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The Proverbial Catch-22: The Unconstitutionality of Section Five of the Immigration Marriage Fraud Amendments of 1986

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INTRODUCTION

In an effort to combat an apparent increase in "sham" marriages,[1] Congress enacted the Immigration Marriage Fraud Amendments of 1986.[2] The amendments[3] dramatically alter the

* Associate, Crosby, Heafey, Roach & May, Oakland, California; LL.M., Georgetown University Law Center (1988); J.D., University of San Francisco, School of Law (1987); B.A., California State University, Chico (1984). The author wishes to dedicate this article to his parents: Hay Tiempos que pienso que no voy a poder vencer obstáculos o terminar proyectos en ésta vida. Pero gracias a Dios que tengo personas como mis creadores José y Mariá que me dan valor, fuerza y ánimo para seguir adelante. Por eso, con mucho cariño quiero dedicar éste exegesis a estas personas. Gracias mamá y papá.

1. A sham marriage is a marriage entered into, or concealed by a United States citizen (or permanent resident) and an alien whereby the alien improperly obtains permanent resident status by circumventing the immigration law restrictions. *See* United States General Accounting Office Report, *Immigration Marriage Fraud: Controls in Most Countries Surveyed Stronger Than in U.S.*, 1 (1986) [hereinafter *GAO Report*]; 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 2.18a(16) (1987). Because of the special status accorded to the alien spouses of American citizens and permanent residents, some aliens, either because they do not qualify for immigration to this country, or if qualified, are not willing to wait until an immigrant visa becomes available, enter into fraudulent marriages with citizens or permanent residents of the United States in order to gain swift entry into this country. *See infra* note 4 and accompanying text; H.R. REP. NO. 906, 99th Cong. 2d Sess. 6 (1986); D. MARTIN, MAJOR ISSUES IN IMMIGRATION LAW 42-43 (1987). One INS survey suggests that approximately 30% of all petitions for immigrant visas based on a marriage to an American citizen or permanent resident involves "suspect marital relationships." *See Fraudulent Marriage and Fiance Arrangements To Obtain Permanent Resident Immigration Status: Hearing Before the Subcommittee on Immigration and Refugee Policy of the Senate Committee on the Judiciary,*, 99th Cong., 1st Sess. 6, 35 (1985) [hereinafter *Fraudulent Marriage Hearing*] *infra* note 4, at 35; *see also* S. REP. No. 491, 99th Cong., 2d Sess. 2, 6 (1986).

2. Pub. L. No. 99-639, 100 Stat. 3537 (1986) (codified in scattered sections of 8 U.S.C.).

3. For an overview of the new provisions in the Immigration Marriage Fraud

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policy and procedures aliens must follow in obtaining permanent resident status by means of a marriage to a U.S. citizen or lawful permanent resident.[4] Under prior law, an alien applying for permanent resident status on the basis of such a marriage would obtain his or her visa and accompanying resident status in the United States shortly after the application was filed.[5] However, the new legislation imposes a two-year conditional status on permanent residence for the alien.[6]

Amendments of 1986, *see* Gordon, *The Immigration Legislation: The Immigration Reform and Control Act of 1986, The Marriage Fraud Act, The State Department Efficiency Bill*, 1 GEO. IMMIGR. L.J. 641, 652-55 (1986); Shane, *Family Law: Marriage Fraud and Other Amendments*, 61 FLA. B.J. 36 (1987); Boiston, *An Overview: The Immigration Reform and Control Act of 1986 and The Immigration Marriage Fraud Amendments of 1986*, 60 OHIO ST. B.A. REP. 150, 157-60 (1987); Drake, Zacovic, Wheeler & Poplowski, *Sweeping Changes in Immigration Laws Affect Aliens' Rights to Work and Legalize Their Status*, 21 CLEARINGHOUSE REV. 74, 84-85 (1987).

4. The Immigration and Nationality Act (INA) of 1952 annually limits the number of immigrant visas that can be issued worldwide to 270,000, with a limit of 20,000 visas for any one country. *See generally INA § 202; 8 U.S.C. § 1152 (1982); See also GAO Report, supra* note 1, at 1. The INA also categorizes aliens seeking to enter this country and makes some of those categories subject to these annual worldwide and per country limits. *See generally* C. GORDON & E. GORDON, IMMIGRATION LAW AND PROCEDURE ch. 2 (Desk ed. 1987); Danilov & Nerheim, *Marriage, Divorce, the Alien, and Washington Law*, 19 GONZ. L. REV. 303, 305 (1983). Aliens in oversubscribed categories in some countries may have to wait as long as fifteen years before receiving an immigrant visa. Countries such as Mexico, the Philippines and Hong Kong, with large backlogs of visa hopefuls exhaust their annual quotas as soon as they become available. Their waiting lists continue to grow. *See Fraudulent Marriage Hearing, supra* note 1, (Statement of Alan C. Nelson, Immigration and Naturalization Service Commissioner); *see also* A Report of the United States Commission on Civil Rights, *The Tarnished Golden Door: Civil Rights Issues in Immigration*, 17-18 (1980).

The United States immigration policy, however, has historically recognized the importance of protecting the nuclear family when granting immigration benefits. *See* H.R. REP. No. 906, 99th Cong., 2d Sess. 6 (1986). Thus, for family unification reasons, the INA exempts the immediate relatives from these numerical restrictions on visas of United States citizens which includes alien spouses. *See* INA § 201(a), (b); 8 U.S.C. § 1151(a), (b) (1982); S. REP. No. 491, 99th Cong. 2d Sess. 1, 8 (1986); *see generally* C. GORDON & E. GORDON, *supra*, at ch 2.18. Aliens who marry lawful permanent residents, although not exempt from these numerical limits, are given second "preference" status. *See* INA § 203(a)(2); 8 U.S.C. § 1153(a)(2) (1982).

5. Prior to the amendments, the average processing time of the application was two to four months. *See* Boiston, *supra* note 3, at 158. *See also* Comment, *Immigration Marriage Fraud Amendments of 1986: Till Congress Do Us Part*, 41 U. MIAMI L. REV. 1087 (1987).

6. *See* INA § 216; 8 U.S.C. § 1186a (Supp. IV 1986), added by the Immigration Marriage Fraud Amendments [hereinafter IMFA], § 2. Within the final 90 days of this two-year period, both the alien spouse and United States citizen or permanent resident spouse must petition the Immigration and Naturalization Service (INS) to have the conditional status "removed." INA § 216(c)(1), (d)(1); 8 U.S.C. § 1186a (c)(1); (d)(1) (Supp. IV 1986). When the couple is interviewed by the INS pursuant to the foregoing petition, they must show that: (1) their marriage has not been judicially annulled or terminated during the conditional period; (2) their marriage was not fraudulently entered into for the main purpose of circumventing the immigration law restrictions; and (3) the filing of the petition did not involve the alien paying a fee or other consideration to the U.S. citizen or

Section Five is the most troubling of the Immigration Marriage Fraud Amendments.[7] Under this section, an alien who marries a U.S. citizen or permanent resident while involved in deportation or exclusion hearings is no longer provided the opportunity to present evidence establishing the bona fides of the marriage.[8] Also, the alien is now deprived of the opportunity to apply for an adjustment of status (a discretionary remedy used to prevent the alien's deportation).[9] In addition, a visa petition to accord the alien the status of immediate relative or second preference may no longer be approved until he has completed a two-year foreign residency requirement, i.e., he must reside outside the United States for a two-year period after the marriage.[10] Accordingly, because this

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permanent resident. *See* INA § 275; 8 U.S.C. § 1325; *see also* D. MARTIN, *supra* note 1, 44-45; Drake, Zacovic, Wheeler, & Poplowski, *supra* note 3, at 84-85.

If the removal petition is granted, the conditional status is removed and the alien spouse is afforded full-fledged permanent resident status. *See* D. MARTIN *supra* note 1, at 44. On the other hand, if the couple fails to file a timely petition for removal of the conditional status, or if the petition is denied, the alien spouse's conditional resident status is terminated and he or she becomes deportable. The administrative review of these determinations occurs in a deportation hearing. Consequently, judicial review of any order of deportation then becomes available. *See generally* INA §§ 216(c)(2), (c)(3); 8 U.S.C. §§ 1186a(c)(2), (c)(3) (Supp. IV 1986).

7. Section Five(a) (amending INA § 245(e), 8 U.S.C. § 1255(e)), provides the following:

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

IMFA § 5(a), added by Act of November 10, 1986, P.L. No. 99-639, 100 Stat. 3537.

Section Five(b) added the following subparagraph to INA § 204, 8 U.S.C. § 1154:

> (h) Notwithstanding subsection (a) of this section [which allows the filing of a petition for immediate relative or second preference status on behalf of the alien spouse], a petition may not be approved to grant an alien immediate relative status or preference status by reason of a marriage which was entered into during the period described in § 245(e)(2), until the alien has resided outside the United States for a two-year period beginning after the date of the marriage.

IMFA § 5(b), added by Act of November 10, 1986, P.L. No. 99-639, 100 Stat. 3537; *see also Matter of Egbunine*, Interim Dec. #3034 (BIA 1987).

8. Critics have already begun to question the effectiveness of these new provisions. *See* Recent Developments, *Immigration Marriage Fraud Amendments of 1986: The Overlooked Immigration Bill*, 10 HARV. WOMEN'S L.J. 319, 322, 325 (1987); Drake, Zacovic, Wheeler & Poplowski, *supra* note 3, at 85.

9. *See supra* note 7.

10. Concerned with immigration marriage fraud, Congress requested the General Accounting Office to conduct a survey of the methods and controls employed by other countries in detecting and preventing sham marriages. The General Accounting Office circulated a questionnaire on the marriage fraud problem to the following twelve countries: Australia, Canada, Denmark, Federal Republic of Germany, France, Great Britain, Italy, Japan, Mexico, Spain, Sweden and Switzerland. *See GAO Report*, *supra* note 1, at 8-9. This survey suggested that most of the countries surveyed had stronger controls to combat marriage fraud than did the United States. For example, some countries reported that they

provision provides no opportunity for the alien to prove the bona fides of the marriage, it establishes, in form and in fact, an irrebuttable presumption of marriage fraud.[11]

Recent marriages entered into between U.S. citizens or permanent residents and alien spouses have become a testing ground during deportation hearings for Section Five, which threatens to separate the couple.[12] Part II of this article argues that as applied to deportation hearings, Section Five violates the alien's procedural due process rights. Aliens who are involved in deportation hearings have constitutionally protected "liberty" and "property" interests at stake. For this reason, the due process clause of the fifth amendment envisions that aliens involved in deportation proceedings receive a fair hearing at which they will have a reasonable opportunity to present evidence establishing the bona fides of the marriage. By depriving aliens who marry during deportation hearings of both the opportunity to present this evidence and the opportunity to apply for an adjustment of status before being deprived of these constitutionally protected interests, Section Five contravenes the procedural safeguards normally afforded by the due process clause. Before the couple can be deprived of their important interests that are at stake, a pre-deprivation informal hearing, at a minimum, is necessary. This hearing would inquire into the couple's motives for entering into the marriage during the deportation hearing.

Part III of this article scrutinizes Section Five under an equal protection analysis. It is argued that the imposition of the two-year foreign residency requirement and the elimination of the defense of adjustment of status for aliens who marry U.S. citizens or permanent residents while in deportation proceedings impermissibly interferes with the fundamental rights of marriage and famil-

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required alien spouses of their citizens to fulfill some form of conditional residency requirement before being granted resident status. *GAO Report*, *supra* note 1, at 3-12. (Denmark, Federal Republic of Germany, France, Great Britain, Italy, and Japan required aliens who married their citizens to fulfill some type of conditional residency period ranging anywhere from three months to ten years.) In addition, several countries reported that before being granted resident status, the alien and his or her citizen spouse had to prove their marriage was not entered into fraudulently. Examples of evidence that could be used to make this showing included proof of cohabitation, joint ownership of property, and joint tax returns filed by the couple. *See*, *GAO Report*, *supra* note 1, at 4.

11. Frye, *Through the Looking Glass Darkly—Section 5 of the Immigration Marriage Fraud Amendments*, 11 IMMIGR. J. 1, 8 (1988). For an extensive discussion of Section Five's creation of an irrebuttable presumption of marriage fraud, *see* Comment, *supra* note 5, at 1106-08.

12. *See Newlywed Says "I Don't" to Deportation: Maryland Couple Challenges INS Marriage Fraud Law*, The Washington Post, Mar. 26, 1988, at B1, col. 1. *See also* Azizi v. Meese, Civil No. H87-957 (1988) (granting the U.S. citizen and alien couple's preliminary injunction in an action challenging the INS's enforcement of Section Five); Smith v. INS, Civil No. 87-1988-C (1988).

ial integrity. Under an equal protection analysis, however, the Supreme Court traditionally does not apply strict scrutiny to federal legislation in the immigration area. It is argued, nevertheless, that the Court should apply intermediate scrutiny in determining the constitutionality of Section Five. Under this test, even if Congress put forth an "important" interest in deterring immigration marriage fraud, Section Five is unconstitutional because the procedures established by this provision are not "substantially related" to achieving this interest. In addition, this provision is analyzed under the minimum scrutiny test which the Court usually employs in determining the constitutionality of federal government classifications based on alienage. It is argued that even under this more relaxed standard of review, Section Five is constitutionally deficient, at least as applied to deportation hearings. Drawing a distinction between aliens who marry before, as opposed to after becoming involved in deportation hearings, is not "rationally related" to accomplishing the federal government's purpose in enacting Section Five.

Before delving into these points, however, the judicial deference exhibited by the Supreme Court to federal immigration legislation needs to be examined. To this, Part I is devoted.

I. Judicial Deference to Congressional and Executive Branch Actions in Immigration Matters

The U.S. Supreme Court has consistently held that the power of Congress and the Executive Branch in the immigration area is broad.[13] When reviewing immigration legislation drafted by the federal government, the Court has thus far deferred to the judgment of the other branches of government.[14] To date, the Court has never upheld an alien's substantive due process or equal protection challenge leveled against a federal immigration statute.[15]

In several instances, however, the Court has stated that in a proper case, a provision in a federal immigration statute might be

13. *See generally* Galvan v. Press, 374 U.S. 522, 530-31 (1954); Kleindienst v. Mandel, 408 U.S. 753, 767 (1972); Fiallo v. Bell, 430 U.S. 787, 792 (1977); *see also* Note, *Aliens and Housing: Toward an Intermediate Level of Review*, 2 Geo. Immigr. L.J. 351, 362-63 (1987).

