Assimilation to the United States: A Study of the Adjustment of Status and the Immigration Marriage Fraud Statutes

Joe A. Tucker*

> We do almost no single sensible and deliberate thing to make family life a success. And still the family survives. It has survived all manner of stupidity. It will survive the application of intelligence.
>
> —Walter Lippmann**

I. Introduction

A couple, who for the purposes of this article shall be identified as the Smiths, a citizen and nonimmigrant student, met and began dating in 1984. By 1985 their relationship had progressed to the point that they were living together. Although the Immigration and Naturalization Service (INS or Service)[1] filed deportation proceedings against the alien during the same year for overstaying a student visa, the couple was probably unconcerned, as they planned to marry.

---

* Assistant Professor of Law, Indiana University School of Law—Indianapolis; B.A. University of Houston, 1977; J.D. University of Texas, 1981.

The original conception of this article derives from a paper I presented at an Immigration Law Seminar on February 9, 1988, jointly sponsored by the Indiana University School of Law at Indianapolis, the Indianapolis Bar Association, and the law firm of Lawrence, Carter, Gresk, Leerkamp & Walsh. The author benefited from the presentations of and interchanges with the other seminar participants: United States Senator Richard G. Lugar; Donald Ferguson, Acting Officer-in-Charge, Immigration and Naturalization Service (INS) Indianapolis Office; Ferenc Vandor, Attorney and former Trial Attorney for the INS Chicago District Office; Paul D. Gresk, Attorney and member of the American Immigration Lawyers Association; Wilma Shepherd, Alien Certification Specialist of the Indiana Employment Security Division; and Timothy Clark, Attorney for the Legal Services Organization of Indiana, Inc. A special thanks must be extended to Professor Paul Cox, who provided insightful commentary. The author, however, bears full responsibility for the positions taken in this article. Finally, I extend a note of appreciation to my research assistant Katharine Liell Polito.

** D. Kirp, M. Yudof & M. Franks, Gender Justice 173 (1986) (quoting Burnett, Family Economic Integrity Under the Social Security System, 7 N.Y.U. Rev. L. & Soc. Change 155 (1978)).

1. The INS is the agency that has jurisdiction to enforce the immigration laws inside the United States. A. Fragomen & S. Bell, Immigration Primer 6-8 (1985) [hereinafter Immigration Primer]. Although the immigration statute provides that the Attorney General has this responsibility, in practice most of this authority is delegated to the Commissioner of the INS. 1 C. Gordon & H. Rosenfield, Immigration Law & Procedure § 1.7b (rev. ed. 1987). The Attorney General has further delegated the authority to review immigration judge decisions to the Board of Immigration Appeals (BIA), a separate branch of the Department of Justice. *Id.* at § 1.10b. The appellate decisions of the

Since the Immigration and Nationality Act of 1952 (INA)[2] permitted the spouses of citizens to acquire permanent residency by adjustment of status[3] without leaving the country, their lack of concern seemed reasonable. The Smiths applied for a marriage license in the summer of 1986. There was no ostensible cause for haste since the deportation proceedings were still continuing at their customary lethargic pace. On November 10, 1986, however, Congress enacted the Immigration Marriage Fraud Amendments of 1986 (IMFA).[4] Oblivious to the passage of the IMFA, the couple married four days later. This was a profound mistake if the couple had any interest in commencing their marital life together without departing the country.

Had the Smiths received legal counselling before marriage, they would have been advised of the steps necessary to maintain their union under the IMFA. First, and foremost, *do not marry* during the pendency of deportation proceedings. Instead, have Mr. Smith obtain "voluntary departure"[5] and leave the country. Then, get married abroad. Finally, have Mrs. Smith apply for Mr. Smith's admission at a United States consulate abroad. This last step would

---

BIA, unless overruled by the Attorney General, are binding on the INS. The Department of State, on the other hand, exercises extra-territorial jurisdiction over immigration. Immigration Primer, *supra,* at 6. Through its Bureau of Consular Affairs, the State Department grants admission visas to aliens. *Id.*

2. Immigration & Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1557 (1982 & Supp. IV 1986)) [hereinafter INA].

3. Under the INA, every alien seeking admission is presumed to have the intention of permanently immigrating to the United States unless she can demonstrate qualification for one of the defined nonimmigrant statutory classifications. INA § 101(a)(15), 8 U.S.C. § 1101(a)(15) (1982 & Supp. IV 1986). Nonimmigrants are not subject to quota limitations since they are only temporarily admitted to the country for a limited purpose. Tourists, business people, or students, for example, generally fall under this category. Individuals in this category are expected to leave the country once their authorized activity has been completed. In contrast, a permanent resident alien has "the status of having been lawfully accorded the privilege of residing permanently in the United States." INA § 101(a)(20), 8 U.S.C. § 1101(a)(20) (1982 & Supp. IV 1986). Adjustment of status permits an alien to become a legal permanent resident without leaving the country if statutory qualification for residency can be demonstrated. Immigration Primer, *supra* note 1, at 67-71. Although the alien is required to be "admitted and inspected or paroled" into the country by the appropriate official, before the law changed in 1986 she could still apply for adjustment even if her status later became unlawful. *Id.* at 67-68. Under current law regarding the adjustment of status this is no longer true in many cases. *See infra* note 114 and accompanying text.

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

5. Voluntary departure is an administrative device which permits the alien to leave the country without the necessity of holding a deportation hearing. Immigration Primer, *supra* note 1, at 274-75. In addition to allowing the INS to avoid the cost of a hearing, this device saves the taxpayers' money by requiring the alien to pay her own transportation costs. In return for leaving voluntarily, the alien is permitted to return to the United States, without being subject to the five year statutory exclusion for deportation, if a statutory ground for admission is later acquired. *Id.*

bear some risk since even an unlawful denial of a visa by a consular officer is not subject to judicial review. If all went well, however, the couple could expect to be reunited in the United States in about three months, and, under the IMFA's conditional status provision, Mr. Smith would receive permanent resident status on a two year conditional basis. Even then, Mr. Smith would be in a precarious position. Mrs. Smith would, in effect, have the de facto power to effectuate her husband's deportation during the two year period if she became disenchanted with him. Moreover, the birth of children to the couple before the grant of conditional status would not provide equitable grounds to defer Mr. Smith's deportation. Even after the termination of the two year period, Mr. Smith would be well advised to proceed cautiously. If he remarried within five years, he might be required to demonstrate to the INS, by "clear and convincing evidence," that his previous marriage to the former Mrs. Smith was not fraudulent.

By marrying during the pendency of deportation the Smiths unknowingly effected the summary termination of the deportation proceedings. Under these circumstances, the IMFA created an irrebuttable presumption of fraudulent intent to circumvent the immigration laws and mandated that Mr. Smith depart the country for two years before the grant of any immigration benefits derived from his marital relationship. Since the marriage was not recognized as legal by the IMFA, the Service did not provide the Smiths opportunity to demonstrate its validity. Moreover, the law's effect would have been the same even if the Smiths had children. The IMFA therefore presented Mrs. Smith with two undesirable options. She could test the marriage's durability by agreeing to a two year separation, or, in the alternative, accompany her husband into exile. This latter alternative would have entailed separation from other family members and friends, the loss of employment in the United States, and various other cultural disadvantages. Instead, the Smiths chose an option not designated by the IMFA. They filed a lawsuit in federal district court challenging the law's constitutionality and asserting that "they are a loving, devoted couple whose marriage was not intended in any way to circumvent the immigration laws."[6] The gravamen of the Smiths' complaint was that they were constitutionally

6. Suit Attacks Marriage Fraud Law As Unconstitutional, 64 Interpreter Releases 940, 942 (1987).

entitled to a marriage validity hearing before the denial of immigration benefits.[7] The federal district court judge, however, upheld the IMFA and denied the Smiths relief.[8]

It is understandable that the Smiths were ignorant of the IMFA's enactment. Mere days before its passage, Congress passed the Immigration Reform and Control Act of 1986 (IRCA).[9] IRCA created employee reporting and verification provisions affecting the hiring procedures of employers throughout the nation, and a legalization program that offered lawful immigration status to aliens who demonstrated long-standing unlawful residence in the country. Since these measures affected millions of individuals, their enactment diverted attention both from subsidiary provisions of IRCA, which restricted the ability of aliens within the country to adjust to permanent residence status, and from the adoption of the IMFA four days later. As the Smiths discovered, the IMFA and amended adjustment of status provisions cause considerable disruption in the lives of citizens and permanent resident aliens who are married to, or planning to marry, aliens. The most significant implication of the neglected enactments, however, may be that they portend congressional intent to shift the emphasis of immigration law away from its historical commitment to preservation of nuclear family unity.

Family reunification is the INA's primary admission criterion, and avoiding the separation of nuclear families its highest priority. The INA authorizes the unlimited entry of "immediate relatives," defined as the spouses, children, or parents of citizens. Aliens seeking permanent admission are subject to a hierarchical preference system with a world-wide annual quota of 270,000 and a per country ceiling

7. Smith v. I.N.S., 684 F. Supp. 1113, 1117-18 (D. Mass. 1988).

8. 684 F. Supp. at 1120. For similar holdings, see Anetekhai v. I.N.S., 685 F. Supp. 599 (E.D. La. 1988) (upholding INA § 204(h) against due process and equal protection attack); Escobar v. I.N.S., 700 F. Supp. 609 (D.D.C. 1988) (same). *See also* Montague v. Meese, 683 F. Supp. 589 (N.D. Tex. 1988) (dismissing a constitutional challenge against the same statute on the grounds that the unmarried plaintiffs lacked standing). At the time of this writing several other cases raising similar claims were pending before the federal courts or the BIA. *See* Manwani v. I.N.S., No. C-C-88-41-M (W.D.N.C. filed Jan. 26, 1988), *reviewed in* 65 Interpreter Releases 1097 (1988) (couple with a relationship of four years duration before institution of deportation proceeding); Azzizi v. Meese, Civ. No. H-87-957 (AHN) (D. Conn. 1988); Alamario v. Attorney General, No. 87-CV-73219-DT (E.D. Mich. filed Aug. 28, 1987); Matter of Lamgaday, A24 450 291 (BIA 1987), *reviewed in* 64 Interpreter Releases 1094, 1097 (1987).

9. Pub. L. No. 99-603, 1986 U.S. Code Cong. & Admin. News (100 Stat.) 3359 (codified in scattered sections of titles 7, 8, 26, 42, and 50 of the U.S. Code) [hereinafter IRCA].

of 20,000.[10] Eighty percent of the 270,000 immigrant visas are reserved for relatives of citizens and permanent residents, while the remaining twenty percent are allocated to aliens having desirable occupational skills.[11] Special treatment is afforded marital relationships, as citizens' spouses are immediate relatives entitled to unlimited entry, and permanent residents' spouses are admitted as "second preference" immigrants. Marriage to a citizen or resident alien also enables the alien applicant to qualify for numerous other statutory benefits.[12] In addition to the visa system, the INA also permits qualified aliens in this country to become permanent residents by adjustment of status, a process which accounts for one quarter of the total annual legal admissions.[13]

The current immigration admission system is impaired by several deficiencies. First, its intended liberal reunification of nuclear families is imperfect in application. Since the spouses of permanent residents, as second preference immigrants, are subject to a severely backlogged quota system, they often endure waits of approximately two to ten years for visas.[14] As the bipartisan Select Commission on Immigration and Refugee Policy (Select Commission) indicated in its 1981 Final Report,[15] extended separation of families provides

10. INA §§ 201(a), 202(a), 8 U.S.C. §§ 1151(a), 1152(a) (1982).

11. INA § 203, 8 U.S.C. § 1153 (1982 & Supp. IV 1986). The preference allocation system based on family relationships is as follows: first preference is reserved for the unmarried sons and daughters of citizens (20%); second preference immigrants are the spouses and unmarried sons and daughters of permanent resident aliens (26%); the fourth preference is for married sons and daughters of citizens (10%); and the fifth preference admits the brothers and sisters of citizens (24%). The third and sixth preferences of admission, each making up 10% of the quota visas, are occupational categories.

12. A second preference spouse may expedite entry by charging her admission to a foreign country other than her nation of origin. INA § 202(b), 8 U.S.C. § 1152(b) (1982 & Supp. IV 1986). In addition, marriage to a citizen may either lessen to three years, or entirely forgive, the required five year residency in the United States to gain naturalization. INA § 319(a), (b), 8 U.S.C. § 1430(a), (b) (1982 & Supp. IV 1986). Marriage to a citizen or permanent resident also enables the alien to apply for waivers of certain statutory grounds of deportation or exclusion. Roberts, Marital Status and the Alien, 62 Interpreter Releases 64, 65-66 (1985) [hereinafter Marital Status].

13. Adjustment of status accounted for the following percentages of annual immigrant admission for the indicated fiscal years: 1978, 25.9%; 1979, 22.7%; 1980, 25.1%; and 1981, 23.9%. *See* T. Aleinikoff & D. Martin, Immigration: Process and Policy 288 (1985) (citing from the 1981 Statistical Yearbook of the Immigration and Naturalization Service. (1982)) [hereinafter Immigration Process & Policy].

14. S. Rep. No. 290, 100th Cong., 2d Sess. 8-9 (1988) [hereinafter Senate Report of 1988].

15. Select Comm'n on Immigration and Refugee Policy, U.S. Immigration Policy and the National Interest, Final Report 14-15 (1981) [hereinafter SCIRP]. The Select Commission was established by Act of Oct. 5, 1978, Pub. L. 95-412, 92 Stat. 907. Its study of the immigration laws was intended to comprise "an objective and thorough . . . [review] beyond the capacity and scope of a single agency of the executive branch or [congressional] committee." Fuchs, Immigration Policy and the Rule of Law, 44 U. Pitt.

strong incentives for illegal entry or fraudulent circumvention of the immigration laws. Second, the preferential treatment of nuclear family immigrants has been condemned as nepotism that disadvantages economically beneficial "new seed" professional and investor immigrants.[16] Moreover, there has been apprehension that the expanding number of immediate relative admissions, exempted from numerical limitation, constitutes a potentially unlimited source of immigration.[17] Comparative studies have demonstrated that the United States, in contrast to other major immigrant-receiving nations, admits the lowest percentage of skilled aliens and almost no foreign investors. Several of these studies therefore recommended emulation of the Canadian and Australian immigration systems by use of a "point" system to evaluate the favorable educational, occupational, and investor attributes of applicants.[18] Alarmed by the growing number of relative admissions, influential legislators have stressed the need to limit entry of these aliens and expand the admission of skilled immigrants and investors.[19]

The Kennedy-Simpson Bill, considered during the 100th Congress, proposes several reforms to address these concerns.[20] The proposed legislation sets a total immigration cap of 590,000 and divides relative and occupational immigration into separate categories

---

L. Rev. 433, 437 (1983) (quoting Senator Edward M. Kennedy, chair of Senate Judiciary Committee).

16. *See, e.g.*, Lochhead, Giving Immigration Points to the Skilled and Educated, Insight, Sept. 5, 1988, at 40; Immigration Primer, *supra* note 1, at 2-3.

17. Simpson, Legal Immigration Reform, 25 San Diego L. Rev. 215, 216 (1988) (indicating that the number of immediate relatives admissions has been increasing by 7% per year, as evinced by the 1976 level of 114,000 in contrast to 223,000 admitted in 1986). *But cf.* Immigration Reform: The Kennedy-Simpson "Immigration Act of 1988," 7 Immigr. L. Rep. 37, 38 (1988) (referring to a General Accounting Office report that "immediate relative immigration has been steady at about 220,000 per year, and predictable within a range of 6-8 percent") [hereinafter Immigration Reform].

18. *See, e.g.*, Chiswick, An Alternative Approach to Immigration Policy: Rationing by Skill, 2 Population Res. & Pol'y Rev. 21 (1983); Comment, Immmigration for Investors: A Comparative Analysis of U.S., Canadian, and Australian Policies, 7 B.C. Int'l & Comp. L. Rev. 113 (1984).

