title, *and section xxx (new categories for workers):* [Provided, t]hat the total number of immigrant visas made available to the natives of any single foreign state under

paragraphs (1) through ~~7~~ of section ~~203(a)~~ shall not exceed ~~20,000~~ in any fiscal year. ~~(4) of section 1153(a) of this title shall be determined by subtracting from 20,000 the number of "immediate relative" visas issued to natives of the same foreign state during the previous fiscal year. . . .~~

(b) - (d) [No change.]

(e) [Delete.]

INA § 203, 8 U.S.C. § 1153:

(a) . . . Aliens who are subject to the numerical limitations in section 201(a) shall be allotted visas as follows:

(1) Visas shall be first made available, in a number not to exceed ~~20~~ 25 per centum of the number specified in section 1151(a) of this title *plus any visas not required for the class specified in paragraph (4) of this subsection*, to qualified immigrants who are the unmarried sons or daughters of citizens of the United States.

(2) Visas shall next be made available, in a number not to exceed ~~26~~ 25 per centum of the number specified in section 1151(a) of this title, plus any visas not required for the classes specified in paragraph (1), to qualified immigrants who are ~~the spouses~~, the unmarried sons *eighteen years of age or over* and the unmarried daughters *eighteen years of age or over* of an alien lawfully admitted for permanent residence.

~~(3) [Delete (provision for members of the professions transferred).]~~

~~(4)~~ (3) Visas shall next be made available, in a number not to exceed ~~10~~ 25 per centum of the number specified in section 1151(a) of this title, plus any visas not required for the classes specified in paragraphs ~~(1) through (3)~~, *(1) and (2)* of this subsection, to qualified immigrants who are the married sons or the married daughters of citizens of the United States.

~~(5)~~ (4) Visas shall next be made available, in a number not to exceed ~~24~~ 25 per centum of the number specified in section 1151(a) of this title, plus any visas not required for the classes specified in paragraphs (1) through ~~(4)~~ (3), to *(A)* qualified immigrants who are the *unmarried* brothers or sisters of citizens of the United States, provided such citizens are at least twenty-one years of age, and *(B) qualified immigrants who*

*(i) are married brothers or sisters of citizens of the United States and who had received approval of a petition by reason of such relationship prior to the effective date of this Act, and*

*(ii) continue to qualify under the terms of this act as in effect*

*on the day before such date.*

~~(6)~~ [Delete. (provision for skilled and unskilled laborers).]

~~(7)~~ [Delete. (provisions for issuance of unused visas to nonpreference immigrants).]

~~(8)~~ (5) A spouse or child as defined in section 1101(b)(1)(A), (B), (C), (D), or (E) of this title, shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under paragraphs (1) through ~~(7)~~ (4) of this subsection, be entitled to the same status, and the same order of consideration provided in subsection (b) of this section, if accompanying, or following to join, his spouse or parent.

(b) . . . In considering applications for immigrant visas under subsection (a) of this section consideration shall be given to applicants in the order in which the classes of which they are members are listed in subsection (a) of this section.

(c) Immigrant visas issued pursuant to paragraphs (1) through ~~(6)~~ (4) of subsection (a) of this section shall be issued to eligible immigrants in the order in which a petition in behalf of each such immigrant is filed with the Attorney General as provided in section 1154 of this title.

(d) . . . Every immigrant shall be presumed to be a nonpreference immigrant until he establishes to the satisfaction of the consular officer and the immigration officer that he is entitled to a preference status under paragraphs (1) through ~~(6)~~ (4) of subsection (a) of this section, or to a special immigrant status under section 1101(a)(27) of this title, or that he is an immediate relative of a ~~United States citizen~~ as specified in section 1151(b) of this title. In the case of any alien claiming in his application for an immigrant visa to be an immediate relative of a ~~United States citizen~~ as specified in section 1151(b) of this title or to be entitled to preference immigrant status under paragraphs (1) through ~~(6)~~ (4) of subsection (a) of this section, the consular officer shall not grant such status until he has been authorized to do so as provided by section 1154 of this title.

(e) [No change.]