14. The Court expresses its judicial deference by applying minimal judicial scrutiny to these statutes. It has recognized that subjecting all federal classifications based on alienage to minimal judicial scrutiny results in Congress making rules that would be unconstitutional if applied to citizens. *See* Mathews v. Diaz, 426 U.S. 67, 80 (1976); *see also* L. Tribe, American Constitutional Law § 5-16, at 281 (1978); C. Gordon & E. Gordon, *supra* note 4, at ch. 4.3.

15. *See generally* Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Galvan v. Press, 347 U.S. 522 (1954): C. Gordon & E. Gordon, *supra* note 4, at ch. 4.3.

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subject to a successful challenge on these substantive grounds.[16] Section Five presents such a case. To be sure, the judicial deference is useful and should be continued, but the Supreme Court should limit its application where legislation, such as Section Five, punishes U.S. citizens and alien spouses for exercising fundamental rights.[17] Moreover, because the rationales underlying the Court's judicial deference[18] lose their force when applied to deportation hearings governed by Section Five, the Court should analyze this legislation with more than its traditional "toothless" review of immigration statutes.[19]

The political branch or political question rationale was exemplified by the Supreme Court in *Galvan v. Press*.[20] It noted:

> [A]ny policy toward aliens is virtually and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.[21]

In *Mathews v. Diaz*, the Supreme Court added, "[t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by Congress or the President in the area of immigration and naturalization."[22] As applied to deportation hearings governed by Section Five, this reasoning is flawed in two respects.

First, in determining whether Section Five adheres to the due process and equal protection mandates, it is doubtful the Court

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16. *See* Landon v. Plasencia, 459 U.S. 21, 34-37 (1982).

17. *See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 11:4, at 535 (1978).

18. These rationales have received extensive criticism. *See generally* Comment, *Petitioning on Behalf of an Alien Spouse: Due Process Under the Immigration Laws*, 74 CALIF. L. REV. 1747, 1763-70 (1986); Comment, *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1419-23 (1983); L. TRIBE, *supra* note 14, at 281-84.

19. *Cf.* Shyameshwar Das, *Discrimination in Employment Against Aliens—The Impact of the Constitution and Federal Civil Rights Law*, 35 U. PITT. L. REV. 499, 536-40 (1974); *see also* L. TRIBE, *supra* note 14, at 281-84. The deference exhibited by the Court towards the virtually unlimited power of Congress and the Executive Branch to regulate immigration matters is in part due to a judicial reluctance to reconsider the principles and rationales expounded in earlier decisions. *See generally* Galvan v. Press, 374 U.S. 522, 530-31 (1954); Kleindienst v. Mandel, 408 U.S. 753, 767 (1972); *Compare* C. GORDON & E. GORDON, *supra* note 4, at ch. 4.3, *with* Comment, *supra* note 5, at 1115 (the Court will not apply a strict scrutiny review even if Section Five unduly burdens the exercise of a fundamental right). Moreover, this would not be the first time the Supreme Court overturned authority in an area which was in dire need of change. *See, e.g.,* Brown v. Bd. of Educ., 347 U.S. 483 (1954); Gideon v. Wainwright, 372 U.S. 335 (1963).

20. 347 U.S. 522 (1954).

21. *Id.* at 531.

22. 426 U.S. 67, 81-82 (1976).

would "implicate our relations with foreign powers."[23] Section Five only detrimentally affects the marriage and familial relationship of the U.S. citizen or permanent resident and the alien spouse.[24] This section is unlike other immigration provisions of the Act that could interfere with the federal government's power and relationship with other countries if subjected to the Court's normal review.[25] Moreover, even if Section Five tangentially touches upon the conduct of foreign relations, this alone should not be sufficient to trigger the Court's judicial deference.

Second, analyzing Section Five under the Court's usual review would not raise a political question.[26] Controversies that raise political questions, and thus avoid judicial review, raise issues which the Constitution has exclusively committed to the other branches of government, or which the judiciary is not well equipped to resolve.[27] Although the Constitution explicitly empowers Congress to deal with naturalization matters, it does not impose any limits on the Court's jurisdiction in immigration cases.[28] Moreover, the Court could arguably determine the validity of federal legislation in the immigration area under the analytical framework it normally employs when reviewing similar state legislation.[29] The po-

23. Several district courts have already considered Section Five's impact on the due process rights of U.S. citizens and alien spouses without bringing into question our relations with the foreign country of the alien national involved. *See e.g.*, Azizi v. Meese, Civil. No. H87-957(AHN) (1988) (granting the American citizen and alien couple's preliminary injunction in an action challenging the INS's enforcement of Section Five); Smith v. INS, Civil No. 87-1988-C (1988).

24. *See infra* notes 71-100 and accompanying text.

25. *See, e.g.*, INA § 101(a)(16); 8 U.S.C. § 1101(a)(16) (1982).

26. The issue of whether Section Five is constitutional under the due process and equal protection clauses is not so purely "political" as to preclude judicial determination of the rights of the parties. *See* Baker v. Carr, 369 U.S. 186 (1962).

27. *Id.* at 217; Gilligan v. Morgan, 413 U.S. 1 (1973) (congressional and executive authority to prescribe and regulate training and weaponry of National Guard precludes any form of judicial regulations). For a blistering critique of the "political question" doctrine, *see* Henkin, *Is There a "Political Question" Doctrine?* 85 YALE L.J. 597, 622 (1976). ("The 'Political Question' Doctrine, I conclude, is an unnecessary, deceptive packaging of several established doctrines that has misled lawyers and courts to find in it things that were never put there and make it far more than the sum of its parts.")

28. The Constitution provides that "[t]he Congress shall have Power . . . [t]o establish a uniform Rule of Naturalization . . ." U.S. CONST. art. I, sec. 8. cl. 4, but it is silent on the subject of immigration. Early state statutes in the immigration area were declared unconstitutional as invasions of the federal government's exclusive power to regulate foreign commerce. *E.g.*, Chy Lung v. Freeman, 92 U.S. 275, 280 (1875); Henderson v. Mayor of New York, 92 U.S. 259, 270 (1875). The constitutionality of the first immigration statute drafted by the federal government was later upheld on the same principle. *The Head Money Cases*, 112 U.S. 580, 596 (1884). Later, however, the Supreme Court held that the power to regulate immigration was incident to national sovereignty and did not need to be inferred from a particular clause in the Constitution. Ekiu v. United States, 142 U.S. 651, 659 (1892).

29. *See* Note, *Adams v. Howerton: Avoiding Constitutional Challenges to Immigration Policies Through Judicial Deference*, 13 GOLDEN GATE U.L. REV. 318, 325 (1983);

litical question rationale is thus an untenable ground for applying judicial deference to Section Five.

Another rationale advanced in support of the Court's judicial deference towards federal statutes in the immigration area has existed since the latter part of the nineteenth century. In *Nishumira Ekiu v. United States*,[30] the Court explained the "sovereignty" rationale as follows:

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.[31]

Several commentators have criticized this reasoning on the basis that "it simply does not follow that a power inherent in the sovereignty of the United States is not subject to constitutional limits."[32] It is true that as a matter of international law, as the maxim suggests, the federal government has the power to exclude or deport aliens even if the alien's native country objects.[33] However, as a matter of domestic law, the federal government is not relieved of its duty to guarantee aliens who are involved in deportation hearings the substantive protections and procedural safeguards normally afforded by our Constitution.[34] The U.S. Constitution is the proper lens through which the Court must judge the authority of Congress and the Executive Branch. To the extent the sovereignty rationale provides that in immigration matters the Constitution is subordinated to international law, it reflects an error of vision.[35] Thus, in general, this rationale would not provide a strong foundation for the Court's "toothless" review of Section Five.

An additional rationale stems from the Court's characterization of the power of Congress and the Executive Branch in the immigration area as "absolute," "unqualified," and "plenary."[36] The

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Comment, *Developments in the Law*, *supra* note 18, at 1421. In the familiar langauge of Baker v. Carr, 369 U.S. at 217, there are "judicially discoverable and manageable standards" to determine whether Section Five deprives aliens who marry U.S. citizens or permanent residents during deportation hearings of the process due under the Constitution.

30. 142 U.S. 651 (1892).

31. *Id.* at 659.

32. *See* Comment, *Petitioning on Behalf of an Alien Spouse*, *supra* note 18, at 1763; Rosberg, *The Protection of Aliens From Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 320.

33. *See* Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Pre-1917 Cases*, 68 YALE L.J. 1578, 1586-87 (1959).

34. *See* Rosberg, *supra* note 32, at 321.

35. *See* L. TRIBE, *supra* note 14, at 283-84.

36. *See* Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893); Carlson v. Landon, 342 U.S. 524, 534 (1952).

characterization of a power as "plenary" does not necessarily immunize it from all judicial and constitutional restraints.[37] For example, the Court has qualified the vast power of Congress in immigration matters by requiring that its legislation observe the procedural due process protections afforded to aliens in deportation hearings.[38] In other areas, while the power of Congress to regulate commerce has been termed "plenary," the Court has interpreted this to mean that it will accord judicial deference only to "regulations of commerce which do not infringe some constitutional prohibition."[39] In the same manner, the President's power to conduct foreign affairs has been characterized as "plenary and exclusive," yet the Court has made clear that this power "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."[40]

It is doubtful that the plenary power of Congress to regulate the admission and deportation of aliens justifies punishing the U.S. citizen (or permanent resident) and alien spouse for exercising their fundamental right to marriage and family association. There is broad language in some U.S. Supreme Court decisions which could be interpreted as providing such authority.[41] However, when this language is viewed in the proper context and in light of subsequent cases, the better view would seem to be that courts should not expand the scope of the plenary power rationale from its traditional application in such cases.[42]

The Supreme Court has also put forth the "right-privilege" reasoning.[43] This rationale is based on the premise that an alien who seeks an immigration benefit or privilege cannot obtain it unless he complies with the congressional conditions under which it is afforded.[44] However, over the years this doctrine has been modified by another principle which provides that an unconstitutional condition cannot be raised to deprive or punish an individual for

37. *See* Comment, *Petitioning on Behalf of an Alien Spouse, supra* note 18, at 1747, 1764.

38. *See generally The Japanese Immigration Case*, 189 U.S. 86 (1903).

39. United States v. Darby, 312 U.S. 100, 115 (1941); Comment, *Petitioning on Behalf of an Alien Spouse, supra* note 18, at 1764.

40. United States v. Curtiss-Wright Corp., 299 U.S. 304, 320 (1936); *see also* Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring); United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953).

41. *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); Jay v. Boyd, 351 U.S. 345 (1956).

42. *See generally*, K. DAVIS, *supra* note 17.

43. *See* United States *ex rel* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); Jay v. Boyd, 351 U.S. 345 (1956). *See also* H. Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977).

44. Note, *Constitutional Limits on the Power to Exclude Aliens*, 82 COLUM. L. REV. 957, 976-77 (1982).

exercising a fundamental right.[45] Moreover, the case law in the immigration area analyzing the right-benefit rationale is of questionable validity.[46] In fact, this justification would seem to support the Court's abdication of its traditional judicial deference to federal immigration legislation if it found that a provision of Section Five, such as the two-year foreign residency requirement, unconstitutionally deprived aliens of a fundamental right.

In sum, the Supreme Court's rationales continue to justify its judicial deference towards federal legislation in the immigration area. However, these reasons do not offer a satisfactory explanation for the Court's "toothless" review of all immigration statutes. In particular, the rationales do not justify the Court's deference to federal legislation in the immigration area that penalizes a U.S. citizen (or permanent resident) and alien spouse for exercising a fundamental right. Deportation hearings controlled by Section Five penalize the U.S. citizen and alien spouse for exercising constitutionally protected interests, such as the right to marry and family association.[47] Thus, these rationales should not preclude the Court from applying a standard of review more stringent than the usual minimal scrutiny.

II. Procedural Due Process Under the Fifth Amendment

A. Applicability of the Due Process Protections to Deportation and Exclusion Hearings

Before engaging in a due process analysis of Section Five it is important to understand the crucial distinction between the two types of proceedings that immigration law has created for determining "which aliens can be denied the hospitality of the United States: deportation hearings and exclusion hearings."[48] The deportation hearing deals with an alien who is "within the United States after an entry irrespective of its legality" but whose right to remain in this country is questioned.[49] On the other hand, the exclusion hearing is the usual means of proceeding against an alien who is outside the United States seeking admission into this country.[50] The differences in the procedural protections accorded aliens

45. *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv L. Rev. 1439, 1458-60 (1968); Stewart, *The Reformation of American Administrative Law*, 88 Harv L. Rev. 1667 (1975).

46. *See* K. Davis, *supra* note 17.

47. *See infra* notes 77-90 & 212-18.

48. Landon v. Plasencia, 459 U.S. 21, 25 (1982); *See generally* C. Gordon & H. Rosenfield, *supra* note 1, at ch. 3.18.

49. *See* Leng May Ma v. Barber, 357 U.S. 185, 187 (1958).

50. *See* Landon v. Plasencia, 459 U.S. 21, 25 (1982).

in deportation hearings versus exclusion hearings are significant.[51]

1. Deportation hearings—While Congress may establish the grounds for deportation of aliens on virtually any substantive basis, the procedural safeguards in deportation hearings must comport with the due process clause of the fifth amendment.[52] One procedure, long recognized to be protected by this clause, is a fair decision-making process. This process is implemented before governmental action is taken that directly impairs a person's life, liberty or property.[53] Accordingly, since the landmark *Japanese Immigrant Case*,[54] the Supreme Court has consistently held that an alien who has either legally or illegally entered the United States, unlike an alien excluded at the border, is entitled to a fair hearing before being deported.[55] One court[56] described the constitutionally-mandated requirements of fairness in deportation hearings as follows:

> The accused shall be notified of the nature of the charge against him in time to meet it, . . . he shall have such an opportunity to be heard, . . . he may, if he chooses, cross examine the witnesses against him, . . . he may have time and opportunity, after all the evidence against him is produced and known to him, to produce evidence and witnesses to refute it. . . . [T]he decision shall be governed by and based upon the evidence at the hearing, and that only; and . . . the decision shall not be without substantial evidence taken at the hearing to support it.