19. *See, e.g.*, Simpson, Legal Immigration Reform, 25 San Diego L. Rev. 215 (1988) (comments of United States Senator Alan K. Simpson, ranking minority member of the Senate Subcommittee on Immigration and Refugee Affairs); Remarks of United States Senator Richard G. Lugar, 1988 Immigration Law Seminar, at the Indiana University School of Law—Indianapolis (reported by Indianapolis Star, Feb. 10, 1988, at D-3).

20. S. 2104, 100th Cong., 2d Sess. (1988), *reviewed in* 64 Interpreter Releases 151 (1988); *see also* Immigration Reform, *supra* note 17, at 37. The bill's proposed reforms that are discussed in this Article can be found in Senate Report of 1988, *supra* note 14, at 3-6, 12-19. Similar legislation was introduced in the preceding congressional session in the Kennedy-Donnelly Bill. S. 1611, 100th Cong., 1st. Sess. (1987) (discussed in Immigration Reform: The Mazzoli Efficiency Bill and the Kennedy-Donnelly Bill, 6 Immigr. L. Rep. 169 (1987)).

with respective limits of 470,000 and 120,000. In addition to implementing a revolutionary cap on family immigration, the Bill also subtracts the number of immediate relatives admitted from the total relative ceiling of 470,000. Admission as an independent or occupational immigrant is determined by a point system evaluating the applicant's level of education and occupational skills. The Bill reserves 5,000 visas from this category for aliens investing at least $1 million and employing 10 or more persons.[21]

The evolution of immigration policy's devaluation of family unity can be fully understood only by analysis of the interrelationship of IRCA, the IMFA, and legislation modeled on the Kennedy-Simpson Bill. Versions of almost all the proposals of these acts were originally part of a single bill introduced several times during the early 1980s.[22] Sponsors of that legislation, however, were eventually compelled to separately introduce these measures since joint passage proved too controversial.[23] These laws exhibit a similar insensitivity to the interests of family unity. The IMFA's conditional status burdens marital relationships, renders irrelevant assimilative factors that otherwise provide grounds for admission, and, in certain circumstances, allows the deportation of citizens' and permanent residents' spouses without a hearing. IRCA's denial of permanent residence to specified aliens within the country extends the contemporary nonassimilative trend of the immigration laws beyond marital relationships. Although the ostensible rationale for these statutes is fraud prevention, many of their provisions are credibly explained only by reference to the Kennedy-Simpson Bill's

21. *See* Immigration Reform, *supra* note 17, at 43. The Bill orginally set the minimum investment amount at $2 million, but was amended at the initiative of Senator Phil Gramm. *Id.*

22. Popularly known as the Simpson-Mazzoli Bill, this legislation was clearly the grandfather of the IRCA and Kennedy-Simpson Bill. Among its many provisions, the Simpson-Mazzoli Bill recommended employer sanctions, a legalization program, a cap on relative immigration, creation of independent immigrant and foreign investor categories, and restriction of adjustment of status. *See* Text and Discussion of Simpson-Mazzoli Bill, 59 Interpreter Releases 248 (1982). The legislation, with various amendments, was unsuccessfully proposed several times during the early 1980s. *See, e.g.*, N. Montwieler, The Immigration Reform Law of 1986, at 19-22 (1987); Eig & Vialet, Comprehensive Immigration Reform: History and Current Status, 1 Geo. Immigr. L.J. 27 (1985) [hereinafter Immigration Reform History].

23. In 1985, the sponsors of Simpson-Mazzoli decided to postpone quota system reforms in order to pass IRCA's regulation of illegal immigration. *See* Immigration Reform History, *supra* note 22, at 39. The Kennedy-Simpson Bill, however, is clearly intended as a continuation of the original intention to effectuate quota reform. *See* Senate Report of 1988, *supra* note 14, at 3 ("The committee believes the time has come for Congress to take up where it left off in 1986 and address the unfinished agenda of immigration—the reform of our *legal* immigration system.") (emphasis in original).

movement of immigration law away from its family reunification emphasis. The Kennedy-Simpson Bill ensures the admission of occupational and investor immigrants by placing their visas on a separate track from the over-subscribed family immigrant visa track. Although the legislation continues to allow liberal immigration of immediate relatives, it subtracts their admission from the annual relative ceiling, thereby reducing the visas available to other relatives. Given IRCA's legalization of two million aliens, who will soon seek the admission of their relatives, it is probable that second preference entry will remain subject to considerable delay.[24]

This Article does not question the need to revise immigration policy to redress the imbalance between relative and occupational or investor immigration, but asserts that reform is possible without unnecessarily dismantling nuclear family relationships. The Article contends that many of the fraud prevention purposes of the IMFA and IRCA could be achieved by moderating the harsh provisions of these statutes. Humane reform of the quota system to decrease the backlog of second preference visas and avoid lengthy separation of families without appreciably increasing immigration[25] would also remove powerful incentives to violate the law. Although the new enactments purport to derive from the recommendations of the Select Commission, in many respects they significantly depart from the Commission's reform proposals.[26] This Article also proposes that greater attention to the Select Commission's recommendations

24. *See* Immigration Reform, *supra* note 17, at 38; Guendelsberger, Implementing Family Unification Rights in American Immigration Law: Proposed Amendments, 25 San Diego L. Rev. 253, 254 (1988) [hereinafter Family Reunification Rights]. The INS projects that even under the proposed Kennedy-Simpson immigration levels, by 1996 the visa waiting list will be backlogged by 700,000 applicants. *See* INS Proposals for Legal Immigration Reform, 7 Immigr. L. Rep. 49, 50 (1988).

25. *See, e.g.*, INS Proposals for Legal Immigration Reform, *supra* note 24, at 51 (discussing the INS's proposal to eliminate family separation for second preference immigrants by permitting immediate immigration of any nuclear family member "accompanying or following to join" within three years of the permanent resident's application); Family Reunification Rights, *supra* note 24, at 273 (recommending that permanent resident nuclear families be afforded the same quota exemption as citizen immediate relatives, to avoid separation). Neither of these proposals would expand immigrant admission beyond the levels suggested by the Kennedy-Simpson Bill since they recommend compensating reductions of non-nuclear-family relative admission.

26. *See, e.g.*, Senate Report of 1988, *supra* note 14, at 4 (legislative history of the Kennedy-Simpson Bill tracing many of its proposals to the Select Commission's recommendations); H.R. Rep. No. 682(I), 99th Cong., 2d Sess. 54, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5649, 5658 (indicating the Select Commission's similar influence on IRCA). The new law's impact on family unity and adjustment of status, however, is inconsistent with the Select Commission's proposals. *See infra* notes 150-57 and accompanying text. The institution of an admission point system is also contrary to the Select Commission's recommendations. Immigration Process & Policy, *supra* note 13, at 175.

would aid the development of a more efficient and equitable family unity and adjustment of status policy.

Section II of this Article provides a statutory analysis of the effects of, and interrelationship between, the IMFA and IRCA's adjustment of status laws. The section concludes that these statutes are of doubtful effectiveness as fraud prevention devices, but clearly institute an over-inclusive system of harsh presumptions working against assimilative and communitarian concerns. Section III assesses the efficiency and precision of the legislation under administrative and regulatory theory. The adoption of onerous statutes, coupled with congressional failure to implement meaningful reform, contributes to the immigration bureaucracy's demonstrably ineffectual implementation of the immigration laws. In offering a "theory of effective immigration administration," the section attempts to explain why these inequitable enactments are also inefficient. Section IV provides a constitutional appraisal of the statutes' validity and asserts that the IMFA offers the judiciary compelling reasons to overcome its deep-seated reluctance to subject immigration legislation to meaningful review. This section argues that the IMFA provides a test vehicle to ascertain whether immigration law has been encompassed by the mainstream of constitutional jurisprudence. In formulating this analysis, Section IV contends that a channeling function designated as the "atrium principle," applied in the context of developing communitarian and dignitary theories, provides a comprehensible foundation for judicial review that avoids judicial immersion in the intricacies of political decision-making. Finally, Section V asserts that Congress could deemphasize family reunification and regulate the incidence of fraud without damaging the interests of existing family relations. The section concludes by offering recommendations to reduce the unnecessarily harsh effect of the laws, while preserving the fundamental regulatory purpose.

II. Statutory Analysis

The backgrounds of the enactment of the IMFA and IRCA are strikingly analogous. Passage of IRCA was facilitated by statistical assertions that enormous hordes of aliens had unlawfully entered the United States. The problem was publicly described in terms of a "flood" or a "rising tide of illegal immigration."[27] Although the problem of undocumented immigration by foreigners is genuine

27. A. Anderson, The Hoover Institution, Illegal Aliens and Employer Sanctions: Solving the Wrong Problem 5 (1986).

and persistent, proponents of restrictive legislation often supported their arguments with highly speculative figures. Even INS estimates of the number of illegal entrants were exaggerated and based upon faulty statistical techniques, in contrast to figures compiled by the United States Bureau of the Census and the National Research Council.[28] Likewise, various members of Congress and other policymakers resorted to hyperbole to persuade the public of the necessity of IRCA's enactment.[29]

The IMFA's adoption was similarly preceded by intense efforts to obtain national media coverage accentuating the pervasive nature of immigration-related marriage fraud.[30] As in any political setting, extensive media exposure influences the tone of legislative consideration and can often predispose the legislature to act without adequate consideration of the issues. Research conducted subsequent to the IMFA's enactment indicates that Congress relied upon misleading empirical data that overestimates the magnitude of marital fraud.

The full effect of the IMFA's conditional status can only be appreciated by analyzing its interrelationship to the INA's adjustment of status provision. The immigration benefits available to conditional status aliens are severely constrained since *once conditional status is granted on the basis of marriage, the alien may not seek adjustment of status on any other statutory ground, even if one becomes available.*[31] As a consequence, the alien's right to remain in the country is contingent upon the success of her marital relationship for the duration of the conditional period. Whereas other applicants who immigrate on the basis of a marriage not subject to the probationary term may adjust their status to other available immigrant categories, conditional status immigrants may only qualify for admission on the basis of the marriage that authorized their initial entry. Through the establishment of an exclusive marital paradigm for conditional status aliens, the IMFA

28. *See id.* at 4-6. For a similar analysis, see Corwin, The Numbers Game: Estimates of Illegal Aliens in the United States, 1970-1981, 45 Law & Contemp. Probs., Summer 1982, at 223.

29. A. Anderson, *supra* note 27, at 6-7.

30. *See* Note, The Constitutionality of the INS Sham Marriage Investigation Policy, 99 Harv. L. Rev. 1238, 1241 n.20, 1254 n.97 (1986) (citing Nightline: Marriage Fraud/Remembering Samantha (ABC television broadcast, Aug. 26, 1985) (interview with Senator Alan Simpson, chair of the Senate Subcomm. on Immigration); 60 Minutes: Do You Take this Alien? (CBS television broadcast, Sept. 22, 1985)) [hereinafter Sham Marriage Investigation]. *See also id.* at n.96 (reporting other sham marriage media coverage); Comment, Alienating Sham Marriages For Tougher Immigration Penalties: Congress Enacts The Marriage Fraud Act, 15 Pepperdine L. Rev. 181, n.17 (1988) (reporting sham marriage media coverage) [hereinafter Alienating Sham Marriages].

31. INA § 245(d), 8 U.S.C. § 1255(d) (Supp. IV 1986).

differentiates those aliens from similarly situated residents by statutorily rendering irrelevant assimilative factors or communal associations that provide grounds of admission for the latter group. The IMFA also denies adjustment to aliens who marry during the pendency of judicial or administrative proceedings contesting their right to remain in the country. In denying these individuals any opportunity to demonstrate the legitimacy of their marriages, the statute again demonstrates its indifference toward assimilative familial interests.

Part A of Section II indicates that faulty empirical data exaggerating the prevalence of marital fraud influenced Congress's decision to enact the IMFA. This section also demonstrates that the IMFA and related statutes either restrict or eliminate immigration benefits formerly available to the spouses and other family members of citizens and permanent resident aliens. Moreover, the IMFA places these persons under severe restrictions in the conduct of their private familial affairs. Part B of Section II reveals that IRCA's restrictive amendment of the INA's adjustment of status provisions, and administrative implementation actions, may be even more injurious to family unity since this provision applies to any alien inside the country who seeks permanent resident status. Finally, Part C of Section II argues that although the IMFA and IRCA adjustment of status laws are of dubious fraud prevention value, they are indicative of congressional intent to shift the emphasis of immigration law away from the goal of family reunification. In this sense, these statutes can be viewed as precursors to legislation modeled on the Kennedy-Simpson Bill.

A. Analysis of the Immigration Marriage Fraud Amendments

The State Department's observation that the IMFA is a "complex Act"[32] is an apt description, since the legislation's full effect can be understood only by studying its relationship to several scattered sections of the INA. The confusing and inartfully drafted IMFA created a conditional status category for aliens married less than two years and limited the ability of these individuals to adjust to permanent resident status.[33] The Act also expanded the statutory grounds

32. State Dep't Wire No. 86 (Nov. 25, 1986), *reprinted in* 64 Interpreter Releases 34, 35 (1987).

33. *See* INA §§ 214(d), 216(g)(1)(B), 8 U.S.C. §§ 1184(d) (1982 & Supp. IV 1986), 1186a(g)(1)(B) (Supp. IV 1986) (requiring that fiances and fiancees have met in person no more than two years before the date the alien files a petition for a visa, and applying conditional status to these marriages). For a discussion of the many drafting errors in

for excluding aliens from the country for visa or entry fraud, and increased the criminal penalties for sham marriage fraud.[34]

1. Legislative and administrative background of the IMFA. Review of the IMFA's legislative history demonstrates that Congress was greatly influenced by INS statistics showing that 30% of immigration-related marriages were fraudulent,[35] and by a comparative study suggesting that conditional status was an effective means of controlling fraudulent immigration.[36] Although there was limited hearing testimony questioning the validity of INS statistical assertions,[37] Congress found it unpersuasive. During the congressional hearing, the INS argued that its legal burden of proof to show fraud was too high and recommended that it be eased.[38] The INS also requested enactment of more stringent criminal sanctions, the adoption of a conditional residence period, and the prohibition of adjustment of status after the institution of an administrative expulsion proceeding.[39] The only significant INS request Congress did not adopt was its call for a legislative definition of marriage viability.[40]

---

several of these provisions, see Ingber & Prischet, The Marriage Fraud Amendments, in The New Simpson-Rodino Immigration Law Of 1986, at 555 (1986).

34. INA § 212(a)(19), 8 U.S.C. § 1182(a)(19) (1982 & Supp. IV 1986), was amended to exclude aliens who have engaged in, or attempted, visa or entry fraud. A questionable agency interpretation that exclusion for visa or entry fraud has now been rendered *retroactively* permanent has increased the IMFA's severity. *See* New View on § 212(a)(19) Amendment Retroactivity, 65 Interpreter Releases 84 (1988). INA § 275(b), 8 U.S.C. § 1325(b) (Supp. IV 1986), increased the criminal penalties for sham marriage violations to not more than five years imprisonment and a fine of no more than $250,000.

35. Fraudulent Marriage and Fiance Arrangements to Obtain Permanent Resident Immigration Status: Hearing Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 35 (1985) (statement of Alan C. Nelson, Comm'r, INS) [hereinafter Fraud Hearings]. *See* H.R. Rep. No. 99-906, 99th Cong., 2d Sess. 6, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5978.

36. General Accounting Office, Immigration Marriage Fraud: Controls in Most Countries Surveyed Stronger Than in U.S., No. GAO-GGD-86-104BR (1986). There are difficulties in exporting the conditional status systems of other countries to the United States. Some foreign nations do not have liberal admission policies; some mandate conditional status for as long as ten years. Another distinguishing factor is that foreign conditional status programs function differently than the IMFA's since many of these nations do not have the United States' long visa wait.

37. Fraud Hearings, *supra* note 35, at 78, 88 (statement of Jules E. Coven, President, Am. Immigration Lawyers Ass'n).

38. *Id.* at 19 (statement of Alan C. Nelson, Comm'r, INS).

39. *Id.* at 17-20 (statement of Alan C. Nelson). The INS proposal was to prohibit immigration for one year; the finally adopted IMFA prohibited it for two years. *Id.* at 5.