Later, Congress incorporated most of these basic requirements of due process into the provisions of the Immigration and Nationality Act (INA).[57] The statute mandates that an alien may be deported only after being provided a hearing[58] where the government bears the burden of proving deportability by "clear, unequiv-

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51. *See generally* Maldonado-Sandoval v. INS, 518 F.2d 278, 280, n.3 (9th Cir. 1975).

52. *See* Galvan v. Press, 347 U.S. 522, 531 (1954); Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952). *See generally* 1A C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE, ch. 4.3a (1987).

53. *See* Hormel v. Helvering, 312 U.S. 552, 553 (1942); Goldberg v. Kelly, 397 U.S. 254, 262-63 (1969); Lassiter v. Dep't. of Social Services, 452 U.S. 18, 24 (1981).

54. Korow Yamataya v. Fisher, 189 U.S. 86, 100-01 (1903).

55. *See also* Sung Wong Yang v. McGrath, 339 U.S. 33 (1950).

56. Whitfield v. Hanges, 222 F. 745, 747 (8th Cir. 1915).

57. INA § 242(b); 8 U.S.C. § 1252(b) (1982). These statutory protections provide the basic ingredients of a fair hearing and due process, which prior to 1952 had been prescribed only by judicial fiat. *See* Sung v. McGrath, 339 U.S. 33, 49-50 (1950). *See generally* C. GORDON & E. GORDON, *supra* note 4, at ch. 5.6. The Supreme Court has not yet determined the minimal constitutional protections that fair play requires. *See* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1297 (1975). *See also* C. GORDON & H. ROSENFIELD, *supra* note 1, at ch. 5.5.

58. The hearing is usually held near the alien's residence within the United States. *See*, INA § 243(a); 8 U.S.C. § 1253(a) (1982).

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ocal, and convincing evidence."[59] He must be afforded reasonable notice of the deportation hearing and be advised of the grounds for deportation.[60] At the hearing, the alien may be represented by counsel.[61] He must be given "a reasonable opportunity to examine the evidence against him, *to present evidence in his own behalf*, and to cross-examine witnesses presented by the Government."[62] The alien also has available several substantive rights in a deportation hearing including the right to designate the country of deportation; seek temporary withholding of deportation on persecution grounds; and apply for suspension of deportation, voluntary departure, or for an adjustment of status.[63]

2. Exclusion hearings—In contrast, aliens involved in exclusion hearings are governed by an entirely different set of rules.[64] Through the years, courts have made clear that Congress may fashion any procedure it deems appropriate to aliens involved in exclusion hearings.[65] Congress may impose conditions on aliens who are seeking entry into this country that would not otherwise withstand constitutional scrutiny if imposed on citizens.[66] For example, aliens in exclusion hearings bear the burden of establishing their admissibility into this country.[67] There is no requirement

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59. *See* Woodby v. INS, 385 U.S. 276, 286 (1966).

60. *See* INA § 242(b)(1); 8 U.S.C. § 1252(b)(1) (1982).

61. *See* INA § 242(b)(2); 8 U.S.C. § 1252(b)(2) (1982).

62. *See* INA § 242(b); 8 U.S.C. § 1252(b) (1982) (emphasis added). *See also Matter of H.* 6 I & N Dec. 358 (1954). The deportation hearing must be conducted by an immigration judge whose determination of deportation must be made on the record in the proceeding before him. *See* INA § 101(b)(4); 8 U.S.C. § 1101 (b)(4) (1982); 8 C.F.R. § 242.8(a) (1988). The regulations also permit the alien to apply for an adjustment of status. *See,* 8 C.F.R. § 242.17(a) (1988); *Matter of Vrettokas,* 14 I & N Dec. 593 (1974). If the alien may apply for discretionary relief, it follows that he or she must be given the opportunity to submit evidence in support of this application. *See* 8 C.F.R. 242.17(d) (1988). In sum, the alien has a right to a reasonable opportunity to present an application for discretionary relief and to a reasonable determination on such an application. *See* INS v. Bagamasbad, 429 U.S. 14 (1976). *Cf.* Wah v. INS, 386 F.2d 292 (1st Cir. 1967); Rose v. Woolwine, 344 F.2d 993 (4th Cir. 1965).

63. *See generally* INA § 244; 8 U.S.C. § 1254 (1982); INA § 245; 8 U.S.C. § 1255 (1982); INA § 246(a); 8 U.S.C. § 1256(a) (1982).

64. Although by statute these aliens are entitled to most of the procedural safeguards accorded aliens in deportation hearings, the Constitution does not guarantee them these procedures. *See* C. GORDON & H. ROSENFIELD, *supra* note 1, at ch. 3.19; *see also* Comment, *Petitioning on Behalf of an Alien Spouse, supra* note 18, at 1747.

65. *See* Comment, *Petitioning on Behalf of an Alien Spouse, supra* note 18, at 1747.

66. *See* Fiallo v. Bell, 430 U.S. 787, 792 (1977); *See also* L. TRIBE, *supra* note 14, at 281 (1978). For criticism of this view, *see,* Schuck, *The Transformation of Immigration Law,* 84 COLUM. L. REV. 1, 18-21 (1984); Note, *Constitutional Limits on the Power to Exclude Aliens,* 82 COLUM. L. REV. 957, 962-63 (1982); Comment, *Developments in the Law—Immigration Policy and the Rights of Aliens,* 96 HARV. L. REV. 1286, 1322-24 (1983).

67. *See generally* C. GORDON & H. ROSENFIELD, *supra* note 1, at ch. 3.20(d).

that they be given advance notice of the charges brought against them.[68] They are ineligible for the discretionary remedies of suspension of deportation and voluntary departure.[69] In addition, if ordered excluded, the alien is not allowed to select the country to which he or she is to be deported.[70]

B. Constitutionally Protected Interests

The due process clause of the fifth amendment provides that Congress shall not "deprive any person of life, liberty, or property, without due process of law."[71] Due process guarantees " 'the aggrieved party the opportunity to present his case and have its merits fairly judged,' which requires 'some form of hearing before the individual is finally deprived of a protected [liberty or property] interest.' "[72]

In enacting Section Five, Congress undertook to pronounce on the validity of marriages entered into by U.S. citizens or permanent residents and aliens.[73] It determined that marriages entered into before deportation hearings started were unlikely to be fraudulent, and thus valid for immigration purposes.[74] On the other hand, Congress assumed that marriages entered into after deportation hearings had commenced were inherently "shams," and were not to be recognized for immigration purposes.[75] Congress added salt to the wound of couples who entered into valid marriages by deporting aliens in this latter category, and in imposing a two-year foreign residency requirement for obtaining an immigration benefit based on such a marriage.[76] Section Five, as applied to deportation hearings, deprives the U.S. citizen or permanent resident and alien spouse of two intertwined constitutionally protected interests.

First, the U.S. citizen and alien spouse have a "liberty" interest and an undeniable stake in their marriage, and in the immigration

68. *See, In re Salazar*, 17 I & N Dec. 167, 169 (1979).

69. *Id.*

70. *See generally* INA § 106; 8 U.S.C. § 1105(a) (1982). For an extensive list of authorities and commentators opposed to this curtailment of the aliens's right to a fair hearing, *see generally* C. GORDON & H. ROSENFIELD, *supra* note 1, at ch. 3.182.4, n. 13.

71. U.S. CONST. amend. V; *see generally* C. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 900-924 (1986).

72. Ali v. INS, 661 F. Supp. 1234, 1249 (D. Mass. 1986) (citing Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982)).

73. *Plaintiffs' Memorandum in Support of their Motion for Summary Judgment* in Smith v. INS, No. 87-1988-C 21-23.

74. INA § 245(e), 8 U.S.C. § 1255(e); INA § 204(h), 8 U.S.C. § 1154(h); *see also, supra* notes 7-9 and accompanying text.

75. *Id.*

76. *Id.*

benefits that accompany the relationship.[77] In undertaking to pronounce on the validity of the marriage, the government threatens fundamental aspects of the marital relationship.[78] In particular, when the Immigration and Nationalization Service (INS), through the application of Section Five, presumes a marriage entered into after a deportation hearing has commenced to be a sham, it deprives the married couple of their fundamental right to make intimate decisions about their marriage and family life together.[79] For example, since couples are prevented from presenting evidence on the bona fides of their marriage, it is unlikely that the alien will receive an immigration benefit based on this relationship. The foreign residency requirement[80] also forces some couples to live apart throughout this period, and thus inevitably leads to the disruption of the couple's marriage and family association. Moreover, these interests are also destroyed by the fact that, under Section Five, both the immigration judge and the Attorney General may not consider evidence of the bona fides of a marriage entered into after the deportation hearing has started.[81] Accordingly, Section Five deprives couples who enter into valid marriages of their liberty interests in marriage and family association.

Second, couples affected by Section Five have a "property" interest in petitioning the government to have the alien spouse declared an immediate relative, and ultimately to secure an immigration benefit based on the marriage.[82] This conclusion is supported by the congressional commitment to family unity in adopting the immediate relative status provision,[83] and in particular, Section Five.[84] In attempting to have an alien declared an immediate relative, the INA and the INS regulations guarantee the U.S. citizen (or permanent resident) and alien spouse the right to: (1) apply for an adjustment of status;[85] (2) present evidence on their own behalf and cross-examine adverse witnesses;[86] (3) rebut

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77. *See Ali*, 661 F. Supp. at 1245-46 n.6; Santosky v. Kramer, 455 U.S. 745, 752 (1982); Landon v. Plasencia, 459 U.S. 21, 34 (1982).

78. *Ali*, 661 F. Supp. at 1246 n.6; *see also* Stokes v. INS, 393 F. Supp. 24, 29 (S.D.N.Y. 1975).

79. *See* Azizi v. Meese, Civil No. H87-957 (1988); Plaintiffs' Memorandum in Support of their Motion for Summary Judgment in Smith v. INS, No 87-1988-C 21-23.

80. *See* INA § 204(h); 8 U.S.C. § 1154(h); *see also supra* note 7 and accompanying text.

81. *See supra* notes 7 & 8 and accompanying text.

82. *Ali*, 661 F. Supp. at 1246 n.6.

83. H.R. REP. No. 1365, 82d Cong., 2d Sess. 37, 38, *reprinted in* 1952 U.S. CODE CONG. & ADMIN. NEWS 1691, 1692; *see also* Ali v. INS, 661 F. Supp. at 1246 n.6.

84. S. REP. No. 491, 99th Cong., 2d Sess. 1, 8 (1986).

85. *See generally* INA § 245, 8 U.S.C. § 1255 (1982).

86. INA § 242(b), 8 U.S.C. § 1252(b) (1982); 8 C.F.R. § 292.5(b).

derogatory information in the record;[87] and (4) have the immigration judge's decision be based only on the evidence presented at the deportation hearing.[88] Section Five infringes on the couple's property interest to petition the government by depriving the couple of the twin opportunities to present evidence establishing the bona fides of their marriage, and to apply for an adjustment of the alien's status.[89] Congress, therefore, has created the right for the couple to submit and substantiate their marriage, and this entitlement invokes the protections afforded by due process.[90]

C. *Procedural Due Process Analysis*

Procedural due process requires fairness in determining whether to grant immigration benefits to an alien based on his or her marriage to a U.S. citizen or permanent resident.[91] In determining whether the procedures provided by Section Five meet the essential standards of fairness under the due process clause, the timing

87. 8 C.F.R. § 103.2(b)(2) (1988).

88. INA § 101(b)(4); 8 U.S.C. § 1101(b)(4) (1982); 8 C.F.R. § 242.8(a) (1988).

89. *See supra* notes 58-63 and accompanying text.

90. Ali v. INS, 661 F. Supp. 1234, 1246 n.6. (D. Mass. 1986).

Aliens who marry after the commencement of exclusion hearings, however, have no liberty interest in the marriage and family relationship, or in petitioning the government. *See supra* notes 64-70 and accompanying text. Under Section Five, an alien who marries a U.S. citizen or permanent resident during an exclusion hearing is not given an opportunity to prove the bona fides of his or her marriage. *See* IMFA § 5 (amending INA § 245; 8 U.S.C. § 1255 (1982)). The discretionary remedy of adjustment of status based on these marriages may not be granted to these aliens. A visa petition on their behalf for immediate relative or "preference" status may not be obtained until they have resided outside the country for two years after the marriage. *Id.* Section Five creates, in form and in fact, an irrebuttable presumption that the marriage is a "sham" and thus makes the marriage invalid for immigration law purposes. *See* Comment, *supra* note 5, at 1106-08.

This exclusion proceeding can hardly be considered a "fair hearing" since this provision does not allow an immigration judge to consider and evaluate competent evidence. *Cf.* Gung You v. Nagle, 34 F.2d 848, 851-53 (9th Cir. 1929). As discussed earlier, however, an alien seeking entry into the United States is not entitled to procedural due process and Congress "can fashion any procedures it deems appropriate to determine whether an entrant is admissible." *See supra* notes 64-70 and accompanying text. As the Supreme Court succinctly stated in Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953):

> It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law . . . . But an alien on the threshold of initial entry stands on a different footing: Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.

While commentators have consistently denounced this holding, it is presently the prevailing view. *See, e.g.*, 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 11:5 (1978); Comment, *supra* note 66, at 1322-24. Thus, although Section Five appears to be procedurally deficient, it would pass constitutional muster as applied to exclusion hearings because this "is due process as far as an alien denied entry is concerned." Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953).

91. Azizi v. INS, Civil No. H87-957AHN (1988) (granting U.S. citizen and alien couple's preliminary injunction in an action challenging the INS's enforcement of Section Five); *Cf.* Ali v. INS, 661 F. Supp. at 1245.

and nature of the hearing must be balanced against the competing private and governmental interests at stake.[92] Under the balancing test set out in *Mathews v. Eldridge*,[93] the court must consider: (1) the interest at stake for the individual; (2) the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards; and (3) the interest of the government in using the current procedures rather than additional or different procedures. Although this provision is in some respects capable of withstanding judicial scrutiny, in other respects it is patently unconstitutional.[94]

1. Private interests affected—The procedures provided by Section Five place an alien who has entered into a valid marriage after the initiation of a deportation hearing in the proverbial Catch-22. As discussed earlier, the liberty and property interests implicated by Section Five are of substantial importance.[95] When the government seeks to burden and adversely pronounce on the validity of a marriage, it implicates fundamental interests and impinges on "interests of basic importance in our society."[96] More-

92. *See generally* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Landon v. Plasencia, 459 U.S. 21, 34 (1982); Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

93. 424 U.S. 319 (1976).

94. Aliens who marry U.S. citizens or permanent residents before deportation or exclusion hearings have started can hardly complain of a due process violation. Under Section Five, aliens who marry prior to the commencement of exclusion or deportation hearings are provided the opportunity to prove the validity of their marriages. *See generally supra* notes 6 & 7 and accompanying text. If the alien succeeds in making this showing, the Attorney General may adjust his or her status, and grant the alien a two-year conditional residency status. *See supra* note 6. Unlike aliens who marry after the initiation of exclusion or deportation hearings, these aliens may remain in this country, and eventually obtain permanent resident status based on such a marriage. *See supra* notes 6 & 7 and accompanying text. Section Five, in this context, provides the procedural safeguards generally afforded aliens in exclusion and deportation hearings. Accordingly, these aliens would be hard pressed to claim a procedural due process violation.

Moreover, aliens who marry after exclusion proceedings have commenced have no grounds for claiming a due process violation. *See supra* note 90. As discussed earlier, Section Five deprives these aliens of no constitutionally protected liberty interest. *See supra* notes 64-70 & 90 and accompanying text.

95. *See, e.g.*, Stokes v. INS, 393 F. Supp. 24, 29 (S.D.N.Y. 1975) (procedures employed by INS to investigate I-130 petitions are subject to judicial scrutiny because they infringe upon the fundamental right to marriage); *see also* Ali v. INS, 661 F. Supp. at 1246 n.6. These aliens stand to lose the right to remain with or to rejoin their immediate family, "a right that ranks high among the interests of the individual." Landon v. Plasencia, 459 U.S 21, 34 (1982). These aliens may also "lose the right to stay and live and work in this land of freedom." *Id.* quoting Bridges v. Wixon, 326 U.S. 135, 154 (1945); *see also* Moore v. City of East Cleveland, 431 U.S. 494, 499, 503-04 (1977) (plurality opinion); *cf.* Zablocki v. Redhail, 434 U.S. 374, 383 (1978); *see also* Plaintiff's Memorandum in Support of Their Motion for Summary Judgment, Smith v. INS, No. 87-1988-C.

96. Plaintiff's Memorandum in Support of their Motion for Summary Judgment at 21, Smith v. INS No. 87-1988-C, (citing Boddie v. Conn., 401 U.S. 371, 376 (1971)).

over, the couple's interest in petitioning the government is adversely affected by Section Five, which prevents the alien from presenting, and the immigration judge and Attorney General from considering, evidence on the bona fides of the marriage.[97] However, in order to protect these interests the couple is constitutionally guaranteed procedures that allow them to prove the bona fides of their marriage during deportation hearings.[98] This means that they must be provided with a full and fair hearing on the issue of deportability, an opportunity to present evidence on the bona fides of their marriage and a reasonable opportunity to apply for any discretionary remedies, such as an adjustment of status.[99] Since Section Five deprives them of these procedures, it destroys their constitutionally protected interests in marriage, family association, and in petitioning the government. Section Five thus renders the deportation hearing unfair.[100]

2. *Erroneous deprivations*—Consideration must be given to the risk that an alien who enters into a bona fide marriage after the commencement of deportation hearings will be erroneously deported due to the procedural deficiencies of Section Five.[101] The risk of an erroneous deportation decision is real and severalfold.

Section Fi e substantially burdens these fundamental interests of the U.S. citizen or permanent re ient and alien spouse. By essentially creating an irrebuttable presumption of marriage .ud (*see supra* note 11 and accompanying text), Section Five is sure to disrupt marriages and family relationships. Section Five also burdens these interests by imposing a two-year foreign residency requirement without providing the alien a prior opportunity to be heard on the validity of his marriage. *Id.*

97. Section Five deprives couples who marry after the deportation hearing has commenced of their constitutionally protected interest in petitioning the government to have the alien declared the U.S. citizen's immediate relative. The Constitution and the INA guarantees these aliens a reasonable opportunity to present evidence on their behalf. *See* INA § 242(b); 8 U.S.C. § 1252(b) (1982). By not allowing aliens who marry during deportation hearings to prove the bona fides of their marriage, however, Section Five renders this procedural safeguard meaningless. *See supra* notes 62-63 and accompanying text. Moreover, although the INA guarantees these aliens an opportunity to apply for an adjustment of status, Section Five drives a wedge through this procedure by forbidding both the immigration judge from considering and the Attorney General from granting permanent resident status to aliens who marry during deportation hearings. *See generally* INA § 245; 8 U.S.C. § 1255 (Supp. 1987). Even aliens who marry prior to the initiation of exclusion hearings, and who are not protected by the Constitution, receive these procedural safeguards. Accordingly, Section Five effectively blocks important procedures that guarantee a fair hearing to aliens who otherwise would have an opportunity to present evidence on the bona fides of their marriage, and who eventually would be able to apply for an adjustment of status, had they fortuitously married prior to the initiation of deportation hearings. *See supra* notes 52-63 and accompanying text.

98. *See supra* notes 52-63 and 82-90 and accompanying text. *Cf.* Rose v. Woolwine, 344 F.2d 993, 995-96 (4th Cir. 1965).

99. *See supra* notes 52-63 and accompanying text.

100. The INA also recognizes that more may be at issue in these proceedings than the bare question of deportability. *See Rose*, 344 F.2d at 996.

101. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 544 (1985).

Couples who enter into valid marriages during deportation hearings are erroneously deprived of their liberty interest in living together as a married couple in this country.[102] Depriving the U.S. citizen (or permanent resident) and alien spouse of their liberty and property interests without providing any procedure for determining whether their marriage is bona fide for immigration law purposes inevitably leads to erroneous decisions.[103] Minimal procedural safeguards to protect couples from being erroneously deprived of their fundamental interests are necessary. For example, a limited pre-deprivation inquiry into whether there are facts to support a reasonable probability that the alien married to circumvent the immigration laws would effectuate the congressional purpose in deterring sham marriages, and serve to minimize the risk of erroneous deportation decisions.[104] Accordingly, if these deportation hearings are to ensure fairness,[105] they must provide aliens with an opportunity to present evidence on the bona fides of their marriage, regardless of when the marriage takes place.[106]

3. Government interest—The third factor of the *Mathews* balancing test requires an evaluation of the governmental interest and the burden in using the procedures established by Section Five, rather than additional or different procedures.[107] Providing aliens who marry after deportation hearings with minimal procedures for determining whether their marriages are bona fide will further the congressional purpose in enacting Section Five. Moreover, this proposal does not present an administrative or financial

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102. Even though the main purpose of the Immigration Marriage Fraud Amendments is to deter couples from engaging in sham marriages, Section Five adversely impacts on the "law-abiding majority" who enter into bona fide marriages. *See infra* notes 231-38 and accompanying text.

103. *See supra* notes 77-90 and accompanying text.

104. *See* Plaintiff's Memorandum in Support of their Motion for Summary Judgment at 23-27, Smith v. INS, No. 87-1988-C.

105. The prospect of error is also enhanced because Section Five deprives aliens who marry during deportation hearings of an opportunity to apply for an adjustment of status. Rather than focusing on the validity of the marriage, Section Five looks to the timing of the marriage. *See infra* notes 257-61 and accompanying text. While the motives of aliens who marry during deportation hearings may be suspect, it does not follow that they all have fraudulent intentions. *See* Comment, *supra* note 5, at 1089. Accordingly, to avoid erroneous decisions, aliens in deportation hearings must be allowed the opportunity to present evidence on the bona fides of their marriage and to adjust their status regardless of when the wedding ceremony takes place.

106. *See* Landon v. Plasencia, 459 U.S. 21, 36 (1982).

Those aliens who fortuitously marry prior to the commencement of exclusion or deportation hearings are provided this opportunity. Thus, the risk of error in this context is slim. However, erroneous deportation decisions will be rendered with respect to aliens who marry after the initiation of such hearings because they are deprived of the opportunity to present evidence establishing the bona fides of their marriages.

107. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

burden on the government.

First, the congressional purpose in enacting the Immigration Marriage Fraud Amendments was threefold. As the legislative history of Section Five indicates, Congress was highly interested in deterring immigration related marriage fraud,[108] providing benefits to aliens who enter into valid marriages, and having deportation hearings reach accurate and reliable decisions.[109] These interests would all be served by providing those aliens involved in deportation hearings with an opportunity to present evidence on the validity of their marriages even if it was entered into after the initiation of such hearings. By so doing, Congress could continue to combat sham marriages by providing benefits to only those aliens who have entered into legitimate marriages with U.S. citizens or permanent residents.

Second, providing aliens who are adversely affected by Section Five with procedures for determining the bona fides of their marriage imposes no additional administrative burden on the government. The pre-Section Five administrative procedures provided aliens with an opportunity to present evidence on the bona fides of their marriage, and served to effectuate the government's interest in deterring sham marriages.[110] In enacting Section Five, Con-

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108. *See* H.R. REP. No. 906, 99th Cong., 2d Sess. 6 (1986); S. REP. No. 491, 99th Cong., 2d Sess. 1-2 (1986).

109. *See* S. REP. No. 491, 99th Cong., 2d Sess. 6-7 (1986).

110. INS investigators focus on the intent of the parties at the time the marriage is celebrated in determining whether to grant an alien permanent resident status based on such marriage. *See generally* Bark v. INS, 511 F.2d 1200 (9th Cir. 1975); Whetstone v. INS, 561 F.2d 1303, 1309 (9th Cir. 1977); Lutwak v. United States, 344 U.S 604 (1953); Danilov & Nerheim, *supra* note 4, at 310. When an immigration petition based on an alien's marriage to a U.S. citizen or permanent resident is submitted, the INS currently employs the following three methods in determining whether the marriage is valid: (1) Parallel marriage fraud interviews, (2) Post-marital supervision of the couple, and (3) "Bedcheck" investigations. *See generally* Comment, *Petitioning on Behalf of an Alien Spouse: Due Process Under the Immigration Laws*, 74 CALIF. L. REV. 1747, 1750-53 (1986); *Fraudulent Marriage Hearing*, *supra* note 1, at 25-31 (discussion of investigatory methods employed by Consular Offices abroad); E. HARWOOD, IN LIBERTY'S SHADOW: ILLEGAL ALIENS AND IMMIGRATION LAW ENFORCEMENT 143-67 (1986).

While the immigration petition is pending, the INS will conduct a parallel marriage fraud interview. *See Fraudulent Marriage Hearing*, *supra* note 1, at 28. The alien and his or her spouse while in separate rooms are simultaneously asked a parallel series of questions about many aspects of the marital relationship. *See* Comment, *The Marriage Viability Requirement: Is It Viable?*, 18 SAN DIEGO L. REV. 89, 98 (1980). These questions are designed to elicit discrepancies in the couple's answers. *See Fraudulent Marriage Hearing*, *supra* note 1, at 61; *but see*, Danilov & Nerheim, *supra* note 4, at 311. For example, the spouses may be asked where and when they met, whether correspondence is available showing that the couple maintained contact while the petition was being processed, details about their marriage ceremony, what gifts they have given each other since the wedding ceremony, the decor of their residence, the division of the household chores, each spouse's favorite activity, or simply what they each had for breakfast on the morning of the interview. *See* C. GORDON & H. ROSENFIELD, *supra* note 1, at ch. 2.18; A. FRAGOMEN, A. DEL REY & S. BERNSEN, IMMIGRATION LAW AND BUSINESS II-40 (1986); Roberts, *Sex and the Im-*

gress did not overturn these procedures. Rather, it delayed the availability of these administrative procedures with respect to aliens who marry during deportation hearings. Upon satisfaction of the two-year foreign residency requirement, the returning alien is provided the opportunity to establish the bona fides of his marriage via these procedures.[111] Therefore, providing aliens the op-

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migration Laws, 14 SAN DIEGO L. REV. 9, 40 (1976); Note, *The Constitutionality of the INS Sham Marriage Investigation Policy*, 99 HARV. L. REV. 1238, 1239-42 (1986); Danilov & Nerheim, *supra* note 4, at 311. The couple may also be interrogated on more intimate matters, such as the method of birth control used, and the couple's sexual conduct. *See generally* Note, *supra* note 66.

After the interview, if it is found that the couple does not commonly share or know what a married couple is reasonably expected to share, or if the alien has a particularly weak claim, the INS examiners have several options. They may persuade the U.S. citizen or permanent resident spouse to "voluntarily" withdraw the petition. *See* Danilov & Nerheim, *supra* note 4, at 311; E. HARWOOD, *supra*, at 153. Or, as will be discussed in more depth, the examiners may deny the immigration petition, and institute deportation hearings against the alien. In any event, the INS examiners may send the file to the fraud unit for further post-marital supervision of the couple.

At this second stage of the investigative process, the INS investigator's task is, in theory, to uncover information that will either support a grant or denial of the immigration petition. *See* E. HARWOOD, *supra*, at 154. Investigators, who have broad discretion, may interview the couple's neighbors, landlords, friends and relatives to verify that the couple cohabitates and maintains an appearance of wedlock. *See* E. HARWOOD, *supra*, at 154. The civil registry or church records may be reviewed to determine if one of the parties has an existing marriage. *See Fraudulent Marriage Hearing*, *supra* note 1, at 27. Income tax returns, insurance policies, employment applications, bank statements, property title documents and the like are sometimes checked to determine if the spouses claim each other as dependents or beneficiaries, or if they hold joint property. *See* E. HARWOOD, *supra*, at 154. Finally, INS records are checked when investigators suspect the citizen or permanent resident has been previously involved in attempting to commit marriage fraud. *Id.* at 155.

The third method the INS resorts to is a "bedcheck." At this stage, the investigator's main aim is to determine if the couple is in fact living together as husband and wife. *See* E. HARWOOD, *supra*, at 154-55. The standard procedure during a "bedcheck" is first to ascertain if the alien and his or her spouse live in the same dwelling. If the alien is absent the investigators may ask the citizen spouse to show them the absent spouse's clothing, and they sometimes check the absent spouse's dirty clothes or personal effects. The investigators make sure that the clothes are the alien spouse's right size, for the clothes may belong to the citizen's "real" spouse. Lastly, they look for evidence of whether or not the couple sleeps under the same roof.