40. *See id.* at 10, 18 (statement of Alan C. Nelson indicating that a statutory definition of marriage would help in the difficult task of distinguishing "good" and "bad" marriages). Given the preexisting statutory presumption that divorce within two years of marital immigration benefits indicated fraud, and the absence of an immigration statute of limitations, the IMFA's enactment is inexplicable without consideration of administrative convenience. In a sense, every alien's status is "conditional"—and was so even

The State Department, however, did not support adoption of these INS-backed measures. It testified that the majority of fraudulent cases were detected at the visa interview stage, and suggested that proper enforcement of existing law might render legislative amendment unnecessary.[41] In contrast to the INS, the State Department believed that "the answer perhaps lies in better utilizing resources presently at our command strengthening both coordination and cooperation with INS, rather than looking at some across-the-board legislation."[42] The unmistakable implication of the State Department testimony was that applicable law was neither aggressively nor efficiently enforced.

The important distinction between unilateral and bilateral marital fraud was raised by INS testimony during congressional hearings.[43] In a case of "bilateral" or contractual fraud, both parties intend from the outset to enter a sham marriage to acquire immigration benefits. Conversely, in the "unilateral" fraud context, the alien seeks to deceive the citizen or permanent resident spouse concerning her true intention, and will abandon her spouse after acquisition of immigration benefits.[44] In the latter instance, the citizen or permanent resident spouse often is understandably outraged and will testify against the alien. Testimony from defrauded spouses provides considerable assistance to the immigration services in demonstrating the occurrence of fraud.[45] Incidents of unilateral fraud

---

before the enactment of the IMFA—since the INS may always question whether immigration benefits were properly granted. *See* Marital Status, *supra* note 12, at 75-76 (indicating that even after the alien receives citizenship, the agency may seek denaturalization for improperly granted immigration benefits). In addition, INA § 241(c) presumes that any marriage terminated within two years was entered into solely for the acquisition of immigration benefits. 8 U.S.C. § 1251(c) (1982 & Supp. IV 1986). The INS probably found the preexisting statutory presumption unsatisfactory because the alien could disprove that presumption by a "preponderance of the evidence." *See* Baliza v. I.N.S., 709 F.2d 1231 (9th Cir. 1983). In contrast, the INS had to satisfy the "clear, unequivocal, and convincing" standard of proof to revoke the alien's status. *See, e.g.,* Woodby v. I.N.S., 385 U.S. 276 (1966) (requiring this level of proof for deportation); Schneiderman v. United States, 320 U.S. 118 (1943) (same burden for denaturalization proceedings). Finally, the INS was dissatisfied by the federal courts' refusal to permit use of a "viability" standard to deny marital immigration benefits. In rejecting agency attempts to ascertain whether an existing marriage was viable, the courts found that the only relevant statutory issue was the subjective intent of the parties at the time of marriage. *See, e.g.,* Alienating Sham Marriages, *supra* note 30, at 197-98.

41. Fraud Hearings, *supra* note 35, at 79-82 (statement of Jules E. Coven, President, American Immigration Lawyers Association).

42. *Id.* at 24, 32 (statement of Vernon D. Penner, Jr.).

43. *Id.* at 12 (statement of Alan C. Nelson).

44. *Id.* at 13-17 (statement of Alan C. Nelson).

45. *See, e.g., id.* at 30 (statement of Vernon D. Penner, Jr.). Apparently it was the view of many INS trial attorneys that successful denial of immigration benefits deriving from a sham marriage under preexisting law was likely only when one of the parties to the

reported by witnesses, therefore, presumably could have been adequately addressed by pre-IMFA law.[46]

In contrast, the discovery of bilateral marital fraud is unlikely to occur without the commitment of investigative resources. Hearing testimony suggested that INS data gathering and record maintenance was inadequate to prevent such fraud.[47] Furthermore, INS managerial convenience in applying a "streamlined adjudication" system to process marriage petitions resulted in a practice wherein "files are not routinely consulted to verify allegations as to identity, claims to status, and kinship."[48] The focus of the hearing, however, was not to improve INS investigative resources or techniques, but to obviate the need for enhancing proficiency by creating a conditional status waiting period and reducing INS statutory burdens of proof.

A 1988 independent study of the INS's statistical methodology casts considerable doubt on the accuracy of the agency's findings concerning the incidence of immigration fraud.[49] First, the study points out that the INS did not use cases in which fraud was actually demonstrated, but derived its estimates from the personal judgments of investigators, formulated after preliminary investigation.[50] Second, the survey base was extremely small, comprising only one-twentieth of one percent of the immigration petitions filed during fiscal year 1984.[51] Third, although purportedly a random sample, the INS survey selectively excluded certain petition types, possibly skewing the findings toward a higher suspected incidence of fraud.[52] Finally, if the fraud rate is as high as the Service asserts, then the number of petitions denied by the agency should be much higher than records indicate.[53]

---

marriage was willing to testify as to the fraud. Remarks of F. Vandor, former INS Chicago District Trial Attorney, 1988 Immigration Law Seminar, at the Indiana University School of Law—Indianapolis.

46. Fraud Hearings, *supra* note 35, at 64-66 (statement of Roger L. Conner, Executive Director, Fed'n for Am. Immigration Reform).

47. *See, e.g., id.* at 70 (statement of Roger L. Conner).

48. *Id. See also* R. Steel, Steel on Immigration Law § 7:20 (1985) (describing a similar expeditious agency procedure used to adjudicate adjustment of status applications).

49. INS Reveals Basis for Fraud Claims, 65 Interpreter Releases 26 (1988).

50. *Id.* at 27.

51. *Id.* For example, the INS examined only 42 cases, finding suspected—not proven—fraud in 11 of these instances, to conclude that 26% of 33,000 labor certifications filed were fraudulent. *Id.*

52. INS investigators were prohibited from including five categories in the data base: "spouses and children of principal beneficiaries, A or G nonimmigrants [representatives of foreign governments], orphans, adopted children or refugees." *Id.*

53. INS Reveals Basis for Fraud Claims, *supra* note 49:

> [E]xtrapolating from the small survey size of 360 cases to the universe of 675,000 I-485, I-140, and I-130 applications projected at the time to be filed in Fiscal Year 1984, the report estimated that a total of over 200,000 suspected fraudulent petitions might be filed that year. By contrast, the actual number of I-485, I-140 and I-

Congressional inclination to burden the immigration benefits afforded marital relationships cannot be entirely attributed to INS fraud data, but also evinces a desire to counteract the historical preference of immigration law for family reunification.[54] The INS empirical study, even if accurate, does not support many of the IMFA's provisions. Although agency data show that occupational immigration was subject to similar levels of fraud,[55] applicants admitted under these categories were not restricted by the IMFA. In contrast, the INS data did not cover many of the applicants actually regulated by the IMFA.[56] Most remarkable, however, is that Congress enacted the IMFA even though the questionable data it relied upon indicated that seven out of ten married aliens were bona fide applicants. It is also worthy of note that the IMFA's forcible banishment of aliens marrying during the pendency of proceedings that contest their right to remain in the country, the harshest provision of the statute, was unsupported by any statistical evidence demonstrating that these individuals are likely to engage in marital fraud.

Probably the most pernicious result of the INS survey was that it drew attention away from the real needs of the immigration services. These needs can likely be met only by more efficient utilization of existing investigative capacities, an increase in administrative resources to implement an effective fraud detection system, and a legislative restructuring of the quota system to lessen the incentive for fraud. Congress has instead implemented a system that permits the INS to use time as a substitute for administrative effort—a technique of questionable effectiveness. In the process, it sacrifices the assimilative goals of the immigration laws by damaging the interests of families seeking reunification.

2. The applicability and effect of the IMFA. The IMFA provides that alien spouses, and the sons or daughters of citizens or permanent residents, who acquire admission on the basis of any marriage of less than two years duration occurring on or after November 10,

130 applications denied in FY [fiscal year] 1984 was only 28,299. This denial rate of 4.6 percent falls far below the survey's claim of a 30 percent fraud rate. While the INS may lack the resources to investigate each filed application as thoroughly as it might like for fraud, still one would expect the denied application rate to be much higher if the amount of actual fraud is as great as the survey maintains.

54. *See, e.g.*, Fraud Hearings, *supra* note 35, at 60 (statement of David S. North, Director, Center For Labor and Migration Studies, New Transcentury Foundation).

55. INS Reveals Basis for Fraud Claims, *supra* note 49, at 27 (citing estimate by INS that 26% of occupational immigration petitions were fraudulent).

56. *Id.* (indicating that the INS study did not review certain immigration petitions filed on behalf of spouses and children).

1986, will obtain permanent resident status on a two year conditional basis.[57] The requirement is inapplicable to aliens whose marriages are of more than two years duration before the acquisition of immigration benefits[58] and does not apply equally to all familial relationships of less than two years duration.[59]

The juncture at which the two year conditional period begins is not the inception of the marriage but the date of the applicant's obtaining conditional status.[60] Although the statute provides that conditional immigrant status will exist for only two years, in practice any qualifying marriage used for admission must endure longer. Since the waiting period is not initiated until the conferral of conditional status, existence of the marriage during the interval of visa processing or adjudication is not considered in computing the two year waiting period. Spouses of permanent residents may have to remain married for almost four years due to the backlogged quota system.[61] Immediate relatives, even though exempt from quota limitations, will also have to maintain their marriages for more than two years due to administrative delays in visa processing.[62] This situation provides a strong incentive for applicants to engage in strategic maneuvering to evade conditional status by calculating the quota

57. INA § 216(a)(1), (g), 8 U.S.C. § 1186a(a)(1), (g) (Supp. IV 1986). *See also* INS Rules on Effective Time of Marriage Fraud Law, 64 Interpreter Releases 593, 594 (1987).

58. INA § 216(g), 8 U.S.C. § 1186a(g) (Supp. IV 1986).

59. For example, the statute exempts the alien spouses and stepchildren of third or sixth occupational preference immigrants from conditional status. INA § 216(g), 8 U.S.C. § 1186a(g) (Supp. IV 1986). *See* Shapiro & McLoughlin, Immigration Marriage Fraud Amendments and the Proposed Regulations, in Immigration and Nationality Law, 42nd Anniversary Symposium of the American Immigration Lawyers Association, 2 Advanced Topics 27 (1988); The Immigration Reform and Control Act of 1986 (Part 2), 5 Immigr. L. Rep. 81, 85 (1986) [hereinafter IRCA of 1986 (Part 2)].

60. INA § 216(a)(1), (g), 8 U.S.C. § 1186a(a)(1), (g) (Supp. IV 1986). *See also* INS Issues Further Instructions on Immigration Marriage Fraud Law, 63 Interpreter Releases 1076, 1077-78 (1986) [hereinafter INS Instructions].

61. *See, e.g.*, IRCA of 1986 (Part 2), *supra* note 59, at 86:

> For example, if the spouse of a resident receives an immigrant visa at a U.S. consulate and is ready to be admitted to the United States 22 months after getting married, admission to the United States at that point would result in two years of conditional status. The marriage would effectively have to last 46 months before it could be dissolved without fear of a removal of residence status.

In contrast, if the alien spouse took advantage of the four month visa validity period and postponed her entry for two months, then she could avoid the two year probationary period. *Id.*

62. The INS's increased workload since implementation of IRCA has lengthened the approval period for immediate relatives to as much as nine months. *See* INS Central Office Answers AILA Questions, 65 Interpreter Releases 28, 29, app. II at 42 (1988) [hereinafter INS Central Office]. The INS attributes visa processing delays to the IRCA legalization program and expects delays to end upon termination of that program. *Id.* Under normal circumstances, citizen spouses are usually admitted within three months of marriage. IRCA of 1986 (Part 2), *supra* note 59, at 85.

backlogs, the time of the filing of entry request, and the interval required for administrative approval. For the knowledgeable second preference applicant, avoidance of the probationary period is either inherent in the quota system process or is a matter of a few months inconvenience. Ironically, spouses of citizens lack recourse to similar stratagems to avoid conditional status.[63]

The novelty of conditional immigrant status has provoked debate focusing on formalistic arguments as to whether the IMFA simply provides "permanent residency on a conditional basis" or instead creates a "new status known as *conditional permanent resident* status."[64] The Act does provide that conditional status aliens have the same naturalization eligibility as permanent residents.[65] Moreover, INS regulations state that any conditional status holder possesses "all the rights, privileges, responsibilities and duties as a lawful permanent resident."[66] The proper interpretation of congressional intent is apparently that, for matters not explicitly discussed in the statute, conditional status holders have the same legal rights as permanent residents.[67] This suggests that state law may not discriminate between conditional and permanent resident aliens. Nonetheless, initial confusion regarding the new status influenced some INS district

63. For second preference immigrants, calculated behavior to avoid the two year probationary period is likely to become the rule rather than the exception. For example, the State Department's estimation of the number of visas available for second preference applicants in March 1988 provided the following waiting periods: for China, India, and Korea, one year and six months; for the Dominican Republic, two years and four months; for Mexico, ten years and one month; for the Philippines, six years and eight months; for Hong Kong, four years and nine months; and for all other countries, one year and seven months. 6 Bureau of Consular Affairs Visa Bulletin, Immigrant Numbers for March 1988, at 2 (1988), *reprinted in* Immigration and Nationality Law, 42nd Anniversary Symposium of the American Immigration Lawyers Association, 1 Fundamentals 130-33 (1988). Second preference spouses with a visa wait of approximately one and one-half years may elude conditional status by strategically postponing visa application or delaying entry. The two year probationary period is superfluous for aliens immigrating from extremely over-subscribed countries since they will be married more than two years by the time of admission. Since citizens' spouses are exempt from the quota system, and can usually be admitted within three months of marriage, evasion of conditional status is unlikely. This result appears to be incongruous since there is no evidence that citizens are more likely to enter into fraudulent marriages than resident aliens.

64. Comment, Immigration Marriage Fraud Amendments of 1986: Till Congress Do Us Part, 41 U. Miami L. Rev. 1087, 1097-98 (1987) (emphasis in the original) [hereinafter Congress Do Us Part].

65. INA § 216(e), 8 U.S.C. § 1186a(e) (Supp. IV 1986).

66. 53 Fed. Reg. 30,018 (1988) (to be codified at 8 C.F.R. § 216.1); *see also* INS Central Office, *supra* note 62, app. I at 34.

67. *See, e.g.*, Congress Do Us Part, *supra* note 64, at 1098 & n.58 (citing 132 Cong. Rec. 8588-89 (daily ed. Sept. 29, 1986)) (quoting the statement of Rep. McCollum that Congress "did not intend to create a new status of permanent residents").

offices to advise state authorities otherwise.[68] Conditional status, however, is not the statutory equivalent of permanent residence. The IMFA distinguishes conditional status holders from permanent residents in two important respects: it denies the former immigration benefits available to the latter, and it places them under severe restrictions in conducting their private familial affairs.

The INS may terminate conditional resident status before the second anniversary of a marriage upon the occurrence of any of three statutorily defined circumstances. Two of the grounds for termination require INS findings that the marriage was a sham or that money, other than attorney fees, was paid to procure entry. A third ground for termination is provided where the marriage has been legally terminated before the end of the two year period.[69] The first two grounds for termination make no significant substantive change to prior law, since the INS had statutory authority to terminate immigration benefits derived from demonstrably fraudulent relationships prior to the IMFA's passage.[70] The new enactments, however, do substantially change the burden of proof borne by the INS. If the alien chooses to contest the cancellation of conditional status, to support termination the agency need only show one of the three conditions by a preponderance of the evidence.[71] Upon removal of the alien's conditional status, she will be subject to deportation since adjustment to any other status is prohibited.[72] Previously the INS had to provide "clear and convincing evidence" to support deportation;[73] thus, the IMFA simplifies the INS's task. Particularly when the ground for cancellation is the legal termination of the marriage, the agency's evidentiary burden can be satisfied by mere presentation of the appropriate legal documentation.

For an alien to remove her conditional status, she and her spouse must jointly petition the INS and present themselves for a personal

68. *See, e.g.*, INS Central Office, *supra* note 62, app. I at 34 (citing the INS Central Office's correction of an INS district director's improper interpretation that a conditional permanent resident college student lacked the right to claim state residence tuition available to permanent residents). *See also* Opinion and Letter Discuss Marriage Fraud Amendments and Education, 65 Interpreter Releases 103, 104 (1988) (citing the opinions of various state and federal agencies that conditional status holders have the same eligibility as permanent residents for federal student financial assistance programs and state resident tuition status).

69. INA § 216(b)(1), 8 U.S.C. § 1186a(b)(1) (Supp. IV 1986).

70. *See supra* note 40.

71. INA § 216(b)(2), 8 U.S.C. § 1186a(b)(2) (Supp. IV 1986); *see also* INS Instructions, *supra* note 60, at 1079.

72. *See* INS Instructions, *supra* note 60, at 1079.

73. *See, e.g.*, Patterson, Palmer & Brandes, IRCA, IMFA, and SDCEA: What does this Immigration Alphabet Soup Spell?, 39 Baylor L. Rev. 413, 458 (1987) [hereinafter Alphabet Soup].

interview during the 90 day period immediately before the second anniversary of the grant of conditional status.[74] The requirement that the petition must be *jointly* filed places the alien's immigration status in a precarious position, dependent upon the good will of her citizen or permanent resident spouse. In the event of domestic dispute, the unscrupulous citizen or permanent resident spouse has a legally superior strategic position to evoke concessions normally unachievable by threat of divorce alone.

In the absence of ability to jointly file the petition, section 216(c)(4)(B) does offer a ground for forgiveness. To satisfy its statutory prerequisites, however, the alien must show that "the qualifying marriage was entered into in good faith by the alien spouse, but . . . has been terminated (other than through the death of the spouse) by the alien spouse for good cause and the alien was not at fault."[75] The statute fails to define or provide examples of "good cause" or "fault." Since many state divorce laws have moved toward a "no fault" model of divorce, problems of proof are likely. Applying the immigration laws in a manner that conflicts with the development of domestic family law may also prove administratively burdensome. Immigration judges may be presented with the onerous task of "untangling the history of the marriage" and delegating fault in a "mud-slinging" proceeding.[76] Furthermore, when divorce has been sought, the waiver is available only if the *alien* spouse files. Given the deleterious consequences to the alien's immigration status should her spouse file for divorce, the statute may encourage a "race to the courthouse," and discourage attempts to resolve marital difficulties. As a consequence, it is inconsistent with "society's long-standing tradition of encouraging, revering, and protecting marriage as an institution."[77]

The statute alternatively provides that the conditional status alien may obtain a waiver of the joint filing requirement upon a showing that "extreme hardship" would result if she was deported.[78] The IMFA does not define "extreme hardship," but the phrase is a term of art appearing in other INA provisions such as the suspension of deportation statute.[79] Although determination of extreme hardship

74. INA § 216(c)(1)(A), (B), 8 U.S.C. § 1186a(c)(1)(A), (B) (Supp. IV 1986); INA § 216(d)(2)(A), 8 U.S.C. § 1186a(d)(2)(A) (Supp. IV 1986).

75. INA § 216(c)(4)(B), 8 U.S.C. § 1186a(c)(4)(B) (Supp. IV 1986).

76. Ingber & Prischet, *supra* note 33, at 564-65.

77. *Id.* at 565.

78. INA § 216(c)(4)(A), 8 U.S.C. § 1186a(c)(4)(A) (Supp. IV 1986).

79. The term "extreme hardship" is used in the INA's suspension of deportation statute and its waivers of exclusion for certain criminal offenses. INA §§ 212(h), 244(a)(1), 8 U.S.C. §§ 1182(h), 1254(a)(1). *See* Waivers of Excludability Under Sections

is clearly committed to the discretion of the INS,[80] derivation of a settled meaning for the term has proven to be elusive. Two factors account for this ambiguity. First, Congress failed to provide adequate interpretive guidance in the form of legislative history.[81] Second, determination of "extreme hardship" defies easy adjudication since it is a "mixed question of law and fact."[82] Mere economic injury associated with deportation is insufficient; the alien must usually demonstrate a complete lack of economic opportunity in her country of origin before extreme hardship will be conceded.[83] Demonstrating that deportation may preclude the alien from obtaining employment comparable to the position she holds in the United States is also inadequate, as is the concomitant separation of family members.[84] Aliens in successful suspension cases usually exhibit an extraordinary combination of factors including: parental separation from young children; an effort to avoid displacement of youthful minors to the alien parent's native country where language barriers and different traditions would present major obstacles to the child's development; and a showing that the parent's severe loss of earning capacity would be detrimental to the child.[85] A significant loss of earning capacity associated with the need to provide a sick child medical treatment, which the country of deportation lacks, has likewise been deemed to constitute adequate hardship.[86]

Several factors suggest that the IMFA's hardship waiver will not provide effective relief. First, an adverse INS waiver decision would be difficult to overturn on judicial review, since abuse of discretion is a limited standard of review resulting in agency affirmance in the majority of cases. Second, the INS is likely to find extreme hardship only in the exceptional instance where a combination of factors present an overwhelmingly sympathetic case. Finally, the IMFA hardship waiver may be even more difficult to obtain than the waiver for suspension of deportation proceedings. In determining extreme hardship under the IMFA, the "Attorney General shall consider circumstances occurring only during the period that the alien was

212(h) and (i) of the Act, 1 Immigr. L. Rep. 33, 37 (1981); Suspension of Deportation, 1 Immigr. L. Rep. 41 (1981) [hereinafter Suspension of Deportation].

80. I.N.S. v. Wang, 450 U.S. 139, 144 (1981) (per curiam).

81. Feldman, Scope of Judicial Review: Extreme Hardship and the Whipsaw of Illegal Aliens, 36 Admin. L. Rev. 27, 32 (1984).

82. *See id.* at 30.

83. Prapavat v. I.N.S., 638 F.2d 87, 89 (9th Cir. 1981).

84. Matter of Sangster, 11 I. & N. Dec. 309 (BIA 1965).

85. *See, e.g.*, Suspension of Deportation, *supra* note 79, at 45 (citing Prapavat v. I.N.S., 638 F.2d 87 (9th Cir. 1981); Bastidas v. I.N.S., 609 F.2d 101 (3d Cir. 1979)).

86. *See* Suspension of Deportation, *supra* note 79, at 45.

admitted for permanent residence on a conditional basis."[87] Since the apparent effect of this provision is to render the interests of children born before the grant of conditional status irrelevant, one of the more effective grounds for claiming hardship has been eliminated. For these reasons, the IMFA extreme hardship waiver will likely prove ineffectual as an ameliorative device in the majority of cases. To the extent that Congress intended to devalue assimilative interests and limit the waiver to extraordinary circumstances, the statute is effective.

The effects of the IMFA remain even after the successful termination of probationary status and grant of permanent residence. Section 204(a)(2)[88] limits the ability of aliens to remarry within five years of the grant of permanent residence except in the event of the former spouse's death. This bar against remarriage is clearly intended to deter "sham divorce." In a sham divorce, an alien divorces her alien spouse, fully intending to remarry him, and immigrates on the basis of marriage to a citizen or permanent resident. Marriage to a former boyfriend after divorce is statutorily fraudulent if the alien did not intend to maintain the immigrating marriage. Section 204(a)(2) therefore prohibits the grant of second preference status to a former conditional status holder's new spouse unless the alien can establish by "clear and convincing evidence" that her prior marriage "was not entered into for the purpose" of circumventing the immigration laws.

The statute is inartfully drafted if its purpose is to discourage the occurrence of sham divorces. In most cases the provision will not apply if the alien immigrated on the basis of marriage to a citizen, because the alien spouse will be eligible for naturalization within three years.[89] As a citizen she then can enable her new spouse to immigrate as an "immediate relative" rather than under a second preference category. Spouses who are entitled to immigrate because of marriage to occupational immigrants are exempt from the restriction since second preference spouses are the only quota immigrants under the statutory impediment.[90] Likewise, the statute is ineffectual if the former spouse or boyfriend has, or can acquire, permanent residence on an independent basis. After divorce and remarriage, the new spouse will not need the alien's assistance to acquire admission. Incentive to fraudulently marry a citizen to gain speedier immigration, however, is not lessened in this circumstance.

87. INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4) (Supp. IV 1986).
88. 8 U.S.C. § 1154(a)(2) (Supp. IV 1986).
89. *See supra* note 12.
90. 8 U.S.C. § 1154(a)(2) (Supp. IV 1986) (last sentence of the section).

The IMFA therefore applies the statutory burden to a very limited class of individuals, while exempting the majority who have similar incentives to engage in fraud. The provision is also troublesome due to its requirement that the alien satisfy the "clear and convincing" burden of proof standard to enable her new spouse to immigrate. Since the five year bar on remarriage is in addition to the two year conditional status, the statute's extended applicability may be an additional cause for concern since even good faith marriages might falter during this seven year period.

If litigation is a valid indicator,[91] the IMFA's most controversial provision is its prohibition of adjustment of status to any alien who seeks that benefit based on a marriage entered into during the pendency of judicial or administrative proceedings contesting her right to remain in the United States.[92] The law provides that any alien who marries under these circumstances may not adjust status "until the alien has resided outside the United States for a two-year period beginning after the date of the marriage."[93] The validity of the marriage relationship is irrelevant—the test is the mere pendency of expulsion proceedings. As a consequence, the couple is denied any opportunity to demonstrate the legitimacy of their relationship. The IMFA irrebuttably presumes that people who marry during the pendency of expulsion proceedings do so for fraudulent purposes. Because the expulsion process can span years, it is likely that the statutory presumption is overinclusive and may actually discourage aliens from exercising their legal right to contest deportation.[94]

Avoiding the statutory mandate by departing the country, traveling overseas to marry, and then applying for readmission is not without cost. This process is particularly onerous for spouses of citizens, who would otherwise have the right to immediately adjust status and begin married life in the United States. The oppressive

91. For citation of the cases filed contesting the constitutionality of these IMFA provisions, see *supra* note 8.

92. INA § 245(e), 8 U.S.C. § 1255(e) (Supp. IV 1986).

93. INA § 204(h), 8 U.S.C. § 1154(h) (Supp. IV 1986).

94. The limited number of immigration judges contributes to significant delays in hearing deportation cases, and appeals to the BIA can take years. Even if the alien is successful at the administrative level, the government may further delay the acquisition of immigration benefits by seeking judicial review. If the alien is unsuccessful, however, she must still comply with the two year foreign residence requirement. As a consequence, aliens contesting deportation are penalized significantly. They would obtain lawful status more quickly by not contesting the deportation charges, even if the charges were inaccurate, departing the country voluntarily and reentering after acquisition of conditional status through marriage. *See, e.g.*, Frye, Through the Looking Glass Darkly—Section 5 of the Immigration Marriage Fraud Amendments, 11 Immigr. J. 1, 8 (Jan./Mar. 1986) (arguing that the IMFA's penalization of the right to challenge deportation is unconstitutional) [hereinafter Through the Looking Glass].

consequences of these provisions apply to any affected couple, however. Lack of financial resources, foreign licensure and residency requirements, illness, or occupational duties may make evasion of the statute arduous.[95] Moreover, the most significant risk of this evasion strategy may be the fact that judicial review of consular visa denial is not available.[96]

B. IRCA Amendment of the Adjustment of Status Statute

IRCA's amendment of the adjustment of status program extends the contemporary nonassimilative trend of the immigration laws beyond marital restrictions. Prior to IRCA, adjustment lessened the incidence of family separation by permitting aliens eligible for permanent residence to acquire this benefit within the United States. In addition, adjustment served a humanitarian function by extending relief from deportation to aliens having certain family relationships. Many aliens are now denied these advantages under the amended adjustment of status statute. The nonassimilative effect of the new statutory restrictions has been exacerbated by the State Department's termination of its stateside criteria program. Stateside criteria, a program that allowed aliens closely related to permanent residents or citizens to apply for permanent residence in Mexico or Canada, greatly diminished the severity of adjustment disqualification.[97] Like the IMFA, IRCA's modification of the adjustment program is emotionally and economically burdensome to family relationships but does not effectively prevent fraud.

1. History and operation of the adjustment of status program. The Immigration Act of 1924 did not permit an alien present in the United States, and otherwise eligible for permanent residence, to acquire permanent status without leaving the country to receive a visa from a consular officer.[98] In effect, the alien was required to leave the country in order to return. This illogical requirement did not escape the notice of either the immigration bureaucracy or interested aliens. Not only did the practice cause monetary and emotional hardship for the alien and her family, but it generated unnecessary paper work and delay for the agencies involved. One

95. *Id.* at 7.
96. *See infra* note 109.
97. *See* Immigration Primer, *supra* note 1, at 74.
98. Foster, The Logic of Adjustment of Status to Permanent Residency, 24 S. Tex. L.J. 37 (1983) [hereinafter Logic of Adjustment]. For another explanation of the history of, purposes of, and qualifications for adjustment of status, see Comment, Adjustment of Status Under Section 245 of the Immigration and Nationality Act, 20 San Diego L. Rev. 165 (1982) [hereinafter Adjustment].

former INS general counsel has described the process as "exceedingly cumbersome and . . . the greatest paper shuffle in the history of the U.S. immigration system."[99]

Due to the problems caused by this requirement, the INS created the pre-examination program in the 1930s. This program permitted adjustment applicants to apply for the benefit in Canada rather than returning to their country of origin.[100] President Truman's 1952 Commission on Immigration characterized the requirement that the alien make a trip abroad solely for the purpose of acquiring a visa as "an expensive procedure which served no useful purpose either for the alien or for the United States."[101] The Commission accordingly approved the administrative practice of pre-examination, finding that it "did not eliminate the usual checks and procedures in issuing visas. . . [and] [n]o persuasive evidence seems to have been presented to justify a contrary view."[102]

Congress nevertheless disapproved of the pre-examination process, asserting "that the preexamination program was cumbersome, obsolete, and, as practiced, contained certain loopholes for the admission for permanent residence of undesirable aliens," and implicitly directed that it be abolished.[103] In 1952, however, Congress enacted section 245 to provide a statutory device for change of status. Unfortunately, the provision had several restrictions that hindered its effectiveness. Major limitations of the 1952 Act included the requirement that the applicant maintain lawful nonimmigrant status to apply for adjustment, and the fact that the filing of the application terminated nonimmigrant status.[104] Furthermore, Congress withheld the Act's benefits from natives of western hemisphere countries, and excluded spouses or children of citizens unless they had been in the country for at least one year before acquiring eligibility.[105] The Truman Commission severely criticized the statute and recommended the adoption of expansive amendments to restore the beneficial features of pre-examination.[106]

---

99. Nonimmigrant Business Visas and Adjustment of Status: Hearing Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 85, 87 (1981) (statement of Sam Bernsen).

100. Logic of Adjustment, *supra* note 98, at 37.

101. President's Commission on Immigration and Naturalization, Report (1953), *reprinted as* Whom We Shall Welcome 209 (1971) [hereinafter Truman Commission].

102. *Id.*

103. H.R. Rep. No. 2096, 82d Cong., 2d Sess. 128 (1952); *see also* 2 C. Gordon & H. Rosenfield, *supra* note 1, at § 7.3a.

104. *See, e.g.*, 2 C. Gordon & H. Rosenfield , *supra* note 1, at § 7.7a.

105. *Id.*

106. Truman Commission, *supra* note 101, at 210-11.

Due to the inadequacy of section 245, and the limited number of aliens that could qualify under its restrictive provisions, the INS revived the practice of pre-examination despite the lack of congressional authorization.[107] Subsequent congressional amendments from 1957 to 1976, however, removed most of the restrictive provisions of the 1952 statute, and were intended both to avoid the filing of numerous private bills to ameliorate hardship in individual cases and to enlarge the number of aliens who could adjust their status within the country.[108] The single most important amendment was the elimination of noneligibility for aliens whose status had become irregular.