If these investigatory procedures reveal objective evidence of the couple's fraudulent relationship, the INS may deny the couple's immigration petition and commence deportation hearings against the alien. *See generally* 1A C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 4.7d (1987); *see also Matter of T*, 8 I & N Dec. 493, 496 (BIA 1959). At the deportation hearing, the government generally shoulders the burden of proving that the alien is deportable. The INS may meet its burden of establishing the couple's fraudulent relationship with evidence that: (1) a marriage broker arranged the marriage; (2) the couple was not sufficiently acquainted prior to the marriage; (3) there is great disparity in the spouses' ages, cultures or religious ties; (4) the alien paid the U.S. citizen or permanent resident spouse to participate in the marriage and to file the immigration petition; (5) the alien and his or her spouse never lived together after they married; or (6) the couple did not intend to continue the marriage relationship (e.g., a prenuptial agreement to this affect). *See* Danilov & Nerheim, *supra* note 4, at 311-19; *Fraudulent Marriage Hearing*, *supra* note 1, at 29.

111. *See supra* note 7.

portunity to be heard prior to, rather than after, depriving them of their implicated liberty and property interests would not impose additional burdens on the government.

Third, providing aliens with an opportunity to present evidence on the bona fides of their marriage during deportation hearings would not otherwise alter the character of the proceeding.[112] At the hearing, the immigration judge is determining whether the alien should be deported, or whether there are equitable factors, such as a marriage to a U.S. citizen or permanent resident, that would militate against deportation. The evidence that will be introduced by aliens who marry after the commencement of deportation hearings to establish the bona fides of their marriage would be very similar to the evidence that aliens who marry prior to the initiation of deportation and exclusion hearings would be presenting.[113]

Fourth, the federal government also has an interest in ensuring that deportation decisions be made as economically and expeditiously as possible.[114] A limited inquiry into the bona fides of the alien's marriage, however, would not impose an additional financial burden on the government. As discussed previously, an alien adversely affected by Section Five will be provided with a hearing on the bona fides of his marriage after he completes his two-year foreign residency requirement. This provision has the effect of deferring, and not removing, the cost of the hearing to the government.[115] Therefore, the proposed pre-deprivation hearing would not impose insurmountable administrative or financial obstacles on the government.

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112. In fact, this would diminish the prospect of an erroneous deportation decision. *See* Comment, *supra* note 5, at 1106.

113. Congress has allowed aliens who marry prior to the commencement of deportation and exclusion hearings to rely on objective indices of the bona fides of the marriage in establishing their right to remain in or enter this country. *See* S. REP. No. 491, 99th Cong., 2d Sess 5-6 (1986). *See also supra* notes 105-09 and accompanying text. In addition, the immigration judges are well-versed in the evidentiary standards involved in deportation hearings, so allowing these aliens to present evidence of the validity of their marriages will protect these individual interests and not produce additional burdens on the government. Extending this opportunity to present evidence to aliens who marry after becoming involved in deportation hearings would cure the procedural deficiencies of Section Five.

114. *See* Landon v. Plasencia, 459 U.S. 21, 34 (1982); *see also* Comment, *Developments in the Law*, *supra* note 18, at 1390-95.

115. The legislative history of the Immigration Marriage Fraud Amendments supports this conclusion. The Congressional Budget Office reported to the Senate and House Committees that enactment of S. 2270, which contained no Section Five counterpart; or H.R. 3737, which included Section Five, "would result in no net costs to the federal government and in no costs to state and local governments." *See* S. REP. No. 491, 99th Cong., 2d Sess. 14 (1986); H.R. REP. No. 906, 99th Cong., 2d Sess. 13 (1986); *see also* Plaintiff's Memorandum in Support of Their Motion for Summary Judgment at 26, Smith v. INS, No. 87-1988-C.

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4. Conclusion of the due process analysis—The dispositive question that a court will face is whether the *Mathews* balancing test dictates that under a due process analysis, aliens who marry U.S. citizens or permanent residents during deportation hearings must be provided the opportunity to establish the bona fides of their marriage.[116] A court's function will be to determine whether the procedures provided by Section Five meet the "fundamental fairness" requirement of the due process clause, and not to impose procedures that simply displace congressional choices of policy.[117] The determination that a pre-deprivation hearing is required because Section Five deprives aliens who marry after the initiation of deportation hearings of due process will be in keeping with this limitation.[118] Section Five deprives these aliens of the fair procedures guaranteed by the fifth amendment.[119] The onerous burden on the alien's liberty and property interests combined with the substantial risk that erroneous deportation decisions will be rendered weigh heavily in favor of a pre-deprivation minimal inquiry into the bona fides of the alien's marriage. Moreover, because the alien is already involved in deportation hearings, his production of evidence on the bona fides of the marriage would not create insurmountable administrative and fiscal burdens on the government.[120] In finding Section Five procedurally deficient as applied to these deportation hearings, a court would thus be reaffirming the principle that, although Congress may provide for the deportation of aliens on virtually any substantive ground, the procedures at such deportation hearings must comport with the fifth amendment's mandate of due process.[121]

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116. The Supreme Court has suggested that in situations where the private interests are at their strongest, the government's interests at their weakest, and the risk of error at their peak, the due process clause is violated and the appropriate procedural safeguards must be provided. *See* Lassiter v. Dept. of Social Servs., 452 U.S. 18, 31 (1981).

117. *See* Landon v. Plasencia, 459 U.S. 21, 34-35 (1982).

118. The Court would not necessarily have to decide what procedural protections would have to be provided at the pre-deprivation hearing. Rather, it could remand the case to the lower court to determine the contours of the hearing. *See, e.g.,* Landon v. Plasencia, 459 U.S. 21, 32-36 (1982).

119. *See supra* notes 52-63 and accompanying text.

120. In fact, Section Five increases the administrative burdens and inconvenience by requiring a hearing two years later where the alien will be allowed to prove the bona fides of the marriage. *See* Comment, *supra* note 5, at 1106.

121. *See* Galvan v. Press, 347 U.S. 522, 531 (1954); *see also* Comment, *Developments in the Law*, *supra* note 18, at 1384.

It has been suggested that Section Five could withstand a procedural due process challenge by aliens in deportation hearings because this provision "does not directly interfere with the procedural due process afforded aliens in these proceedings." *See supra* note 5, at 1104. However, the validity of the alien's marriage to a U.S. citizen or permanent resident, even if entered into after the commencement of deportation proceedings, is critical and decisive of the alien's claim to remain in the United States. *See supra* notes 71-90 and accompanying text. The related contention that it is proper to allow some aliens who are

III. Equal Protection Analysis

The fifth amendment prohibits the federal government from enacting statutes which deny any person the equal protection of the laws.[122] The term "person" in the amendment encompasses

involved in exclusion hearings, but not those involved in deportation hearings, to establish the bona fides of their marriage is ironic when it is understood that all aliens involved in deportation hearings, regardless of when their marriage takes place, have a constitutionally guaranteed right to be heard. Moreover, the determination of whether the alien's marriage is valid for immigration law purposes can be made during deportation hearings, but only if the alien is provided an opportunity to be heard. *See generally* Rose v. Woolwine, 344 F.2d 993 (4th Cir. 1965). Unfortunately, Section Five deprives these aliens of this opportunity.

It has also been argued that Section Five is constitutional as applied to deportation hearings since it is a substantive change in congressional policy in the immigration area. *See* Comment, *supra* note 5, at 1104. This argument is premised on the general principle that the congressional power to establish deportation grounds is virtually limitless. *See generally* C. Gordon & E. Gordon, *supra* note 4, at ch. 4.3. Thus, the argument goes, in enacting Section Five, Congress indicated that an alien's marriage to a citizen or permanent resident of the United States after the commencement of deportation hearings is a ground for deportation, and is no longer a basis for preventing an alien's deportation via an adjustment of status. *See* Comment, *supra* note 5, at 1104. This argument is seriously flawed.

The Supreme Court has rejected a similar argument in Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985). In so doing, Justice White, writing for the majority, stated:

> The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."

Id. at 541 (quoting Arnett v. Kennedy, 416 U.S. 134, 167 (1974)). Section Five presents a similar case. As discussed earlier, Congress has elected to confer property interests to aliens who marry U.S. citizens or permanent residents. *See supra* notes 73-90. The Supreme Court has made clear that deportation hearings must provide these aliens with the basic ingredients of a fair hearing, and must conform with the constitutional mandate of procedural due process. *See generally* C. Gordon & E. Gordon, *supra* note 4, at ch. 4.3. Aliens involved in deportation hearings have a constitutionally and statutorily protected right to present evidence on the bona fides of their marriage and at least a statutorily protected right to adjust their status on the basis of a marriage to a U.S. citizen or permanent resident. *See supra* notes 52-63 and accompanying text. Section Five, however, deprives aliens and U.S. citizens of their liberty and property interests in marriage, family association, and in petitioning the government "without appropriate procedural safeguards." *See supra* notes 73-90 and accompanying text. Accordingly, even if these procedural safeguards could be statutorily changed by Congress, an alien is still constitutionally entitled to these protections under the due process clause of the fifth amendment. *See Cleveland Bd. of Educ.*, 470 U.S. at 542; *cf.* Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 173-76 (1974). (Although members of a class action formed under Fed. R. Civ. P. 23(b)(1) are not entitled to the statutorily-mandated individual notice of the class suit, they are constitutionally guaranteed "reasonable notice.")

122. U.S. Const. amend. V. The constitutional guarantees of substantive due process and equal protection of the laws are two analytical frameworks the Supreme Court employs in analyzing legislation that intrudes upon individual liberty and property interests. *See generally* Strickman, *Marriage, Divorce and the Constitution*, 22 B.C.L. Rev. 935

United States citizens, as well as aliens.[123] The equal protection principle, however, does not require that legislation treat every person the same in all circumstances; it only mandates that persons "similarly situated" be treated equally.[124] The U.S. Supreme Court has devised a three-tiered standard for determining the validity of federal legislation that is challenged as denying equal protection.[125]

At the first tier, a statutory classification is generally measured against the minimum scrutiny test.[126] Under this analysis, the federal statute is presumed to be valid and will be sustained if the classification created by the legislation is "rationally related" to a legitimate government interest.[127] This relatively relaxed standard of review reflects the Court's awareness that the drawing of lines, which inevitably create different classes of individuals, is a peculiar legislative branch function.[128] The Court presumes that improvident decisions made by Congress will eventually be rectified by the democratic process.[129]

(1981); *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156 (1980) [hereinafter *The Constitution and the Family*]. The fifth amendment expressly guarantees due process, and the courts have interpreted this clause as nplicitly guaranteeing the equal protection of the laws. *See, e.g.*, Califano v. Boles, 443 U.S. 282, 288-97 (1979); *see also* Comment *Developments in the Law*, *supra* note 18, at 1418 n. 123. Even though the Court generally treats them as distinct modes of analysis, it has done little to illuminate the distinctions. *See The Constitution and the Family*, *supra*, at 1193. The judicial scrutiny applied in substantive due process cases is theoretically different despite the Court's use of language similar to that found in equal protection cases. *See e.g.*, Zablocki v. Redhail, 434 U.S. 374, 385-88 (1978); *see also The Constitution and the Family*, *supra*, at 1194. In general, nevertheless, if a statutory classification does not comply with the mandates of equal protection it will likewise not be consistent with substantive due process guarantees. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (classification which served to penalize the fundamental right to travel violated both the equal protection and due process clauses); *see also Zablocki*, 434 U.S. at 385-88; Kriebel v. Hein, 429 U.S. 288 (1977).

123. *See* Plyer v. Doe, 457 U.S. 202, 210 (1982); Graham v. Richardson, 403 U.S. 365, 370 (1971); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); Truax v. Raich, 239 U.S. 33, 39 (1915).

124. *See* Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985) (the equal protection clause "is essentially a direction that all persons similarly situated should be treated alike."); *see also* Comment, *Intermediate Equal Protection Scrutiny of Welfare Laws That Deny Subsistence*, 132 U. PA. L. REV. 1547 (1984).

125. *See generally Cleburne*, 473 U.S. at 439-441 (discussing the current structure of equal protection analysis); L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 1436-1536, 1601 (1988); *The Constitution and the Family*, 93 HARV. L. REV. 1156, 1188 (1980).

126. *See generally* Schweiker v. Wilson, 450 U.S. 221, 230 (1981); *Califano*, 443 U.S. at 288-293; San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973).

127. *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174-177 (1980); *San Antonio School Dist.*, 411 U.S. at 40-41; Trimble v. Gordon, 430 U.S. 762, 767 (1977); New Orleans v. Dukes, 427 U.S. 297, 304-06 (1976).

128. The minimum scrutiny test is generally applicable to social and economic legislation. *See* Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976).

129. *See Cleburne*, 473 U.S. at 440 ("the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.")

The Court has also established a "second tier" of more intrusive and stringent judicial review known as strict scrutiny.[130] Under this test, if a classification impinges upon a "fundamental" right[131] or involves a "suspect" class,[132] it is subjected to the strictest of judicial scrutiny.[133] To pass muster under strict scrutiny, the government must establish that the legislative classification: (1) is necessary to promote a compelling governmental interest, and (2) is narrowly tailored so that there are no less restrictive alternatives in meeting such an interest.[134] The government shoulders a heavy burden of justifying the classification, and the courts will closely scrutinize the statute in light of the governmental interests at stake.[135]

Since 1976, the third tier of review, which falls somewhere between minimum and strict scrutiny, has become a regular part of the Court's equal protection analysis.[136] Legislative classifications based on gender and illegitimacy have generally triggered this mid-level scrutiny.[137] In recent years, however, a growing range of cases involving classifications other than gender and illegitimacy, and numerous "important" although not "fundamental" interests have triggered this heightened level of review.[138] Under this test, a classification fails unless the government shows that it is "substantially related" to an important governmental interest.[139] Moreover, in applying this test, unlike minimum scrutiny review, the Court will not hypothesize findings of fact that would link the classifica-

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130. *See The Constitution and the Family*, *supra* note 122, at 1188 and cases cited therein.

131. *See* Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (fundamental right to marriage); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (fundamental right to interstate travel); Roe v. Wade, 410 U.S. 113, 150-55 (1973) (fundamental right to abortion). However, the mere prospect that a statute discourages an individual from engaging in constitutionally protected activity is not enough to trigger the strict scrutiny test. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 316 (1980).

132. *See* San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); McLaughlin v. Fla., 379 U.S. 184, 192 (1964).

133. *See Roe*, 410 U.S. at 155; *Shapiro*, 394 U.S. at 634.

134. *Shapiro*, 394 U.S at 634.

135. *See generally* Dunn v. Blumstein, 405 U.S. 330, 343 (1972); Hunter v. Erickson, 393 U.S. 385, 391-93 (1969).