After the INA of 1952 was enacted, adjustment of status under section 245 gradually evolved into an effective tool for aliens in the United States who had both the desire and legal basis to become lawful permanent residents. Adjusting status in the United States is superior to applying for a visa overseas in several ways: pragmatic advantages in time and expense to both the alien applicant and the government; less stringent documentation requirements; a generally faster processing time; and the retention of the right to judicial review should the adjustment be denied.[109] Pre-examination was revived under the guise of the stateside criteria program.[110]

2. Analysis of the new adjustment of status provision. IRCA's amendment of section 245 is a poorly drafted provision[111] which represents a regression in the assimilative evolution of the immigration laws. Prior to the IRCA, section 245 was the primary means by which aliens already present in the United States acquired permanent residence and sought elimination of technical problems with

107. 20 Fed. Reg. 3,496 (1955) (amending 8 C.F.R. §§ 242.61, 245.54).

108. 2 C. Gordon & H. Rosenfield, *supra* note 1, at § 7.7a.

109. *See generally* Immigration Process & Policy, *supra* note 13, at 484-85. *See also* 2 C. Gordon & H. Rosenfield, *supra* note 1, at § 7.7a. Under current law, a consular officer's denial of a visa is not subject to judicial review. *See, e.g.*, Centeno v. Shultz, 817 F.2d 1212 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 696 (1988). This view has been severely criticized. *See, e.g.*, Bernsen, Consular Absolutism in Visa Cases, 63 Interpreter Releases 388 (1986); Gotcher, Review of Consular Visa Determinations, 60 Interpreter Releases 247 (1983); Note, A Case For Judicial Review of Consular Visa Decisions, 22 Stan. J. Int'l L. 363 (1986).

110. *See* Logic of Adjustment, *supra* note 98, at 38.

111. For a discussion of the drafting errors in section 245, see Rubin, Section 245 of the Immigration and Nationality Act as Amended by the Immigration Reform and Control Act of 1986 and the Immigration Marriage Fraud Amendments of 1986, in The New Simpson-Rodino Immigration Law of 1986, at 518-19 (1986); Bender's Immigration and Nationality Act Pamphlet 144 n.28 (B. Chase & J. Rintoul ed. 1987).

their immigration status. Leading immigration law sources commonly describe the adjustment provision as "relief from deportation" or "regularization of status,"[112] but the IRCA has rendered these designations anachronistic since section 245 no longer either offers relief from deportation or regularizes the status of many aliens. This severity comports with congressional intent not only to restrict the availability of the relief, but also to encourage the elimination of the stateside criteria program.[113]

IRCA's most significant change to the adjustment of status process is the amendment of section 245(c)(2) to prohibit the adjustment to permanent resident of any non-immediate relative alien "not in legal immigration status on the date of filing the application for adjustment of status or who has failed (other than through no fault of his own for technical reasons) to maintain continuously a legal status since entry into the United States."[114] This section reflects congressional desire to reinstate the 1952 version of section 245, which required that the applicant possess a lawful nonimmigrant status in order to become a permanent resident. Failure to maintain immigration status now disqualifies an alien from adjusting status in the United States, and requires that she proceed overseas to acquire a visa from a State Department consulate officer. Pursuant to BIA interpretation, the provision does not apply to any alien whose adjustment application was filed prior to November 6, 1986, the date of the statute's passage.[115] The limitation is likewise inapplicable to the spouses of citizens because they are immediate relatives. Contrary to the erroneous opinion of some commentators, perhaps due to a failure to fully comprehend the complex interrelation of section 245 to other INA provisions, this preferential treatment does not permit immediate relatives to avoid the harsh effects of the IMFA.[116]

---

112. *See, e.g.*, 2 C. Gordon & H. Rosenfield, *supra* note 1, at ch. 7 (discussing adjustment of status in chapter entitled "Relief from Deportation"); Immigration Process & Policy, *supra* note 13, at ch. 6, § C (similar discussion under "Regularization of Status").

113. S. Rep. No. 1200, 99th Cong., 1st Sess., Part 2, at 31 (1985).

114. INA § 245(c)(2), 8 U.S.C. § 1255(c)(2) (Supp. IV 1986).

115. Matter of Battista, I.D. No. 3036 (BIA Oct. 21, 1987).

116. *See* Alphabet Soup, *supra* note 73, at 463:

> To avoid . . . [the section 204(h)] two-year foreign residence requirement, the alien need merely await the conclusion of the deportation or exclusion proceedings, leave the United States to marry, and then gain immigration benefits. Granted, the alien must take a short vacation, but can confidently return prior to issuance of a visa as the INA [section 245] excuses . . . lack of status for an immediate relative.

The above assertion is an overstatement for several reasons. First, it would be unwise to "await the conclusion" of an exclusion or deportation hearing since the execution of a successful expulsion order constitutes an independent basis for barring future readmission. INA § 212(a)(16), (17), 8 U.S.C. § 1182(a)(16), (17) (Supp. IV 1986); INA § 241(a)(2), 8 U.S.C. § 1251(a)(2) (Supp. IV 1986). The astute practice is to avoid this

3. The stateside criteria program. After adoption of the section 245 amendments, the State Department initially attempted to use stateside criteria to lessen the law's severity. The State Department's first position was that only aliens ineligible to adjust solely by reason of the amended version of section 245 were disqualified from the stateside criteria program.[117] If the alien, however, was also ineligible because of another INA provision, then the applicant could seek stateside criteria. Despite its desirability as a device for "subverting" draconian legislative intent, this interpretation was suspect because the distinction appeared to have no valid interpretive or moral basis. It would, in effect, provide an incentive for an alien to place herself in violation of some other provision of the INA to qualify for stateside processing. This would constitute a calculated risk since the alien must presume, perhaps falsely, that she can successfully procure a statutory waiver of the additional deficiency.

After reconsideration, the State Department changed its position and announced its intention to totally eliminate the stateside criteria program as of December 31, 1987.[118] Although the State Department explained that the program was "not a regulatory one and [was] based solely upon administrative decisions,"[119] a degree of skepticism may be justified before accepting this as the primary reason for the program's termination. First, the program had been subject to legislative disfavor since 1952, but was continued on grounds both of applicant hardship and of administrative convenience. It is noteworthy that Congress expressed displeasure with the program in IRCA's legislative history, while not expressly prohibiting its operation by statute. Second, recitation of factors of administrative convenience dominate the State Department notice, and may be the primary motivation for terminating the program. The State Department stated that it needed to reallocate its resources "to carry out the Department's requirements under IRCA."[120] It is possible that some form of stateside criteria may be reinstituted once the pressures of the IRCA legalization program have terminated.

---

occurrence through voluntary departure. Second, the advice evinces a failure to analyze section 245 in its entirety. Although section 245(c) does exempt immediate relative aliens from the continuous maintenance of legal status requirement, it does not excuse surreptitious entry without visa. Section 245(a) qualifies section 245(c) by limiting adjustment of status to aliens who were "admitted or paroled into the United States." INA § 245(a), 8 U.S.C. § 1255(a) (Supp. IV 1986).

117. *See* Wire of INS Commissioner Alan C. Nelson to INS Field Offices (Jan. 14, 1987), *reprinted in* 64 Interpreter Releases 152, 153 (1987).

118. 52 Fed. Reg. 45,272 (1987).

119. 52 Fed. Reg. 19,442 (1987).

120. 52 Fed. Reg. 19,443 (1987).

The State Department's exercise of managerial authority in this matter probably does not constitute an abuse of discretion in the legal sense of that term.[121] The State Department indicated that the stateside criteria program must be given a lower priority than the Department's statutory requirements under IRCA and "other high priority needs."[122] On policy grounds, however, the rationale for this reallocation is suspect. First, the policy gives insufficient weight to the fact that most aliens subject to a disqualifying deficiency under section 245 will seek admission on the basis of a family relationship. The emotional and economic reliance often present in these relationships, and the alien's existing attachment to and involvement in the community, at least raise doubt as to whether nonimmigrant aliens abroad and others dealing with the State Department should receive priority treatment in this context. Second, not all countries have visa-issuing posts. In this situation, the State Department has stated that it would take this factor under consideration as a "hardship."[123] State Department consideration, however, apparently does not encompass the injury accruing to adjustment applicants who may find it arduous to return to their countries of origin because of personal reasons, time, or expense. Third, the majority of aliens having irregular status originate from particular nations. The reallocation of stateside criteria cases will "certainly impact those posts in countries with already high numbers of immigrant visa applicants, such as Mexico, the Philippines, Haiti, the Dominican Republic and Jamaica."[124] Finally, it is not obvious that elimination of the stateside criteria program will serve the end of administrative convenience. Neither the State Department nor the INS has adequately explained why two of the program's primary attributes—the avoidance of unnecessary paperwork and conservation of agency time—are no longer desirable.

C. Commentary on the IMFA and the IRCA Adjustment of Status

It would be misleading to view the IMFA and the IRCA adjustment of status provisions as mere fraud prevention devices. If the deterrence of fraud was Congress's primary objective in passing the IMFA, then the statute's exemption of the spouses and children of

121. *See generally* Fletcher, Some Unwise Reflections About Discretion, 47 Law & Contemp. Probs., Autumn 1984, at 269, 280 (indicating that a "decision to allocate resources represents an exercise of managerial discretion").

122. 52 Fed. Reg. 19,443 (1987).

123. 52 Fed. Reg. 45,272, 45,273 (1987).

124. 64 Interpreter Releases 1337 (1987).

occupational aliens is inexplicable. The Act's treatment of conditional status aliens whose marriages do not survive the two year period is also incongruous since occupational aliens are not required to retain employment for a set period of time and may remain even without having worked at all or having worked briefly and subsequently terminated employment, absent a showing of fraud.[125] When viewed as a precursor of the Kennedy-Simpson Bill, the preferential treatment of "talented" immigrants by the IMFA exhibits a certain rationality and could be understood as a desire to redress the historical dominance of family relationships under the immigration laws. The statute could be restructured, however, to more equitably effectuate the latter purpose. The IMFA regulates the incidence rather than the causes of marriage fraud by neglecting quota system reforms that would alleviate such fraud. The Kennedy-Simpson Bill offers some relief by broadening opportunities to immigrate on other grounds but underestimates the degree to which powerful pressures for fraud stem from the forcible separation of families. Future immigration legislation should do more than is currently proposed to ease the backlog of first preference immigration.

The IMFA's capability to prevent fraud is questionable. First, individuals sufficiently determined to enter the country can successfully maintain the appearance of a valid marital relationship for two years without great inconvenience. Although the statute mandates that at the end of the period the petitioning couple must present itself to the INS for an interview, the INS will probably waive this requirement in most instances unless it has some specific reason to suspect marriage fraud.[126] Second, given that the IMFA does not improve the inadequate investigative capability of the INS to discover fraud, substituting the passage of time for administrative effort is unlikely to prove effective. Only individuals ignorant of the law will marry during expulsion proceedings. To permit them at least the *opportunity* to demonstrate marital legitimacy does not appear too great a concession to relational interests. The resulting administrative costs are not excessive since the marital validity hearing could be part of an ongoing proceeding and patterned after the existing

125. *See* Jang Man Cho v. I.N.S., 669 F.2d 936 (4th Cir. 1982) (alien not reporting for work permitted to retain permanent resident status absent a showing of a lack of intent to accept the position upon entry); Matter of Marcoux, 12 I. & N. Dec. 827 (BIA 1968) (alien dissatisfied with employment who left after five days allowed to remain since there was no evidence of fraudulent intent to gain other employment).

126. New INS Operations Instructions on Transferees and Students; Proposed Marriage Fraud Regulations, 7 Immigr. L. Rep. 13, 24 (1988).

waiver for failure to file a joint petition.[127] Finally, implementation of a statutory design contrary to the policies of United States family law is incompatible with the interests of administrative efficiency.

As with the IMFA, the key to understanding legislative dissatisfaction with pre-IRCA adjustment is awareness of Congress's sense that the provision promoted fraud.[128] Under the adjustment program, any alien who had acquired a nonimmigrant visa with a "preconceived intent" to immigrate had circumvented the statutory scheme and could be denied adjustment.[129] Although IRCA's legislative history does not reveal this concern, Congress believed, apparently without statistical basis, that the increasing number of adjustments indicated the proliferation of fraud. There are two possible explanations for the paucity of legislative history in this respect. First, given the extensive consideration accorded such amendments over the years—as substantively similar bills were reintroduced[130]—Congress may have found further debate unnecessary. Alternatively, because much of the prior debate was injurious to the amendments' enactment, entering similar testimony into the record might have proven embarrassing.

Prior adjustment of status studies and recommendations advised against diminishing the statute's assimilative benefits and concluded that the proposed amendment would increase fraud rather than protect the integrity of the visa system. The Select Committee's 1981 Final Report, like the Truman Commission report, recommended that the statute remain in its pre-IRCA form since there was no demonstrable evidence of substantial abuse.[131] The State Department testified in congressional hearings that the proposed amendment was impractical because it did not disqualify applicants from immigration benefits, but merely required a pointless trip to a consular

127. Marriage Fraud Amendments Regulations, 53 Fed. Reg. 30,011, 30,020-21 (to be codified at 8 C.F.R. § 216.5) (providing that a waiver for good cause may be based on commingling of assets, length of cohabitation after marriage, or other pertinent evidence).

128. *See, e.g.*, H.R. Rep. No. 1365, 82d Cong., 2d Sess., *reprinted in* 1958 U.S. Code Cong. & Admin. News 1653, 1718.

129. *See, e.g.*, Adjustment, *supra* note 98, at 175-79.

130. *See, e.g.*, S. 2222, 97th Cong., 2d Sess. (1982); H.R. 5872, 97th Cong., 2d Sess. (1982). Similar legislation was introduced in several successive congressional sessions. *See* Immigration Reform History, *supra* note 22, at 31-34; Griffith, Reforming the Immigration and Nationality Act: Labor Certification, Adjustment of Status, the Reach of Deportation, and Entry by Fraud, 17 U. Mich. J.L. Ref. 265 (1984).

131. SCIRP, *supra* note 15, at 205.

post.[132] Other immigration experts criticized the measure as "unhumanitarian," an impediment to international trade and commerce, and an unnecessary administrative burden.[133] The preexisting section 245 promoted the acquisition of legal status by providing a relatively simple adjustment procedure to aliens statutorily qualified for permanent residence. The new restrictions, however, may encourage aliens to maintain illegal status to avoid family separation and the burden of returning abroad to apply.[134] It is particularly ironic that the legislation will effectively penalize aliens who enter the country in good faith, but will probably not significantly deter those entering the country with preconceived intent to commit fraud.[135] If the IRCA's amendment of section 245 was designed to prevent fraud, then it is an ineffective, symbolic gesture unnecessarily burdensome to potential immigrants and to the immigration system. A broader look at the legislation shows that it facilitates Congress's shift of emphasis in immigration law away from domination by concerns of family reunification. The revision of the adjustment process is of even greater utility than the IMFA in this cause, as it encompasses any alien in the country who seeks permanent residence. The restriction of the adjustment program, like the IMFA's adoption, signals more than congressional concern with fraud prevention or a historical regression to the 1952 version of the INA. The new adjustment of status provision is also a precursor of Kennedy-Simpson's realignment of immigration policy.

The IMFA and IRCA adjustment of status laws exhibit an appalling attempt to conserve administrative resources at the cost of "human capital." Administrative convenience also underlies the disparate responses of the immigration agencies to the adoption of these laws. The State Department, fearful of diverting scarce resources to unnecessary labor-intensive tasks, opposed adoption of the legislation. The INS's support for the new enactments was motivated by a desire to avoid burdensome fraud investigations.[136]

132. Immigration Reform and Control Act: Hearings on S. 529 Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 456, 461 (1983) (prepared statement of Diego C. Asencio, Assistant Secretary for Consular Affairs, Dep't of State).

133. *Id.* at 102-05.

134. *See* Nonimmigrant Business Visas and Adjustment of Status: Hearing Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 92, 106 (1981) (prepared statement of Charles Foster, President, Am. Immigration Lawyers Ass'n).

135. *See* Adjustment, *supra* note 98, at 184.

136. *Cf.* Alienating Sham Marriages, *supra* note 30, at 188-90 (describing INS resource deficiencies preventing effective use of investigation to discover sham marriages).

Post-IMFA INS rulemaking has instituted further resource savings through questionable statutory interpretations that increase the laws' severity.[137] The next section demonstrates why these statutes and administrative rules lack efficiency or optimal rule-precision.

III. A Theory of Effective Immigration Administration

One of the main principles of any immigration reform effort is that immigration law "should be enforced, and therefore enforceable."[138] To obey this admonition, policymakers and administrators must continually rectify past errors and enhance program efficiency.[139] Congress's enactment of the IMFA, and its adjustment of status amendments, however, are signs that concern about enforceability had not been fully integrated into the legislative framework. At the same time, the immigration agencies have done little to compensate for, or to ameliorate, legislative inadequacies. The principal reasons for these failures are harsh, unrealistic policies,

137. In proposed rulemaking, the INS broadly interpreted the phrase "[pending] administrative. . . proceedings. . . regarding the alien's right to enter or remain" to apply the IMFA's two year exile to rescission of adjustment of status proceedings. Marriage Fraud Amendment Regulations, 53 Fed. Reg. 2,426, 2,427 (1988). The INS retreated from this position after it was disputed by the BIA and by adverse rulemaking comments. *See* Recent Decision, 65 Interpreter Releases 383, 384 (1988); Marriage Fraud Amendment Regulations, 53 Fed. Reg. 30,011, 30,013 (1988). The INS regulations could apparently be construed to apply the banishment provision even if the proceedings are terminated in favor of the alien. *See* Proposed Marriage Fraud Amendment Regulations Published, 65 Interpreter Releases, 97, 98 (1988). The construction might arguably comport with congressional intent if it is assumed that a subsequent favorable judicial or administrative decision is irrelevant to the alien's fraudulent intent. The INS interpretation, however, also encompasses aliens who decline to delay their marital plans, believing they have lawful status. Particularly when the alien's view is affirmed, applying the two year exile would appear to violate fundamental principles of fairness. The INS's view that the statutory banishment period is applicable to "any alien who marries between the date of the issuance of the order to show cause [against deportation] and the date of the alien's departure from the U.S." is probably consistent with Congress's restrictive purpose. INS Interprets Marriage Fraud Law, 64 Interpreter Releases 1097 (1987) (citing INS letter to Mr. Alan Lee, May 18, 1987). The INS position that an alien may not file a visa petition during the two year exile, however, is more questionable. 53 Fed. Reg. 30,011-13. Although this construction would be of little consequence to immediate relatives, it would greatly delay the already lengthy admission of second preference spouses by tacking the IMFA's two year interval onto their lengthy admission wait. Nothing in the statute expressly forbids applicants abroad from filing an immigrant petition to concurrently satisfy the IMFA's foreign residency requirement and the INA's visa waiting period. The INS interpretation is also inconsistent with the favorable visa treatment the INS has extended to certain occupational immigrants. *See* 8 C.F.R. § 204.6(a) (1988). Finally, INS regulations failed to clarify vague statutory terminology such as "good cause," "fault," "extreme hardship," or indicate the IMFA's effect on preexisting INA fraud waivers.

138. Whelan, Immigration Principles of U.S. Immigration Policy, 44 U. Pitt. L. Rev. 447, 455 (1983).

139. *See* SCIRP, *supra* note 15, at 233.

inadequate resources for immigration services, and disarray of the immigration bureaucracy. The immigration bureaucracy's refusal to leave the boundary of mainstream administrative law, along with the judiciary's deference to this choice, has exacerbated the problem by hindering the development of effective decisionmaking techniques. In addition, application of regulatory theory suggests that the IMFA and the adjustment of status provisions are suboptimal laws lacking precision. This section contends that rational, realistic, and equitable statutes are necessary requirements for effective administration.

A. Harsh Laws, Inadequate Resources, and Ineffective Reform

The immigration bureaucracy's implementation of the immigration laws has been the subject of extensive study and criticism.[140] Neither the INS nor the State Department, however, is solely accountable for the ineffectual implementation of immigration laws. Congress is a major, perhaps primary, source of the bureaucratic dilemma. One Attorney General, the cabinet officer in charge of the INS, has testified that the immigration statutes have sought to implement "unrealistic policies" and that the INS has "failed to enforce our laws effectively."[141] Although any national regulatory program has its critics, it is unusual for the head of the office charged with that program's oversight to be one of them.

A key factor contributing to the immigration bureaucracy's administrative difficulties is Congress's historical practice of enacting unnecessarily harsh immigration legislation. Many of the INA's exclusionary provisions are anachronistic and redundant.[142] Congress has largely ignored even those recommended reforms that, while faithful to the INA's substantive purposes, could ease administrative

140. *See, e.g.*, M. Morris, Immigration—The Beleaguered Bureaucracy (1985); U.S. Comm'n on Civil Rights, The Tarnished Golden Door: Civil Rights Issues in Immigration (1980) [hereinafter Civil Rights]. Immigration reform has for years been a particularly popular subject of both congressional and executive studies. For a noninclusive sampling of such reports, see History of the Immigration and Naturalization Service, Senate Comm. on the Judiciary, 96th Cong., 2d Sess. 8, 81-82 (Comm. Print 1980) (prepared by the Congressional Research Service, Library of Congress, for the Select Commission on Immigration and Refugee Policy).

141. Administration's Proposals on Immigration and Refugee Policy: Joint Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, and the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 6 (1981) (testimony of Att'y Gen. William French Smith).

142. *See* SCIRP, *supra* note 15, at 282-83 (urging Congress to reconsider the INA exclusionary grounds, some inaugurated in 1875, many of which now seem "archaic").

burdens by permitting recognition of legitimate assimilative interests.[143] Statutory improvements could be instituted without renovation of substantive admission criteria or reconsideration of the quota system.[144] More radical improvements would require reconsideration of several substantive provisions in the current law that are unduly severe and difficult to administer in their present form.[145] The INA is a complex and poorly drafted law.[146] Probably comparable only to the tax code in complexity, the Act has been described as so convoluted that it "accelerate[s] the aging process of judges."[147] Immigration law's complexity invites creative statutory interpretation but fails to provide an effective regulatory system. The IMFA perpetuates this problem by engrafting complex provisions upon an already convoluted statutory design. The effect is exacerbated by the new law's additional incentives to engage in strategic maneuvering.[148] The complexity factor also increases the likelihood that legislators may not fully comprehend the effect of their enactments. In fact, there are indications that Senate supporters of the IMFA did not fully appreciate the severe consequences of the legislation and may seek ameliorative amendments.[149]

143. *See, e.g.,* Gordon, The Need to Modernize Our Immigration Laws, 13 San Diego L. Rev. 1 (1975); Maslow, Recasting Our Deportation Law: Proposals for Reform, 56 Colum. L. Rev. 309 (1956); Rosenfield, Necessary Administrative Reforms in the Immigration and Nationality Act of 1952, 27 Fordham L. Rev. 145 (1953).

144. *See, e.g.,* Rosenfield, *supra* note 143, at 145.

145. The list of critically needed reforms is long, but a sample follows. Lack of an immigration statute of limitations has been identified as needing change. Maslow, *supra* note 143, at 325. The application of the "reentry" doctrine should also be revised. It fails to recognize communal and assimilative interests, and instead applies the same exclusionary standards and procedural protections to resident aliens who temporarily leave the country as to initial applicants for admission. SCIRP, *supra* note 15, at 284-87. Granting administrative ability to waive certain exclusionary grounds would also provide needed flexibility. Gordon, *supra* note 143, at 6-8. Another helpful modification would be the lowering of unreasonably high standards, such as "extreme hardship," that condition the conferral of discretionary antideportation waivers. SCIRP, *supra* note 15, at 278; Maslow, *supra* note 143, at 342-43.

146. *See* Gordon, *supra* note 143, at 2 (referring to the INA as "cumbersome, obscure" and overly complicated); *see also* Rosenfield, *supra* note 143, at 145 n.2 (describing in detail the complexity of the INA as enacted in 1952).

147. Lok v. I.N.S., 548 F.2d 37, 38 (2d Cir. 1977) (comparing the INA and tax codes to "King Minos's labyrinth in ancient Crete").

148. *See supra* notes 61-63 and accompanying text.

149. *See* Schmidt, Selected Issues Under the Immigration Marriage Fraud Amendments of 1986, in Immigration and Nationality Law, 42d Anniversary Symposium of the American Immigration Lawyers Association, 2 Advanced Topics 51 (1988) (stating that Senators "Simon and Kennedy, were unaware of the full extent of the harsh consequences [of some parts of the IMFA]" and that "it is possible that [a portion of the IMFA] will be modified by new legislation").

The Select Commission's Report has been described as an effort to "balance the requirements of efficient, sensible and fair enforcement with due process protections and humanitarian concerns."[150] Its adjustment of status and admission proposals recommended movement away from policies damaging to family reunification. Although professing to rely on the Commission's study as support for enactment of the new legislation,[151] Congress departed from the report's recommendations in these areas. A particular concern of the Commission was the impact of the backlogged visa system on family unity:

> There is something wrong with a law that keeps out—for as long as eight years—the small child of a mother or father who has settled in the United States while a nonrelative or less close relative from another country can come in immediately. *Certainly a strong incentive to enter illegally exists for persons who are separated from close family members for a long period of time.*[152]

Any meaningful reform should lessen the period of family separation, thereby decreasing the motive for fraud, and not merely focus on punishing the incidents of fraudulent behavior.

The Select Commission also recommended that family reunification remain as an important element of immigration policy.[153] The Commission not only specifically advised retention of the policy of admitting immediate relatives without limitation, but also advised that unmarried adult sons and daughters of citizens, as well as the grandparents of citizens, be included in this group.[154] Furthermore, the Commission provided strong arguments for retention of the adjustment of status in its prior form.[155] Finally, it urged the consideration of quota system reform to reduce the period of family separation resulting from visa backlog.[156] The Select Commission's findings simply do not support IRCA's restrictive adjustment of status provisions or the IMFA's harsh treatment of marital relationships.[157] Moreover, to the extent that the Kennedy-Simpson

150. Fuchs, *supra* note 15, at 443.
151. *See supra* note 26 and accompanying text.
152. SCIRP, *supra* note 15, at 15 (emphasis added).
153. *Id.* at 112 ("[p]sychologically and socially, the reunion of family members with their close relatives promotes the health and welfare of the United States").
154. *Id.* at 114-15.
155. *Id.* at 205.
156. *See id.* at 116-17, 145-51.
157. *See* Fuchs, *supra* note 15, at 444 ("One major recommendation of the Commission, never even considered in the legislative process, was the proposal to eliminate country and world ceilings for what is now second preference—the immediate relatives of United States resident aliens—and to establish a separate, expanded number of visas for immigration applications in that category.").

legislation proposes further restrictions on family-related immigration, it too departs from the Commission's recommendations.

Despite its rhetoric, Congress has never provided the immigration bureaucracy with sufficient resources to fulfill its statutorily mandated duties. Absent an overwhelming public interest in immigration—which occurs sporadically at best—legislators historically have not accorded high priority to this issue of lack of resources. Since the early 1900s, agency complaints of inadequate manpower and support have fallen largely on deaf ears,[158] despite continuous growth in the number of aliens seeking admission. Recent mass immigration of Indochinese, Cuban, and Haitian entrants has aggravated the problem:[159] the INS must process these new arrivals, and eventually adjudicate their requests for residence or citizenship, expanding the agency's workload enormously. Now "[t]he time period from arrival to citizenship can take up to seven years and requires three separate INS adjudications."[160] Furthermore, there are indications that global pressures may lead to even greater levels of future international migration.[161] Increased agency duties resulting from IRCA will further burden effective INS functioning.

The State Department is also subject to increasing workload pressure. From 1972 to 1980, the number of nonimmigrant visas issued almost tripled to more than six million.[162] By 1983, the backlog of immigrant visa applications had reached approximately 1.5 million.[163] Although Congress has attempted to eliminate fraud in visa applications through draconian legislation, it has failed to allocate resources sufficient to enable the immigration agencies to effectively investigate such fraud.[164] Workload pressures make it difficult for

158. *See, e.g.*, M. Morris, *supra* note 140, at 90-91; Hiller, Immigration Policies of the Reagan Administration, 44 U. Pitt. L. Rev. 495, 496 (1983) (David Hiller, former Associate Deputy Attorney General, U.S. Department of Justice, commenting on the long-standing underfunding of immigration enforcement efforts).

159. *See, e.g.*, Martin, Due Process and Membership in the National Community: Political Asylum and Beyond, 44 U. Pitt. L. Rev. 165, 168 (1983) (speaking of the new "crisis" engendered by the influx of Cubans, Haitians, and Salvadorans).

160. Boswell, The Immigration Reform Amendments of 1986: Reform or Rehash?, 14 J. Legis. 23, 34 n.58 (1987).

161. SCIRP, *supra* note 15, at 19-20.

162. M. Morris, *supra* note 140, at 96.

163. *Id.* The increase in the number of active immigrant visa cases has been steady and persistent: "1983—1,411,151; 1984—1,587,360; 1985—1,777,931; and 1986—1,903,475." Boswell, *supra* note 160, at 36 n.67 (citing U.S. Dep't of State, Bureau of Consular Affairs, Worldwide Visa Services During 1986, at 5 (Vol. 100, No. 5)).

164. For example, according to Bureau of Consular Affairs statistics, between 1974 and 1982, consular workload rose by 166% while personnel positions increased by 22%. M. Morris, *supra* note 140, at 99. *See also id.* at 98 (indicating a need for improved facilities and procedures in order to investigate fraud).

consular officials to discover fraudulent applications. Consular officers reportedly now process a nonimmigrant visa application in an average of two minutes or less,[165] insufficient time to discover fraudulent intent with any regularity.

Modern technological devices could significantly improve the immigration bureaucracy's efficiency. Computer automation and more personnel are required to make the system work well.[166] The State Department has had some success in using computers to focus its investigative efforts on nations whose applicants frequently commit immigration fraud.[167] The INS, on the other hand, has experienced major problems in computerizing operations; its data-gathering capacity lags behind that of other federal agencies regulating large numbers of persons, such as the Federal Bureau of Investigation or the Social Security Administration.[168] This lag contributes to the INS's unsatisfactory fraud investigation capability.[169] The Service's data-gathering problems also reinforce its noted proclivity toward enforcement, rather than service functions.[170] In a setting of scarce resources, severe time constraints, and information acquisition difficulties, adjudication of immigrant benefits is not accorded high priority.[171] Besides damaging the agency's prestige and morale, these inadequacies have proven costly to the Service in other respects. Poor management practices have motivated Congress to withhold money from the INS budget, and have also led to Government Accounting Office criticism of the agency.[172]

---

165. *Id.* at 96-97. There is evidence, too, that the INS suffers from a similar lack of resources to adequately conduct fraud investigations. *See* Alienating Sham Marriages, *supra* note 30, at 189 n.64 (the average INS interview "lasts only 10 to 15 minutes, which is hardly sufficient time to make an informed evaluation of the bona fides of the marriage") (citing Fraudulent Marriage and Fiance Arrangements to Obtain Permanent Resident Immigration Status: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 170 (1981)).

166. M. Morris, *supra* note 140, at 102.

167. *Id.* (discussing the Bureau of Consular Affairs' development of data banks and use of computers to process visa applications).

168. *Id.* at 114.

169. *Id.*

170. *See* Civil Rights, *supra* note 140, at 40-43.

171. M. Morris, *supra* note 140, at 125 (that the INS "has been unable to respond adequately to some service demands is reflected in the massive backlogs and long delays that have persisted in its adjudicatory work").

172. *Id.* at 131 ("after appropriating $3.7 million in fiscal year 1980 to automate the INS district offices, Congress halted the effort because INS officials had failed to plan the undertaking properly"); *see also* General Accounting Office, ADP Acquisitions: Immigration and Naturalization Service Should Terminate its Contract and Recompete, No. GAO-IMTEC-86-5 (1986). The INS's reputation even affects the degree of judicial confidence afforded its decisions. Immigration Process & Policy, *supra* note 13, at 83.