136. *See* Craig v. Boren, 429 U.S. 190 (1976) (applying mid-level scrutiny to a gender classification); *see also* Plyer v. Doe, 457 U.S. 202, 223-224 (1982) (classification of children of illegal aliens); L. TRIBE, *supra* note 125, at 1601.

137. *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982) (gender classification); Mills v. Habluetzel, 456 U.S. 91, 99 (1982) (illegitimacy classification).

138. *See, e.g.*, Plyer v. Doe, 457 U.S. 202 (1981) (applying heightened level of review to school legislation which classified the children of illegal aliens); *see also* L. TRIBE, *supra* note 125, at 1601.

139. *See Cleburne*, 473 U.S. at 441 ("A gender classification fails unless it is substantially related to a sufficiently important governmental interest.").

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tion in question to an articulated legislative purpose.[140]

A. Strict Scrutiny

1. Suspect class—In *San Antonio School District v. Rodriguez*,[141] the U.S. Supreme Court identified a "suspect" class, generally entitled to the protection of strict scrutiny, as one "saddled with such, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[142]

Aliens are a quintessential example of a group that has long been subjected to purposeful unequal treatment. Legislative classifications based on alienage are thus generally considered "suspect" and subject to strict scrutiny.[143] However, under current law, only state classifications based on alienage are analyzed under strict judicial scrutiny.[144] On the other hand, due to the broad power of Congress in the immigration area,[145] the Court does not subject similar federal classifications to this heightened level of review.[146]

Because Congress enacted Section Five of the Immigration Marriage Fraud Amendments, the Court will not characterize the classifications it creates as "suspect," despite the fact that they apply only to aliens. Therefore, under the "suspect" class branch of equal protection analysis, Section Five may be evaluated under a test lower than strict scrutiny.[147]

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140. *See Craig*, 429 U.S. at 198-201; *see also The Constitution and the Family*, *supra* note 122, at 1188.

141. 411 U.S. 1 (1973).

142. *Id.* at 28.

143. The Court has recognized that aliens are a socially and politically handicapped group within the United States. *See* Graham v. Richardson, 403 U.S. 365, 372 (1971). Aliens have come from abroad and faced varying degrees of hostility, suspicion and abuse prior to their assimilation into American society. *See generally* Shyameshwar Das, *Discrimination in Employment Against Aliens—The Impact of the Constitution and Federal Civil Rights Law*, 35 U. PITT. L. REV. 499, 533-540 (1974). Their status as aliens has restricted them from enjoying and exploiting opportunities that would otherwise have been available to them in the United States. *Id.* They have been isolated, stigmatized and stereotyped. *See In re* Griffiths, 413 U.S. 717 (1973); Plyer v. Doe, 457 U.S. 202, 216 n.14 (1981); McLaughlin v. Fla., 379 U.S. 184, 192 (1964).

144. *See Graham*, 403 U.S. at 372. However, when a state classification based on alienage relates to a government function or involves the inculcation of American values to school children, the Court generally employs the minimum scrutiny test. *See generally* Cabell v. Chavez-Salido, 454 U.S. 432 (1982).

145. *See supra* notes 13-47 and accompanying text.

146. *See Plyer*, 457 U.S. at 223-24 (applying mid-level scrutiny to a legislative classification of children of illegal aliens); Mathews v. Diaz, 426 U.S. 67, 77-87 (1976) (applying minimum scrutiny to alien classification created by Congress).

147. *See infra* notes 203-261 and accompanying text.

2. Fundamental rights—Under the "fundamental right" branch of equal protection review, the strict scrutiny test is generally triggered when a statutory classification either penalizes an individual's access to a fundamental right,[148] or imposes a burden on one who has exercised such a right.[149] There are arguably two rights obstructed by Section Five: the right to marry and the right to familial integrity.

a. Fundamental right to marry—In our society, marriage has long been regarded as one of the most basic and sacred of social institutions.[150] For this reason, the corresponding individual interests have been recognized as falling within the constitutional right of privacy.[151] A long line of Supreme Court decisions makes it clear that although not explicitly mentioned in the Constitution, there is a constitutionally protected right to marry which occupies the status of a fundamental right.[152] As the late Chief Justice Warren, writing for the majority in *Loving v. Virginia*[153] stated: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[154] Thus, when a federal government classification significantly burdens or impinges upon an individual's decision to marry, courts generally subject such classifications to the strict scrutiny test.[155]

b. Fundamental right to familial integrity—Another protected right Section Five may intrude upon has been characterized as the right of the immediate family to live together, or family integrity.[156] Although the Constitution is silent on the subject of families, freedom of personal choice in matters of family life have long been within the fundamental right of privacy.[157] The Supreme

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148. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 383 (1978); Shapiro v. Thompson, 394 U.S. 618, 638 (1969); *See also The Constitution and the Family, supra* note 122, at 1192.

149. *Shapiro*, 394 U.S. at 634.

150. *See* Strickman, *supra* note 122, at 949-58; *The Constitution and the Family, supra* note 122, at 1159-60.

151. *See* Roe v. Wade, 410 U.S. 113, 152-53 (1973).

152. *See Zablocki*, 434 U.S. at 383; United States v. Kraus, 409 U.S. 434, 444 (1973); Boddie v. Conn., 401 U.S. 371, 376 (1971); Loving v. Va., 388 U.S. 1, 12 (1967); Griswold v. Conn., 381 U.S. 479, 486, 495 (1965).

153. 386 U.S. 1 (1967).

154. *Id.* at 12.

155. *See infra* notes 165-202 and accompanying text.

156. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 504-05 (1977) (plurality opinion).

157. Although this right has been asserted under various constitutional provisions, it has recently come to be rooted in due process protections. *See* Santosky v. Kramer, 455 U.S. 745, 752-57 (1982). The right of familial integrity is a value basic to our heritage, and protected by the liberty guarantee of the fifth amendment. *See* Smith v. Org. of Foster

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Court first extended substantive protection to the right of the extended family to live together in *Moore v. City of East Cleveland.*[158] Writing for the plurality, Justice Powell characterized this right as "fundamental" and went on to state: "[W]hen the government intrudes on choices concerning family living relationships, this Court must examine carefully the importance of the governmental interest advanced and the extent to which they are served by the challenged regulation."[159] Accordingly, the Court has overturned government procedures that do not adequately protect an individual's right to maintain a familial relationship.[160]

In determining whether it will apply strict scrutiny to Section Five, the Court will look to the directness[161] and substantiality[162] of the statute's interference with an implicated fundamental right. Generally, if the statute directly and substantially intrudes upon such rights, the Court characterizes the interference as "significant" and applies strict scrutiny.[163] On the other hand, if the interference is either indirect or insubstantial, the Court will use either the mid-level scrutiny or minimum scrutiny to determine the constitutionality of the statute.[164]

3. Interference with the right to marry—The extent to which the Constitution protects an individual's decision to marry received extensive consideration in *Zablocki v. Redhail.*[165] The Court attempted to reconcile the holding in this case with its arguably inconsistent decision earlier the same term in *Califano v. Jobst.*[166] In *Califano*, at issue were sections of the Social Security Act which provided for the termination of a dependent child's

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Families, 431 U.S. 816, 845 (1977); Prince v. Mass., 321 U.S. 158, 166 (1944); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925). The Supreme Court recently indicated that the alien's right to remain with or to rejoin his or her family is "a right that ranks high among the interests of the individual." Landon v. Plasencia, 459 U.S. 21, 34 (1982).

158. 431 U.S. 494, 504-05 (1977) (plurality opinion).

159. *Id.*

160. *See Santosky*, 455 U.S. at 752; *Moore*, 431 U.S. at 504-05.

161. A direct interference with a fundamental right is similar to a condition precedent in contract law. This type of interference would make a prospective couple's marriage valid contingent on them meeting a requirement imposed by the government. On the other hand, an indirect interference is more like a condition subsequent in contract law. This type of interference "weights the choice by imposing certain consequences upon marriage but leaves the ultimate choice with the individual." *See The Constitution and the Family*, *supra* note 122, at 1255.

162. In determining whether a statute substantially interferes with the decision to marry, the Court measures the relative burdens or difficulties imposed by the statute. *See The Constitution and the Family*, *supra* note 122 at 1248-57.

163. *See infra* notes 165-200 and accompanying text.

164. *See infra* notes 160-70 and accompanying text.

165. 434 U.S. 374, 386-90 (1978).

166. 434 U.S. 47 (1977).

benefits if he or she married an individual who was not entitled to benefits under the Act.[167] The Court expressly noted that the provision terminating benefits upon marriage was not "an attempt to interfere with the individual's freedom to make a decision as important as marriage."[168]

The Social Security provisions did not place a direct obstacle in the path of those desiring to marry. In addition, there was no evidence that these provisions significantly discouraged, let alone made "practically impossible," any marriages. In fact, the individuals who challenged these provisions were not deterred from getting married.[169] Applying minimum scrutiny, the Court upheld the provisions.[170]

In *Zablocki*, on the other hand, the Court applied strict scrutiny to a Wisconsin statute which provided that members in the affected class of state residents could not marry without first obtaining a court order.[171] The class created by the statute included any "resident having minor issue not in his custody and which he is under an obligation to support by court order."[172] A court would grant permission to marry only if the applicant could show compliance with support obligations and that the children were not likely to become public charges.[173]

The Supreme Court explained[174] that it was not inconsistent to apply minimum scrutiny in *Califano*, and strict scrutiny in *Zablocki* because:

> [N]ot . . . every . . . regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed. The statute at issue here however clearly [did] interfere directly and substantially with the right to marry.

The statute in *Zablocki* significantly and directly interfered with this fundamental right because members in the affected class could not marry without a court order.[175] In addition, some of these residents were "absolutely prevented from getting married," because they either were unable to meet their support obligations,

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167. *Id.* at 54.
168. *Id.* at 47-48.
169. *Id.*
170. *Id.*
171. *Zablocki*, 434 U.S. at 387.
172. *Id.* at 375.
173. *Id.*
174. *Id.* at 386-87.
175. Any marriage entered into in violation of this statute was both void and punishable as a criminal offense. *Id.* at 387.

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or could not prove their children would not become public charges.[176]

Arguably, Section Five directly and substantially interferes with the U.S. citizen and alien couple's decision to marry. The legislative history of the Immigration Marriage Fraud Amendments indicates that the congressional intent behind these provisions was to intrude upon the decision to marry.[177] Even though Section Five is directly aimed at deterring "sham" marriages, it also discourages legitimate marriages. In addition, Section Five's two-year foreign residency requirement substantially affects the alien's ability to obtain immediate relative or second preference status after his or her return from living abroad for two years.[178] In determining whether to grant an alien this status, the INS places major emphasis on whether the alien and his or her American spouse cohabited after the marriage.[179] Of course, some United States citizens or permanent residents affected by Section Five will be unable to leave the country and visit or live with their alien spouse because they lack the financial means. These couples will inevitably be forced to live apart throughout this two-year period. As a result, the restrictions of Section Five intrude upon the couple's decision to marry and make it more likely that the INS will reject the couple's status petition after the alien has returned from his or her two year stay abroad.

These arguments will probably fail because Section Five, like the Social Security provision in *Califano*, is not a congressional attempt "to interfere with the individual's freedom to make a decision as important as marriage."[180] Rather, the main aim of this provision is for the government to gain control of its borders by deterring the incidence of marriage fraud.[181] While Section Five places substantial burdens on a marriage entered into after the commencement of deportation hearings, it places no direct obstacle in the path of U.S. citizens (or permanent residents) and aliens who desire to get married.[182] The affected couple makes the ultimate decision to marry, but the government imposes certain re-

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176. *Id.*

177. By imposing the two-year foreign residency requirement on aliens who marry during deportation and exclusions hearings, Congress wanted to deter "sham" marriages. The drafters believed that two years would be too onerous of a burden for parties to a sham marriage to bear. *See* H.R. REP. No. 906, 99th Cong., 2d Sess. 6-8 (1986); S. REP. No. 491, 99th Cong., 2d Sess. 7 (1986). *But see* Recent Developments, *supra* note 8, at 325.

178. *See supra* note 7.

179. *See generally* E. HARWOOD, *supra* note 110.

180. *Zablocki*, 434 U.S. at 387.

181. *See* Comment, *supra* note 5, at 1113-15.

182. The two-year foreign residency requirement is analogous to the condition subsequent in *Califano*.

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quirements after the marriage has been entered into. Moreover, unlike the statute in *Zablocki*, Section Five does not make it impossible for these couples to marry.[183]

4. Interference with the right to familial integrity—The U.S. Supreme Court decisions in *Moore v. City of East Cleveland*,[184] and *Village of Belle Terre v. Boraas*,[185] provide the Court guidance in resolving whether Section Five significantly interferes with the fundamental right of the family to live together.

In *Moore*, East Cleveland enacted a housing ordinance that limited occupancy of a dwelling unit to members of a single family. However, the ordinance defined a family in such a way that certain related family members were prohibited from living together. The result was that petitioner's two grandsons, who were first cousins, would place petitioner in violation of the ordinance if they both lived in her home. A plurality of the Court applied heightened scrutiny and struck down the ordinance because of its significant impact on the family unit.[186]

On the other hand, in *Boraas*, a village ordinance placed a two person limit on the number of non-related individuals who could live in one dwelling. Six unrelated students rented a home in this area. The Supreme Court first found that this ordinance did not impinge upon or burden a fundamental right because it did not infringe on a family's right to live together.[187] Applying minimum scrutiny, the Court upheld the ordinance.[188]

Arguably, Section Five creates a direct and substantial governmental intrusion into the living arrangement of the family.[189] By essentially forcing a U.S. citizen or permanent resident spouse to choose between living abroad with the alien spouse or residing alone in the United States, Section Five creates a classical Hobson's choice. This inevitably leads to disruption of familial integrity.

The Court, however, will probably find that Section Five does not intrude to a constitutionally impermissible degree on the right of family integrity. This provision substantially, but not directly, impinges upon the family's decision to live together. Unlike the ordinance in *Moore*, Section Five does not bring the constitutional

183. Some marriages naturally result in the relocation of one of the spouses. *See* Comment, *supra* note 5, at 1114.

184. 431 U.S. 494 (1977).

185. 416 U.S. 1 (1974).

186. *Moore*, 431 U.S. at 503-07.

187. *Boraas*, 416 U.S. at 7.

188. *Id.* at 7-9.