The expansion of INS statutory duties by enactment of the IRCA employer sanctions and legalization programs has intensified the agency's need for resources. In passing IRCA, Congress pledged increased appropriations for the INS.[173] To compensate for past funding deficiencies, however, such appropriation increases would have to continue for an extended period. History casts doubt on Congress's commitment to satisfying the budgetary needs of the immigration agencies either in the present or over the long run.[174]

B. Immigration as the "Stepchild" of Administrative Law

Immigration law has long remained outside the mainstream of administrative law. As a result, the immigration agencies have developed slowly, not benefiting from the evolution of administrative theory and practice. The Administrative Procedure Act (APA)[175] does not apply to deportations or to the proceedings of the INS's highest adjudicatory review body, the Board of Immigration Appeals (BIA).[176] Unlike appellate bodies with similar authority, adjudication by the BIA is subject to reversal by the Attorney General.

---

173. *See, e.g.*, H.R. Rep. No. 99-682(I), 99th Cong., 2d Sess. 94, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5649, 5698.

174. *See, e.g.*, INS Proposals for Legal Immigration Reform, 7 Immigr. L. Rep. 49, 52 (1988) ("the State Department . . . is already instituting severe cutbacks in visa services in response to congressionally mandated budget cuts"); State Department to Close Seven More Consulates, 64 Interpreter Releases 226 (1987) ("Like the similar closings of seven consulates last year . . . the move was prompted . . . by sizable reductions in the State Department's 1987 budget and the lack of any brighter prospects for 1988."); Administrative Budget Request Shows Large Increase for INS, Cuts for Refugee Programs, 64 Interpreter Releases 29, 30 (1987) ("increases in INS's enforcement budget will not be enough to fund all of the positions called for in the new [IRCA]. . . . Similarly, the budget calls for a major increase in [the number of] INS investigators, but does not provide enough money to fund the new positions."); Cash Shortfall May Hurt Immigration Law, Indianapolis News, Dec. 18, 1986, at 27.

175. Pub. L. No. 79-404, ch. 324, §§ 1-12, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C. (1982 & Supp. IV 1986)). The APA was intended to standardize federal agency rulemaking and adjudication procedures, and to ensure fairness by prohibiting the commingling of prosecutorial and adjudicative functions and by ensuring the independence of agency adjudicators. Wong Yang Sung v. McGrath, 339 U.S. 33, 41-45 (1950). Although APA procedures regulating formal adjudication do not apply to either of the two immigration agencies, and the State Department is exempt from its rulemaking requirements, INS rulemaking is subject to the Act. *See* Verkuil, A Study of Immigration Procedures, 31 UCLA L. Rev. 1141, 1172 (1984). The INS has avoided this inconvenience, however, by formulating policy largely through adjudication.

176. *See, e.g.*, Marcello v. Bonds, 349 U.S. 302 (1955); Giambanco v. I.N.S., 531 F.2d 141 (3d Cir. 1976); Cisternas-Estay v. I.N.S., 531 F.2d 155 (3d Cir. 1976).

The BIA exists by virtue of regulation rather than pursuant to statutory authorization.[177] The Select Commission's Final Report recommended the creation of a statutory Immigration Board subject to the APA and independent of the Attorney General.[178] Already, numerous adminstratively implemented procedural reforms have brought the INS closer to the APA model of adjudication over the course of several years.[179] Existing deportation proceedings are sufficiently formal that application of the APA would not significantly burden the INS.[180] Few persuasive reasons exist for failing to complete the evolutionary journey by statutory fiat. Fears of procedural burdens overwhelming agency resources are unwarranted so long as exclusion proceedings remain exempt from APA formal procedural requirements. Unfortunately, procedural reform is not a current congressional priority.[181]

Although the INS does have rulemaking authority, its execution has proven controversial.[182] As early as 1947, the commissioner of the INS stated that "[t]he process of rulemaking does not occupy an important place in the activities of the Immigration and Naturalization Service."[183] The agency has largely declined to exercise its substantive rulemaking powers, and has demonstrated a preference for establishing precedent by individual adjudication. Particularly in

177. *See, e.g.*, Legomsky, Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process, 71 Iowa L. Rev. 1297, 1375-78 (1986).

178. SCIRP, *supra* note 15, at 248. For examples of similar proposals, see, e.g., Roberts, Proposed: A Specialized Statutory Immigration Court, 18 San Diego L. Rev. 1 (1980); Roberts, The Board of Immigration Appeals: A Critical Appraisal, 15 San Diego L. Rev. 29 (1977).

179. *See generally* Rawitz, From *Wong Yang Sung* To Black Robes, 65 Interpreter Releases 453 (1988); Legomsky, *supra* note 177.

180. A brief experience in the 1950s suggests that the INS could survive application of the APA without disastrous consequence. The Supreme Court, in *Wong Yang Sung*, 339 U.S. 33, held that the APA applied to deportation hearings. For seven months, until Congress passed legislation reversing the decision, the INS complied with APA requirements. *See* Rawitz, *supra* note 179. This brief exposure to the APA was beneficial since the agency returned to its former hearing procedures "with greater awareness of the need to measure up to prevailing concepts of fairness and administrative due process." *Id.* at 457.

181. Throughout the congressional immigration reform efforts of the 1980s, only fleeting consideration has been given to procedural issues. *See, e.g.*, H.R. Rep. No. 98-115, 98th Cong., 1st Sess. 52-53 (1983) (proposing a statutory United States Immigration Board and the application of the APA to immigration judges). Analogous measures have not resurfaced in subsequent legislative proposals.

182. *See* Sofaer, The Change-of-Status Adjudication: A Case Study of the Informal Agency Process, 1 J. Legal Stud. 349 (1972) [hereinafter Case Study]; Sofaer, Judicial Control of Informal Discretionary Adjudication and Enforcement, 72 Colum. L. Rev. 1293 (1972).

183. Carusi, The Federal Administrative Procedure Act and the Immigration and Naturalization Service, 4 Monthly Rev. 95, 99 (1947).

the adjustment of status context, this rulemaking abdication has resulted in disparate treatment of similar cases, failure to guide both courts and lower level agency administrators, and insufficient notice to both practitioners and affected individuals of agency standards governing the discretionary benefits.[184] The United States Administrative Conference has recommended that the Service make rules to provide standards for the exercise of adjustment of status discretion.[185] This advice and similar recommendations have not yet persuaded the INS to increase its rulemaking substantially.[186] Moreover, existing Supreme Court precedent endorses agency discretion in this regard, so judicial intervention to improve the situation is unlikely.[187] The Service has ignored the example of other

184. *See* Case Study, *supra* note 182, at 349, 373 & accompanying notes; Verkuil, *supra* note 175, at 1205 ("The statutory standards for adjustment of status . . . are not adequate to guide discretion and need to be redefined. . . . [F]ailure to do so imposes costs on the eligible class, whose applications may be treated unequally, and upon the administrative system, which risks increased judicial supervision."). *See also* Wong Wing Hang v. I.N.S., 360 F.2d 715, 718 (2d Cir. 1966) (referring to the need for administrative development of standards under the suspension of deportation statute).

185. Administrative Conference of the United States, Recommendation 71-5 (1971) observed:

> Examiners who decide cases under section 245 usually obtain little guidance from the statute, rules, standards or precedents. The lack or inadequacy of such guidance often results in unequal justice and invites pressures upon Members of Congress to intervene in individual cases. A large proportion of the decisions under section 245 can and should be controlled by regulations which establish the rules and standards for decision. These regulations should crystallize the existing body of precedents, staff instructions and established traditions of decision into a form which should in the ordinary case both control discretion and provide a publicly available body of the governing law. In drafting these regulations, the Service should seek to restrict unnecessary or unwarranted discretion in reaching individual decisions and should also seek to ensure that decisions are reached on grounds that have a direct relationship to the purposes of section 245.

186. In 1979, the INS proposed rules with respect to adjustment of status, revocation of approved petitions, voluntary departure, and stays of deportation. 44 Fed. Reg. 36,187 (1979). The Service indicated that the proposed rules were necessary "in order to place in our regulations the discretionary criteria we use in making administrative decisions . . . [and that they were] intended to insure that all applications and petitions submitted to this Service receive consideration under appropriate discretionary criteria and are adjudicated in a fair and uniform manner throughout the United States." *Id.* However the INS subsequently cancelled the proposed rules concluding that "[i]t is impossible to foresee and enumerate all of the favorable or adverse factors which may be relevant and should be considered in the exercise of administrative discretion." 46 Fed. Reg. 9,119 (1981). For a critique of this rationale, see Ludd, Administrative Discretion and the Immigration and Naturalization Service: To Review or Not to Review?, 8 T. Marshall L.J. 65, 81-82 (1982).

187. *See* Securities & Exchange Comm. v. Chenery Corp., 332 U.S. 194, 203 (1947) ("the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency") (emphasis in original). *But see* Ford Motor Co. v. FTC, 654 F.2d 599 (9th Cir. 1981); Bahat v. Sureck, 637 F.2d 1315 (9th Cir. 1981); Konishi v. I.N.S., 661 F.2d 881 (9th Cir. 1981); Patel v. I.N.S., 638 F.2d 1199 (9th Cir. 1980). Other circuits have interpreted *Chenery*

federal agencies, like the Social Security Administration, that use their rulemaking power to eliminate the need for repetitive individual adjudications.[188] Nor has the INS developed the technique of using "structuring" or "confining" rules[189] to limit its discretion or to provide guidance to regulated individuals.

The effectiveness of rules in achieving their intended purpose can be evaluated by examining three attributes: transparency, accessibility, and congruence.[190] Rulemakers can strive for rule "transparency" by using terminology that is easily and uniformly understood by members of the affected population.[191] Transparent rules reduce administrative or transaction costs. A rule's "accessibility" refers to the ease with which it can be applied in appropriate situations.[192] Accessible rules can promote social and dignitary values by enabling regulated persons to participate in the application of the standard to their individual cases.[193] Finally, the optimality of a rule can be judged by its "congruence," or conformity to the policy objectives of its drafters. Congruence furthers moral objectives by promoting, consonant with the rule's objectives, uniform outcomes in individual cases.[194] In practice, these three competing attributes force drafters to engage in painstaking deliberation to balance the concomitant values of all three in order to derive an

---

more literally and have declined to follow the Ninth Circuit Court of Appeals in requiring agencies to make rules. *See* Davis, Administrative Law Treatise, § 7:25, at 179 (Supp. 1982).

188. *See, e.g.*, Secretary of Health and Human Servs. v. Campbell, 461 U.S. 458 (1983).

189. *See generally* K. Davis, Discretionary Justice: A Preliminary Inquiry (1969) [hereinafter Discretionary Justice]. Professor Davis argues that agencies should use their expertise and statutory familiarity to create relevant standards since the legislatures and courts largely lack this ability. *See, e.g.*, Davis, A New Approach to Delegation, 36 U. Chi. L. Rev. 713 (1969). He accordingly identifies "structuring" and "confining" rules as the primary means to control agency discretion. "[R]ules which establish limits on discretionary power confine it, and rules which specify what the administrator is to do within the limits structure the discretionary power." Discretionary Justice, *supra*, at 97. Davis recognizes that initially the agency may be incapable of enacting a substantive rule to govern its implementation of new statutory duties. The agency should, however, use nonbinding policy statements or interpretive rules to provide guidance. After sufficient experience is gained in the formulation and implementation of the statutory purpose, Davis envisages an evolution from unconfined discretion toward rules. *Id.* at 108. INS policy development in both the marriage fraud and adjustment of status areas would be viewed as inadequate under Davis's theory of regulatory evolution.

190. *See* Diver, The Optimal Precision of Administrative Rules, 93 Yale L.J. 65, 67 (1983). In this context, the term "rule" is used in its broader sense to encompass statutory law.

191. *Id.* at 67, 92-97 (offering a theory to explain INS desire for opaque standards in the implementation of the adjustment of status program).

192. *Id.*

193. *Id.* at 67, 71.

194. *Id.* at 71.

appropriate mixture. Although the balancing process may be difficult, because it is often ad hoc and intensely fact dependent, failure to balance imposes costs. Mechanical rules provide the greatest degree of transparency, and sometimes accessibility, but usually at the expense of over- or under-inclusiveness. Such rules generally sacrifice congruence to other values by failing to discriminate among classes of individuals possessing disparate characteristics. The most common example of such a rule is the "irrebuttable presumption."[195] Moreover, rules which are significantly over- or under-inclusive generally result in disparity between drafter intention and actual operation.

Attempts to provide a single normative principle that permits decisionmakers to balance these attributes have been largely unsuccessful.[196] Several general observations, however, can be made. First, agencies presented with heavy demands tend to favor transparent rules.[197] When statutes of general applicability are imprecise—as most statutes comprehensible to the general public are—the burdens usually fall on the regulated populace rather than on the regulating agency. The agency may therefore view such burdens as externalities and apply transparent bright-line rules.[198] Second, when the costs of over- or under-inclusive rules are high, rational drafters should favor flexible rules.[199] In the absence of perfect information, all rules suffer from some degree of either over- or under-inclusiveness. When the affected interest is important, however, congruence should be pursued even at the cost of transparency. This will not necessarily result in inefficiency since the regulating agency avoids expending resources to address or defeat the claims of those contesting transparent, arbitrary rules.[200]

---

195. *Id.* at 68.

196. It has been suggested that the invocation of "moral values like fairness, equity or community" represents a futile attempt to provide a normative standard of rule optimality and that efficiency criterion provides a more useful alternative. *See, e.g., id.* at 71-76. The task of applying appropriate measurement values to ascertain efficiency, however, appears to be equally elusive. Despite the fact that efficiency evaluation is usually the prime component of regulatory analysis, the jurisprudential consideration of equitable concerns remains unquestionably important. In some instances, controversial transparency and congruence determinations require recourse to "moral judgment" or a "libertarian model." *Id.* at 107. Given the IMFA's impairment of fundamentally important interests, it represents a particularly appropriate instance for the application of the latter theories. *See infra* text accompanying notes 209-10, 274-78.

197. Diver, *supra* note 190, at 75.

198. *Id.* at 103.

199. *Id.*

200. *Id.* at 72-73. The plethora of litigation under the IMFA validates this observation. *See supra* note 8. There is also evidence to suggest that the INS has lessened this effect by using its "prosecutorial discretion" to avoid enforcing the immigration laws in

Application of this analysis to the immigration laws at issue suggests that these laws fail to provide an optimal, or even acceptable, level of rule precision. The INS preference for implementing transparent rules, particularly in the area of marriage fraud, is understandable given its investigative burdens. The IMFA's two year banishment provision, however, diminishes dignitary and participation values by denying affected individuals the right to be heard, although it is accessible in the sense that it can be applied to factual situations with minimal effort. This over-inclusive irrebuttable presumption is particularly lacking in congruence, is of dubious benefit as a fraud reduction device, and imposes high costs in cases of erroneous results. In this instance, as well as in the context of adjustment of status legislation, congressional policymakers failed to adequately weigh the external costs of inflexible bright-line rulemaking.[201] The important interest of preserving family unity demands a high level of rule congruence. Because they lack transparency and accessibility, the IMFA's "extreme hardship" waiver provisions[202] also fail to achieve rule precision. Their ambiguity defies easy agency administration and effectively bars regulated persons from meaningful participation in application of the standard.

The disparate reaction of the different immigration agencies toward the enactment of the IMFA and adjustment of status laws exemplify bureaucratic behavior seeking to optimize managerial convenience. State Department opposition to these measures not only expresses concern for affected individuals, but also reveals the agency's recognition that implementation will effect a serious drain on State Department resources. In the adjustment context, additional demands are placed on already overburdened consular posts by requiring aliens to make unnecessary trips abroad. The IMFA's two year banishment provision will place burdens on the State Department to certify and keep track of aliens during the waiting period, to maintain a paper record for potential readmittants, and to

selective cases. *See* Wildes, The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act, 14 San Diego L. Rev. 42 (1976) (describing the effect of the INS "deferred action" program).

201. The lobbying efforts and political influence of regulated individuals usually encourage legislators to consider externalities and attributes of congruence. The fact that these constraints are not as powerful when Congress legislates alien interests may explain that body's historical propensity to enact draconian immigration laws. *See infra* note 212 and accompanying text.