189. It is also contrary to the immigration family unification policy which historically has protected the immediate family from separation. *See* H.R. REP. No. 906, 99th Cong., 2d Sess. 6 (1986).

rights of family association into play.[190] The fact that Section Five requires certain aliens to reside outside of the country for two years does not amount to a per se disruption of familial integrity. Marriages often result in the relocation of one of the spouses.[191]

This conclusion is also buttressed by the legal principle that the mere prospect that a statute discourages the exercise of a constitutionally protected activity is not sufficient to warrant the application of strict scrutiny. *Harris v. McRae*[192] illustrates the point. At issue was the Hyde Amendment under which Medicaid recipients received public funding for medical services incident to childbirth, but not for certain medically necessary abortions.[193] The plaintiffs, who included indigent pregnant women, argued that this legislation violated the equal protection guarantee of the due process clause of the fifth amendment.[194] The district court agreed. It held that the Hyde Amendment was constitutionally deficient because the unequal subsidization of childbirth services and certain medically necessary abortions impinged on the "fundamental right to abortion."[195]

The Supreme Court disagreed with the district court. It was of the view that the funding restrictions "placed no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion."[196] In explaining this result, the Court cited to the subtle, yet crucial, difference between a direct governmental interference with a protected right and the government's encouragement of an activity consonant with legislative policy.[197] In this respect it stated:

> The Hyde Amendment . . . places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest . . . . [A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indi-

190. *See, e.g.*, Hameetman v. City of Chicago, 776 F.2d 636, 643 (7th Cir. 1985) ("[C]ollateral consequences of regulations not directed at the family, such as regulations designed to keep illegal aliens out of the country, do not bring the constitutional rights of the family association into play.") *See also*, Comment, *supra* note 5, at 1114 ("Section Five does not forbid an American citizen to marry an alien, and thus . . . this section of the Amendments does not regulate marriage or family association directly.")

191. *See* Comment, *supra* note 5, at 1114. *But see, id.* at 1114-15.

192. 448 U.S. 297 (1979).

193. *Id.* at 301-03.

194. *Id.* at 301.

195. This right was recognized in Roe v. Wade, 410 U.S. 113, 150-55 (1973).

196. *McRae*, 448 U.S. at 314, citing from Maher v. Roe, 432 U.S. 464, 474 (1977); *see also* L. TRIBE, *supra* note 125, at 1346.

197. *McRae*, 448 U.S. at 315.

gency falls in the latter category.[198]

The Hyde Amendment did not impinge on the right to abortion because it left "an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all."[199] Thus the funding restrictions did not trigger the strict scrutiny test.[200]

As discussed earlier, Section Five does have a substantial impact on the right to marry and to familial integrity. However, this provision, like the Hyde Amendment in *McRae*, places no direct obstacle in the path of a U.S. citizen or permanent resident who wishes to marry an alien.[201] Moreover, this section does not place a permanent obstacle in the living arrangement of the family.[202] Section Five therefore will probably not be evaluated under a strict scrutiny analysis.

B. *Mid-level Scrutiny*

Traditionally, gender classifications have triggered intermediate scrutiny.[203] Over the years, however, the Supreme Court has been more willing to apply mid-level scrutiny to cases that: (1) implicate "sensitive," although not necessarily "suspect," criteria of classification,[204] or (2) involve "important" although not "fundamental" interests.[205] At least one of these factors dictates that the Court apply intermediate scrutiny when evaluating the constitutionality of Section Five.

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198. *Id.* at 315-16.

199. *Id.* at 317.

200. In Maher v. Roe, 432 U.S. 464 (1977), the Court was faced with a similar issue. In this case, a state statute subsidized medical services incident to childbirth, but not the services incident to abortions. The Court held that under the equal protection clause of the fourteenth amendment this statute did not infringe upon the woman's decision to have an abortion. Instead it held:

> The Connecticut regulation places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependant on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there.

Id. at 474. Like the Hyde Amendment in *McRae*, the Court held that this regulation did not impinge on the fundamental right to abortion. *Id.* at 475-76.

201. *See* Comment, *supra* note 5, at 1114.

202. *See supra* notes 177-191 and accompanying text.

203. *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982); *see also* L. TRIBE, *supra* note 125, at 1601.

204. *See generally* L. TRIBE, *supra* note 125, at 1610-18.

205. *See supra* notes 136-40 and accompanying text.

In *Plyer v. Doe*,[206] a Texas statute deprived the children of illegal aliens a public school education.[207] One factor the Court explicitly considered in applying intermediate review was the "important," yet not "fundamental" interest in public education.[208] The other criteria that merited this standard of review was the "constitutional sensitivity" of the class involved.[209] Although the Texas statute did not contain a "suspect" classification, it did impose "a lifetime hardship on a discrete class of children not accountable for their disabling status."[210] Having triggered mid-level scrutiny, the statute was found to be unconstitutional.[211]

Section Five affects the couple's "important" value in marriage and family association. Although for purposes of strict scrutiny this provision does not implicate these fundamental rights, it nevertheless burdens the "important" values associated with these rights. As a practical matter, the provision's interference is indirect, but substantial.[212] For example, Section Five prevents aliens from obtaining an immigration benefit based on a valid marriage because this provision does not allow couples: (1) to present evidence on the bona fides of the marriage, and (2) to refute or cross-examine adverse witnesses. Also, the two-year foreign residency requirement[213] will make it difficult for a U.S. citizen or permanent resident and an alien to maintain a family if the spouse and children are living in the United States and are financially unable to visit or live with the alien abroad.[214] The couple, as well as their children, will in most cases be forced to live apart throughout this period.[215] In *Plyer*, the Court recognized that one reason for applying heightened scrutiny was the fact that the Texas statute "penalize[d] these children for their presence in the United States."[216] Section Five operates to penalize couples (and

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206. 457 U.S. 202 (1982); *see also The Supreme Court, 1981 Term*, 96 HARV. L. REV. 1, 62 (1982).

207. *Plyer*, 457 U.S. at 207.

208. Writing for the majority, Justice Brennan stated:

> Public education is not a "right" granted to individuals by the Constitution. Neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction.

Id. at 221 (citations omitted).

209. *Id.* at 220.

210. *Id.* at 223.

211. *Id.* at 230.

212. *See supra* notes 182 & 202 and accompanying text.

213. *See supra* note 7.

214. *Cf.* Zablocki v. Redhail, 434 U.S. 374, 387-88 (1978); L. TRIBE, *supra* note 125, at 1612.

215. *See supra* note 80 and accompanying text.

216. *Plyer*, 457 U.S. at 220.

their families) who marry during deportation hearings in a similar fashion, and thus, this fact militates in favor of the Court's application of mid-level scrutiny.

Section Five does not involve a "suspect" classification since, as the Court noted in *Plyer*, an alien's "presence in this country in violation of federal law is not a 'constitutional irrelevancy.' "[217] Nevertheless, the fact that Section Five does not involve a "sensitive" class, like the children of illegal aliens in *Plyer*, should not prevent the Court from applying the intermediate level of review. Prior Supreme Court decisions suggest that in certain situations an "important" right alone will trigger intermediate scrutiny.[218] Section Five's onerous burden on the fundamental values associated with marriage and family justifies the imposition of intermediate review.

1. Application of mid-level scrutiny—Under an intermediate level of review, the federal government may urge that the following "important" interests are furthered by Section Five: (1) relieving the INS of the burden of establishing that these marriages are not valid in deportation hearings, and (2) deterring immigration related marriage fraud.

The first interest furthered by Section Five is the administrative convenience afforded by the irrebuttable marriage fraud presumption embodied in Section Five.[219] This provision will indeed lighten the government's burden in two ways. First, the INS will be relieved of its burden in deportation hearings of establishing that the alien should not receive an immigration benefit based on a marriage to a U.S. citizen or permanent resident.[220] Second, because Section Five deprives an alien of the opportunity to establish the bona fides of his or her marriage (if entered into after the deportation hearing has commenced)[221] the time and expense of a

217. According to Justice Brennan, who authored the majority opinion, the plaintiffs' status as illegal aliens was not irrelevant to the question of determining what level of scrutiny to apply. *Id.* at 223.

218. *See, e.g.*, United States Dept. of Agric. v. Murray, 413 U.S. 508 (1973) (foodstamps could not be denied to dependents living with ineligible recipients). Other intermediate review cases, however, have implicitly required the presence of both an important value and a sensitive factor. *See, e.g.*, Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) (class of mentally retarded persons and important value in housing); Plyer v. Doe, 457 U.S. 202 (1982) (children of illegal aliens and important interest in education). *See generally* L. TRIBE, *supra* note 125, at 1613 n.22.

219. *See* Comment, *supra* note 5, at 1106-08.

220. *See* Woodby v. INS, 385 U.S 276 (1966) (in deportation hearing the INS has the burden of proving alienage and deportability by clear, convincing and unequivocal evidence).

221. *See* INA § 245(e), 8 U.S.C. § 1255(e) (Supp. IV 1986); *see also supra* notes 7 & 8 and accompanying text.

more extensive hearing is saved. While the efficacious administration of governmental programs is a valid consideration, it is not a sufficiently "important" interest to pass muster under mid-level scrutiny.[222]

Arguably Section Five furthers the government's second interest—deterring "sham" marriages. The chief purpose of the Immigration Marriage Fraud Amendments was "to deter immigration-related marriage fraud and other immigration fraud."[223] Section Five's objective in preventing fraudulent marriages is undoubtedly an "important" interest.[224]

If the government's interest was shown to be important, Section Five would not pass muster under mid-level scrutiny because it is not "substantially related"[225] to meeting the government's interest in deterring immigration marriage fraud. Under intermediate scrutiny, the Supreme Court requires that legislation be "substantially related" to the achievement of the objectives invoked by the government to justify those rules.[226] For example, in *Craig v. Boren*,[227] the Court evaluated the constitutionality of a statute containing a gender classification allowing the sale of 3.2% beer to females, but not males, eighteen years of age.[228] It held that the statute's purpose in protecting "the public health and safety" was an important governmental interest.[229] However, the Court struck down the statute because the statistics offered in support of this legislation "broadly establish that .18% of females and 2% of males in [the eighteen to twenty year-old] age group were arrested" for drunk driving, and thus provided "an unduly tenuous fit" to the accomplishment of the government interest.[230]

The INS estimates of the extent of sham marriages in the United States present problems similar to the statistics in *Craig*. During the Senate hearing, the INS Commissioner testified that

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222. *See, e.g.*, Reed v. Reed, 404 U.S. 71, 76 (1971) (classification preferring males to otherwise equally qualified females as administrators of estates not supported by important governmental interest—reducing the workload on probate courts).

223. *See generally* H.R. REP. No. 906, 99th Cong., 2d Sess. (1986); S. REP. No. 491, 99th Cong., 2d Sess. (1986).

224. *Id.* However, it does not appear that the magnitude of the sham marriage problem is of such dimension as to render the governmental interest in deterring such marriages "important." *See infra* notes 231-38 and accompanying text.

225. *See* Williams v. Vt., 472 U.S. 14 (1985) (finding unconstitutional an automobile use tax statute because the classification created by the statute was not sufficiently related to the government's purpose in allowing users of out-of-state roads to pay only one state's use tax).

226. *See* L. TRIBE, *supra* note 125, at 1603.

227. 429 U.S. 190 (1976)

228. *Id.* at 192-93.

229. *Id.* at 199-200.

230. *Id.* at 201-202.

"INS estimates" indicate that of the aliens who obtain an immigration benefit based on a marriage to a U.S. citizen or permanent resident, nearly thirty percent[231] are involved in "suspect marital relationships."[232] However, it is doubtful that "suspect marital relationships" is the equivalent of a "sham" marriage.[233] Moreover, in quantifying this percentage, the various INS representatives who testified at the Senate hearing gave different and conflicting figures.[234] Accordingly, nothing in the legislative history of this provision indicates that most marriages entered into after deportation hearings have commenced are "shams."[235]

In contrast, other information and sources cast considerable doubt on these high figures and on the INS's claim that marriage fraud is on the rise.[236] For example, one commentator estimates that approximately one or two percent of the immigration petitions based on a marriage to a U.S. citizen or permanent resident involves fraud.[237] Additionally, other statistics show that a very large number of these immigration petitions are approved each

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231. This figure is based on one preliminary survey. *See Fraudulent Marriage Hearing, supra* note 1, at 35.

232. S. REP. NO. 491, 99th Cong., 2d Sess. 2, 6 (1986); *see also Fraudulent Marriage Hearing, supra* note 1, at 69. (An internal study by the INS indicates that 30% to 40% of all applications submitted in support of immediate relative petitions are fraudulent.)

233. *See* E. HARWOOD, *supra* note 110, at 144-56.

234. At one time during these hearings, the INS estimated that the number of fraudulent immediate relative petitions filed in any given year is between 150,000 and 200,000; and the INS claims that the number is growing. *See Fraudulent Marriage Hearing, supra* note 1, at 70. *But see* Note, *The Constitutionality of the INS Sham Marriage Investigation Policy*, 99 HARV. L. REV. 1238, 1241 (1986). ("The INS estimates that 50,000 spurious marriage petitions are filed each year and claims that the number is growing.") At other times, however, it claimed this figure to be 45,000. *See Fraudulent Marriage Hearing, supra* note 1, at 35.

As to the number of fraudulent visa petitions received by American Consulate offices abroad, the figures varied according to the geographical location. For example, one embassy in the Caribbean reported that 65% of the visa petitions based on a marriage to a U.S. citizen or permanent resident and which have been investigated resulted in findings of fraudulent relationships. *See Fraudulent Marriage Hearing, supra* note 1, at 29-30. Moreover, although other testimony suggested that fraudulent marriages are also on the rise in American consulate offices in Europe, Canada, and Asia, no statistics, other than the one above, were offered on the extent of the problem in these countries.

235. *See* Plaintiff's Memorandum in Support of Their Motion for Summary Judgment at 44, Smith v. INS, No. 87-1988-C.

236. *See Fraudulent Marriage Hearing, supra* note 1, at 78. (Statement of Jules Coven); E. HARWOOD, *supra* note 110, at 143.

237. *Fraudulent Marriage Hearing, supra* note 1, at 78. Mr. Coven, President of the American Immigration Lawyers Association, argues that statistics show that 95 to 97% of all visa petitions based on a marriage to a U.S. citizen or permanent resident are approved each year. *Id.* at 88. Thus, it follows that a small percentage of visa petitions are not approved because of fraud or other technical reasons. Another commentator also notes that despite the high estimate of immigration-related marriage fraud, the INS detects only approximately 5,000 of such cases each year. *See* J. CREWDSON, THE TARNISHED DOOR: THE NEW IMMIGRANTS AND THE TRANSFORMATION OF AMERICA 38 (1983).

year. This information suggests that most of these petitions involve legitimate marital relationships.[238]

Like the statistics in *Craig*, the INS estimates that "broadly establish"[239] that aliens who marry during deportation hearings engage in fraudulent marriages provides "an unduly tenuous fit"[240] to justify Section Five's prohibition on the presentation of evidence on the bona fides of the marriage,[241] and the two-year foreign residency requirement. These provisions are not "substantially related" to meeting the governmental interest in enacting Section Five.[242] It would not be difficult or burdensome for the INS to determine the validity of the marriage entered into during deportation hearings on an individualized basis, like the hearing afforded aliens prior to the passage of the Amendments.[243] Thus, application of intermediate scrutiny leads to the inescapable conclusion that Section Five, as applied to deportation hearings, is constitutionally deficient.[244]

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238. *See* E. HARWOOD, *supra* note 110, at 143. (In a typical year, approximately 95% of all I-130 immediate relative visa petitions are approved.)

239. *Craig*, 429 U.S at 201.

240. *Id.* at 202.

241. It is hard to believe that the INS estimates accurately represent the magnitude of the "sham" marriage problem. One of the problems in placing an exact number on these fraudulent marriages is that the INS only knows of the fraudulent relationships it detects. *See* E. HARWOOD, *supra* note 110, at 143. The difficulties in detecting fraudulent relationships and in gathering hard evidence which would enable the INS to legally deny petitions based on sham marriages also makes quantifying the problem a speculative task. *See Fraudulent Marriage Hearing, supra* note 1, at 29; *A Report on the United States Commission on Civil Rights, supra* note 4, at 34-35. It has also been suggested that the reason for the great disparity in the figures provided by the INS and other sources reflects longstanding institutional biases. *See* Note, *supra* note 234, at 1240 n.18. (In general, the INS may tend to overstate the magnitude of a problem because the funding it receives from Congress will vary with the extent of the particular problem. Thus, the INS will tend to present statistics showing that the "sham" marriage problem is of epidemic proportions. On the other hand, lawyers defending aliens may have an incentive to understate the extent of the particular problem in the belief that Congress will not enact more stringent legislation.) However, since a very large number of these immigration petitions are annually approved, it is doubtful that the incidence of marriage fraud is as high as claimed by the INS.

242. *Cf.*, Williams v. Vt., 472 U.S. 14 (1985); Trimble v. Gordon, 430 U.S. 762, 770-72 (1977).

243. *See* Plaintiff's Memorandum in Support of their Motion for Summary Judgment, Smith v. INS, (No. 87-1988-C). In fact, allowing the alien to present evidence on the bona fides of the marriage would aid the INS in deterring sham marriages. Of course, the alien and his or her spouse will have an incentive to introduce all the pertinent evidence and testimony to make such a showing. Second, the INS workload is lessened because the investigators do not have to go out and search for this evidence. Rather, with this evidence in hand, their job will be to determine the weight to be given to such matters. If after an investigation it turns out the evidence presented by the alien or his or her spouse is defective, the Attorney General can terminate the conditional resident status.

244. Of course, there are several judicial and legislative solutions that will alleviate the unconstitutional nature and attendant hardships of Section Five. *See generally Craig*, 429 U.S. at 199; L. TRIBE, *supra* note 125, at 1609.

C. Minimum Scrutiny Analysis

The Court may decide that under either the "suspect" class or the "fundamental" rights branch of equal protection analysis, the constitutionality of Section Five should be evaluated under minimum scrutiny. In applying this test, the Court may find that even under this relaxed standard of review, Section Five is unconstitutional as applied to aliens who marry U.S. citizens or permanent residents after deportation hearings have commenced.

In enacting Section Five, Congress created two classifications: aliens who marry after the initiation of exclusion or deportation hearings; and aliens who marry before the commencement of these proceedings.[245] The latter group of aliens is provided an opportunity to establish the bona fides of the marriage, and to adjust their status.[246] However, aliens in the former group are deprived

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The Court could uphold the constitutionality of this provision by interpreting Section Five, as most provisions in deportation statutes must be construed, narrowly. *See, e.g.*, Rosenberg v. Fleuti, 374 U.S. 449, 452-62 (1963). While this provision is unconstitutional as applied to aliens who marry after the commencement of deportation hearings, it could withstand constitutional scrutiny as applied to aliens in exclusion hearings. A court could find authority for this interpretation from other provisions in the INA. For example, in exclusion hearings, the immigration judge is bound by medical certificates provided by the public health service. In contrast, in a deportation hearing the immigration judge is not bound by such a certificate. Instead, he must evaluate all the evidence. Medical certificates are received into evidence during a deportation hearing, subject to the alien's opportunity to cross-examine the physicians. In fact, unlike in the exclusion hearing context, the certificates are not conclusive even if the issue of deportability relates to the alien's inadmissibility on medical grounds. Leon v. Murff, 250 F.2d 436, 438 (2d Cir. 1957); *see generally* C. GORDON & H. ROSENFIELD, *supra* note 1, at ch. 5.10d(5). Similarly, a court could construe Section Five narrowly, and allow aliens who marry after the initiation of deportation hearings to present evidence on the validity of their marriage, while not allowing aliens involved in exclusion hearings this opportunity. *See, e.g.*, L. TRIBE, *supra* note 125, at 1609. (One of the Supreme Court's "techniques of intermediate review is to require that the legal scheme under challenge be altered so as to permit rebuttal in individual cases even if the scheme is not struck down altogether.")

Congress could also cure the deficiencies established by this provision. The Washington Post, Mar. 26, 1988, at B1, col. 1 (Senators Paul Simon and Edward Kennedy, "who initially supported passage of the marriage fraud law now indicate they will work to repeal the two-year period of waiting outside the United States.") The application of Section Five's prohibition of establishing the bona fides of the marriage and the blanket two-year foreign residency requirement will inevitably result in substantial hardship to U.S. citizens and permanent residents. Eventually, the accumulation of these hardships will result in Congress amending Section Five to avoid the rigor of deportation by providing a waiver of these obstacles in certain cases. *See, e.g.*, INA § 212(e); 8 U.S.C. § 1182(e) (1982). *See generally* C. GORDON & H. ROSENFIELD, *supra* note 1, at ch. 6.8h. (After the accumulation of hardships, Congress amended INA § 212 which at one time provided for the blanket application of a similar two-year foreign residency requirement for all exchange visitors who sought permanent resident status after their period of lawful stay in the United States ended. This provision now allows for a waiver in four situations.) However, although this solution is the most effective, it will take several years before Congress pursues this avenue and eliminates the hardships created by Section Five.

245. *See supra* notes 7 & 8.

246. *See supra* notes 7-10 and accompanying text.

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of these opportunities.[247] In addition, a visa petition to accord these aliens immediate relative or second preference status cannot be approved until they have resided outside of the country for two years after the marriage.[248] Thus, while aliens in both groups are in similar positions because they marry U.S. citizens or permanent residents, Section Five differentiates amongst them solely on the timing of their marriage.

It is undisputed that the government has a legitimate interest in deterring immigration-related marriage fraud.[249] Thus, the main issue under a minimum scrutiny test will be whether distinguishing between aliens on the timing of their marriage is "rationally related" to deterring "sham" marriages.

In *Francis v. INS*,[250] the Second Circuit addressed a similar question. At issue was Section 212 of the INA which provides relief to some aliens involved in deportation hearings.[251] Prior to 1976, the Board of Immigration Appeals interpreted this provision to allow an alien, convicted of a narcotics offense and who departed from and returned to the United States for an unrelinquished domicile of seven years, to remain in this country at the Attorney General's discretion. On the other hand, the Attorney General was without discretion to allow an alien, like Mr. Francis, who was convicted of a narcotics offense, to remain in the United States despite having an unrelinquished domicile of more than seven years simply because he had not departed from this country since the time of his conviction.[252] Thus, the main question in *Francis* was whether it was reasonable for the government to distinguish between two aliens merely because one alien was returning after a temporary sojourn abroad whereas the other alien had never left the country.[253]

The court in *Francis* began with an examination of the underlying policy for the Board's distinctions in the application of Section 212. It was decided that the policy was based on Congress' intent that certain aliens returning to the United States should not be

247. *Id.*

248. *Id.*

249. The Court has traditionally exhibited extreme deference to the asserted governmental interests. *See* City of New Orleans v. Dukes, 427 U.S. 297, 303-06 (1976); *but see* Zobel v. Williams, 457 U.S. 55 (1982); Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985).

250. 532 F.2d 268 (2d Cir. 1976).

251. This provision allows the Attorney General to exercise his discretion to admit into the country an alien who would otherwise be deportable. *See generally* Griffith, *Exclusion and Deportation: Some Avenues of Relief for the Alien*, 15 SAN DIEGO L. REV. 79, 93 (1977).

252. *See Francis*, 532 F.2d at 270-72; *see also* Dunn v. INS, 499 F.2d 856 (9th Cir. 1974).

253. *Francis*, 532 F.2d at 272-73.

denied the opportunity of uniting with their families despite their excludability.[254] However, if this were the case, there was no rational basis for the Board to distinguish between an alien who had remained in this country, and one who was returning to the United States from a temporary sojourn. These aliens were similarly situated except for the fact of departure.[255] In holding that these distinctions were not rationally related to the legitimate purpose of Section 212, the Second Circuit stated:

> Fundamental Fairness dictates that . . . aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner. We do not dispute the power of the Congress to create different standards of admission and deportation for different groups of aliens. However, once those choices are made, individuals within a particular group may not be subjected to disparate treatment on criteria wholly unrelated to a legitimate governmental interest.[256]

Like the Board's interpretation of Section 212 in *Francis*, Section Five is arbitrary and not rationally related to the federal government's interests in combatting marriage fraud and in promoting family unity.[257] Is it reasonable for Congress to distinguish between two aliens simply because one alien marries a U.S. citizen (or permanent resident) prior to the initiation of deportation hearings, and the other alien marries after becoming involved in such a hearing?[258] The lines drawn by Congress in drafting Section Five are not "reasonably related" to its purpose in providing benefits to aliens who enter into valid marriages, and in having deportation hearings reach accurate and reliable results.[259] There is no evidence that suggests that aliens who marry prior to, or after the hearings have commenced are more likely to engage in "sham" marriages.[260] Aliens in both groups are in the same position but for the fact that one group of aliens fortuitously marries prior to becoming involved in deportation or exclusion hearings. This provision is arbitrary because it focuses on the timing and not the bona fides of the marriages when denying immigration

254. *Id.*

255. Arguably, the alien who had never left the country had a better case for dispensation. *See* Griffith, *supra* note 251, at 93-94.

256. *Francis*, 532 F.2d at 273.

257. *See also* Zobel v. Williams, 457 U.S. 55, 62-63 (1982) (invalidating as irrational a statute which distributed income from the state's natural resources to state residents based upon the year in which their residency was established).

258. Arguably, the motives of aliens who marry after the commencement of these hearings are suspect. *See* Comment, *supra* note 5, at 1110.

259. *See* S. REP. No. 491, 99th Cong., 2d Sess. 6-7 (1986).

260. To alleviate the harsh results of Section Five, aliens might marry as soon as conceivably possible to develop an adequate record on the bona fides of the marriage. *See Recent Developments*, *supra* note 8, at 325.

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benefits to these aliens.[261] Thus, like in *Francis*, there appears to be no rational basis for denying aliens the twin-opportunities of presenting evidence on the bona fides of their marriage or of adjusting their status merely because of the timing of their marriage.

CONCLUSION

Although Congress had good intentions in enacting legislation to deter fraudulent marriages, it showed poor judgment and penmanship in drafting Section Five of the Immigration Marriage Fraud Amendments of 1986. This provision will likely pass constitutional muster as applied to aliens in exclusion hearings.[262] However, as applied to aliens in deportation hearings, it suffers from procedural and substantive deficiencies.

Section Five violates the fifth amendment procedural due process rights of aliens who marry U.S. citizens or permanent residents during deportation hearings. These aliens have a "liberty" interest, and an undeniable stake in the marriage and the permanent resident status that follows from this relationship. Congress has also provided the couple with a "property" interest in petitioning the INS to have the alien spouse declared an immediate relative, and ultimately to secure an immigration benefit based on the marital relationship. Due to these constitutionally protected interests, aliens who are involved in deportation hearings must be provided a fair hearing where they will have a reasonable opportunity to present evidence to establish the bona fides of the marriage. Section Five is unconstitutional because it provides that sham marriages are those entered into between aliens and U.S. citizens or permanent residents after deportation proceedings have commenced. Also, it does not allow aliens to present and the immigration judge to consider, evidence on the bona fides of the marriage. The mere suspicious timing of a marriage does not support a finding of a sham marriage, especially when other evidence, such as living together or intentions of living together as husband and wife, indicates that the marriage was entered into in good faith.[263] Accordingly, in order to comply with the due process clause, Section Five must provide these married aliens with a pre-deprivation

261. *See* Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985).

262. *See supra* notes 90 and 94 and accompanying text.

263. *Cf. In re* Grand Jury Proceedings (84-5) (Emo v. United States), 777 F.2d 508, 509 (9th Cir. 1985) (for purposes of determining the validity of the marriage of a witness who asserts the marital privilege "mere suspicious timing of a marriage does not support a finding of a sham marriage, especially when other evidence, such as living together or intentions of living together as husband and wife, indicates that the marriage was entered into in good faith").

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informal hearing to determine the bona fides of the marriage.

Section Five falls short of providing aliens who marry U.S. citizens or permanent residents during deportation proceedings the equal protection of the laws under the fifth amendment. The two-year foreign residency requirement and the abolition of the adjustment of status defense for these aliens impedes the exercise of the fundamental rights of marriage and family integrity. Even though courts will not subject Section Five to strict scrutiny, they should test the validity of this provision under intermediate scrutiny. Even if Section Five was enacted to further the important interest of deterring immigration marriage fraud, it is unconstitutional because the procedures established by this provision are not "substantially related" to achieving this interest. Courts may decide that minimum scrutiny should be the appropriate constitutional yardstick. Under this test, Section Five does not pass muster because the lines it draws—aliens who marry before deportation hearings commence, as opposed to aliens who marry after deportation hearings begin—are not "rationally related" to the congressional purposes in enacting this provision.