202. *See supra* notes 79-87 and accompanying text.

advise aliens of readmission procedures.[203] In contrast, the IMFA permits the INS to conserve its limited resources by eliminating its responsibility for conducting labor-intensive fraud investigations. INS optimizing behavior (in the form of support for the IMFA and adjustment provisions) is therefore ostensibly rational, given its responsibilities under the IRCA employer sanction and legalization programs. Inconvenience to the INS under the new adjustment program will not compare with that experienced by the State Department.

Managerial convenience is not the only goal of effective legislation. An effective administrative system should achieve the goals of efficiency, accuracy, and acceptability.[204] Administrative efficiency, in contrast to allocative efficiency, entails minimizing process costs and delay.[205] The IMFA's bright-line transparent rules may satisfy this goal within INS but they do so by shifting administrative burdens to the State Department. It is therefore doubtful that aggregate efficiency has been achieved.

Whether accuracy—in the sense of remaining faithful to the statutory design[206]—is achieved is also questionable. The statute lacks congruence because it is over-inclusive. Final resolution and review of deportation proceedings may extend for several years, and genuine relationships may be formed during this period. The law's failure to permit interested parties the opportunity to show good faith in the resulting marriages sacrifices congruence for transparency. Accuracy in implementing such a law does not suggest that truth has been ascertained, but merely that this concern has been rendered legally irrelevant.

An effective statute should also be deemed "acceptable" by regulated individuals and by the general public. Persons denied the opportunity to demonstrate a bona fide marital relationship, as well as affected family members, are likely to view the procedure as patently unfair. Socially conscientious persons not directly regulated by the IMFA may also be offended, since the law probably fails to satisfy

203. *See, e.g.,* INS Lists Documents Needed Under Marriage Fraud Act, 64 Interpreter Releases 1122 (1987).

204. *See* Crampton, A Comment on Trial-Type Hearings in Nuclear Power Plant Siting, 58 Va. L. Rev. 585, 591-93 (1972). For analysis of these goals in the administration of the immigration laws, see Legomsky, *supra* note 177, at 1313.

205. Cass, Allocation of Authority within Bureaucracies: Empirical Evidence and Normative Analysis, 66 B.U.L. Rev. 1, 14 (1986).

206. *Id.* at 15.

minimal standards of fairness.[207] Administrative law theory suggests that such inappropriate results can be expected when individualizing discretion is sacrificed in circumstances requiring fact-dependent determinations.[208]

Congress's adoption of onerous statutes and failure to implement meaningful reform have contributed to the ineffectual implementation of immigration laws. The enactment of the IMFA and of the IRCA adjustment of status legislation extends this historical pattern. In addition to the inefficient characteristics of the laws described in this section, certain provisions of these statutes may also impermissibly impair constitutionally protected interests.

IV. Constitutional Analysis

Constitutional doctrine has been influenced by the administrative realities of implementing immigration laws. Millions of aliens seek admission to the United States each year, either temporarily or permanently, and the Supreme Court has studiously avoided creating constitutional doctrines that might further burden the immigration bureaucracy's already strained resources. Moreover, the judiciary has historically exhibited a powerful awareness of the limitations of its constitutional function. Decisions regarding immigrant admission traditionally have been viewed as political questions committed to the special province of the legislature.

This section examines the constitutional doctrines buttressing the judiciary's reluctance to review immigration legislation and discusses the limitations of these doctrines. A channeling function, referred to as the "atrium principle," is proposed to allay the "slippery slope" fear of opening the floodgates of immigration litigation. The atrium principle should facilitate application of evolving communitarian and due process dignitary theories in this area. These theories focus on the "functional social linkages actually forged between aliens and the American people"[209] and justify extension of judicial scrutiny beyond purely "instrumentalist" legal

207. *See generally* M. Walzer, Spheres of Justice: A Defense of Pluralism and Equality 42-63 (1983) (discussing the moral claims that alien residence may foster).

208. *See, e.g.*, Koch, Judicial Review of Administrative Discretion, 54 Geo. Wash. L. Rev. 469, 471-72 (1986); Discretionary Justice, *supra* note 189, at 19, 25-26.

209. Schuck, The Transformation of Immigration Law, 84 Colum. L. Rev. 1, 49-50 (1984).

analysis.[210] Applied in the context of the concession that policy determinations of admission belong exclusively to the legislature, these concepts offer a feasible solution to the constitutional challenge: they neither require the judiciary to address issues beyond its institutional competence nor compel a procedural framework that would overwhelm the immigration bureaucracy.

This constitutional analysis focuses on the IMFA's regulation of citizen and permanent resident nuclear families.[211] These groups present powerful communitarian and dignitary claims cognizable under the atrium principle. This section measures these claims against due process and equal protection doctrine and briefly considers constitutional issues relevant to the rights of conditional status holders.

A. The Constitutional Challenge

Just as immigration operates outside the confines of administrative law, it has been segregated from the mainstream of constitutional law. As a result, the constitutional jurisprudence of immigration law is unrivalled in its routine sanction of harsh and excessive governmental treatment of individuals. Because the legislature is "[u]nrestrained for all practical purposes by the prohibitions of a constitution and undeterred by the fear that the voteless objects of its antipathy will resort to political reprisals," it is free to "embody into law its fears, hostilities, and suspicions of the

210. Professor Mashaw has proffered a "dignitary theory" of due process as an alternative to positivist right-privilege theory. In contrast to communitarianism's attention to associational communal contacts, the dignitary theory focuses on individual interests to "preserve and enhance human dignity and self-respect." Mashaw, Administrative Due Process: The Quest for a Dignitary Theory, 61 B.U.L. Rev. 885, 887 (1981) [hereinafter Dignitary Theory]. *See generally* Mashaw, "Rights" in the Federal Administrative State, 92 Yale L.J. 1129 (1983); Mashaw, Administrative Due Process As Social Cost Accounting, 9 Hofstra L. Rev. 1423 (1981); Mashaw, The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value, 44 U. Chi. L. Rev. 28 (1976).

211. Although the wisdom and efficiency of the adjustment of status amendments are questionable, the inconvenience entailed in requiring a nonresident to return overseas to adjust status probably does not rise to constitutional proportions. Prior constitutional challenges to similar statutes were unsuccessful. *See* Alvarez v. District Director of U.S. Immigration and Naturalization Service, 539 F.2d 1220 (9th Cir.), *cert. denied,* 430 U.S. 918 (1976) (rejecting a constitutional challenge to the INA's denial of adjustment of status to western hemisphere aliens); Dunn v. I.N.S., 499 F.2d 856 (9th Cir. 1974), *cert. denied,* 419 U.S. 1106 (1975). The resulting injury is not comparable to the IMFA's forced two year separation of a married couple otherwise legally entitled to joint residence within the country.

alien."[212] The United States Supreme Court, for example, has sustained blatant racial and gender discrimination under the immigration laws that very likely would have been invalidated in other legal contexts.[213] Many of these decisions defy logical explanation outside of the administrative context of immigration law; "[i]mmigration students learn that in constitutional cases, the government almost always wins."[214] The constitutional challenge is to develop a jurisprudence that recognizes valid judicial limitations but also provides meaningful criteria to preserve constitutional coherence and the values of individual dignity. The challenge is formidable since the Supreme Court has "never invalidated a congressional choice to exclude or deport particular classes of aliens. . . . "[215]

It is unlikely that the judiciary will change this deferential posture without a comprehensible theory allaying its apprehension about involvement in the political decisionmaking process. This article therefore proposes the "atrium principle" as a channeling function to preserve and allocate limited judicial resources. Not every injury is susceptible to judicial remedy; only legally recognized rights and interests are afforded this protection.[216] The atrium principle accepts the premise that the legislative prerogative to formulate initial

212. Maslow, *supra* note 143, at 309; *see also* Boswell, *supra* note 160, at 35 & n.65 (stating that aliens "must rely on small constituencies within the . . . political structure that protect foreigners' rights"). In addition, powerful political groups fearful of wealth transfers to potential immigrants exercise considerable influence on legislators seeking to maximize political support. *See generally* Shughart, Tollison & Kemenyi, The Political Economy of Immigration Restrictions, 4 Yale J. on Reg. 79 (1986).

213. Probably the most infamous racial exclusion was the nineteenth century exclusion of Chinese immigrants. Chinese Exclusion Act of May 6, 1882, ch. 60, 27 Stat. 25 (dicta suggesting the Act would withstand constitutional attack appears in Fong Yue Ting v. United States, 149 U.S. 698, 720 (1893)). Congress was also deemed to have the power to deny citizen fathers the privilege to enable their illegitimate children to immigrate, while permitting mothers to enjoy this benefit. Fiallo v. Bell, 430 U.S. 787, 792 (1977) (result overturned in 1986 by IRCA § 315(a), amending INA § 101(b)(1)(D), 8 U.S.C. § 1101(b)(1)(D) (Supp. IV 1986), permitting a natural father to bring his illegitimate child to the United States "if the father has or had a bona fide relationship with the person"). *See generally* L. Tribe, American Constitutional Law § 5-16 (1988); Legomsky, Immigration Law and The Principle of Plenary Congressional Power, 1984 Sup. Ct. Rev. 255, 282.

214. Nueman, Recalling the Role of the Constitution in Immigration Law, 64 Interpreter Releases 1273 (1987).

215. *Id.* at 1275.

216. Doctrinal constitutional theory does not require that the government provide procedural process unless a recognized loss of "liberty" or "property" is threatened. J. Nowak, R. Rotunda & J. Young, Constitutional Law, § 13.2, at 453 (3d ed. 1986) [hereinafter Constitutional Law]. The breadth of these concepts could lead to the extension of judicial protection to every aspect of individual life amenable to government regulation. Accordingly, the Supreme Court has never accepted the expansive assertion that a right to freedom from arbitrary state action itself triggers constitutional protection. *See,*

admission decisions is constitutionally unassailable.[217] Acceptance of this limitation, however, is not acquiescence to the lack of meaningful judicial review.

Aliens afforded political admission have reached a point "beyond the atrium" and possess interests that are no longer subject to the legislative prerogative. Although the legislature may still regulate interests "beyond the atrium," it must now justify its actions and make them subject to judicial scrutiny. The dimensions of this post-admission zone of protection are clarified by the distinction between immigration *law* and immigration *policy*. In formulating immigration policy, Congress accommodates conflicting interest groups and crafts compromises, often by means of deft political maneuvering. Questions of who and how many may enter are quintessential examples of political and economic decisions outside the realm of judicial expertise. After formulation of these decisions, the political bargain has been consummated; legally cognizable rights and interests have been created. It then becomes the duty of administrators to execute the "law," and the judiciary's responsibility to ensure that the execution conforms to minimal constitutional standards.

The enactment of IRCA and the IMFA should accelerate the evolution of constitutional and administrative protections in immigration law. The IRCA employer sanctions extend the INA's provisions beyond the hapless alien to the general public. Labor law attorneys familiar with "conventional administrative law" will invariably bring the "more intrusive modes of judicial review into the immigration field" to protect their clients.[218] The IMFA exerts even greater evolutionary pressures by provoking conflict between the

---

e.g., Van Alstyne, Cracks in "the New Property": Adjudicative Due Process in the Administrative State, 62 Cornell L. Rev. 445 (1977). Instead, the nature of the specific interest at stake must be identified as amenable to judicial protection. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972). Furthermore, property rights do not derive from the constitution but "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . " 408 U.S. at 577.

217. To clarify the dimensions of atrium theory it should be emphasized that the principle channels judicial review only as to the legitimacy of specific admission claims. Initially, Congress must make the majoritarian decision of whether a class of foreigners may enter and reside in the United States. If Congress decided to punish an alien's unlawful entry, however, this would implicate other substantive constitutional interests, distinct from a claim to admission and therefore outside the confines of atrium theory. In the context of the IMFA a political admission decision has been made to admit nuclear family relatives of citizens and permanent residents. Therefore, those family members have passed beyond the atrium and due process must govern their individual admission decisions.

218. Nueman, *supra* note 214, at 1276.

deference historically afforded congressional immigration enactments and the constitutional rights of association and privacy accorded citizens, permanent resident aliens, and their spouses. In such a battle, however, it is uncertain whether the existing foot-soldiers of due process and equal protection are adequate to the task of constraining the forces of deference without communitarian and dignitary reinforcement.

B. Constitutional Doctrines of Immigration Deference

The Supreme Court has invoked several rationales to justify the grant of broad legislative and executive discretion in the creation and execution of immigration law. The court has unequivocally recognized plenary congressional authority in the immigration field.[219] In *Gibbons v. Ogden,* Chief Justice Marshall described the nature of plenary power as "complete in itself," and added that it "may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[220] In Marshall's view, the only other restraint on plenary authority is the political influence exercised by voters.[221] The public policy constraints ordinarily present when domestic legislation is adopted are effectively absent from the immigration setting. The ideological struggle in the immigration area is perpetuated by the modern contention that the plenary immigration power is constrained by the "prescribed" provisions of the Bill of Rights. Because the relevant constitutional provisions[222] refer to "persons," not citizens, there is no textual reason for finding these constraints inapplicable to congressional power over immigration.

The Court has also found authority to formulate political decisions with foreign affairs consequences to be inherent in the concept of sovereignty.[223] A necessary element of this authority holds that

219. *See, e.g.,* Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909))); *accord* Fiallo v. Bell, 430 U.S. 787, 792 (1977).

220. 22 U.S. 1, 196 (1824).

221. *Id.* at 197.

222. U.S. Const. amend. XIV, § 1 provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." *See also* U.S. Const. amend. V.

223. *See, e.g.,* Fong Yue Ting v. United States, 149 U.S. 698 (1893); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) (providing that "[i]t is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to preservation, to forbid the entrance of foreigners within its dominions,

an alien has no "right" to admittance but must accept whatever entry "privileges" Congress may choose to dispense, subject to whatever conditions it may impose.[224] There are strong indications that underlying this "rights" thesis is the circular justification that aliens are simply not members of the social and political community.[225]

Scholarly literature over the last three decades, however, has greatly undermined the theoretical foundations of the plenary power and foreign affairs doctrines.[226] Neither the immigration nor the foreign affairs power is expressly set forth in the Constitution or in other historical records that would provide insight into the framers' intent. Professor Henkin, referring to the constitutional basis for Congress's broad exercise of foreign affairs authority, has observed that "[i]t requires considerable stretching of language, much reading between lines, and bold extrapolation from 'the Constitution as a whole,' and that still does not plausibly add up to all the power which the federal government in fact exercises."[227]

In *United States v. Curtiss-Wright Export Corp.*, however, the Supreme Court indicated that the federal government's immigration power derives from extra-constitutional sources of international law.[228] In

---

or to admit them only in such cases and upon such conditions as it may see fit to prescribe"); Chae Chan Ping v. United States, The Chinese Exclusion Case, 130 U.S. 581 (1889).

224. *See, e.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953).

225. *See, e.g.*, Comment, Petitioning on Behalf of an Alien Spouse: Due Process Under the Immigration Laws, 74 Calif. L. Rev. 1747, 1768 (1986) ("[i]t is . . . probable that the tendency to view the alien as one who does not 'belong' to the national community is pervasive and colors much of the traditional legal thinking about immigration law") [hereinafter Spousal Due Process].

226. *See, e.g.*, Legomsky, *supra* note 213; Martin, *supra* note 159; Hart, The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953); Spousal Due Process, *supra* note 225; Note, Constitutional Limits on the Power to Exclude Aliens, 82 Colum. L. Rev. 957 (1982) [hereinafter Constitutional Limits].

227. L. Henkin, Foreign Affairs and The Constitution 16-18 (1972). Professor Henkin has suggested that the *per se* creation of a national government effectively mandated that the powers common to sovereign states be vested in the federal government. *Id.* at 24.

228. 299 U.S. 304, 316 (1936). The Court in effect found that the Constitution had failed to delegate the full scope of immigration power exercised by the federal government, because the Constitution conferred on the federal government only the power that states had originally possessed. In the Court's view, therefore, the Constitution was not intended to grant powers of external sovereignty since "the states severally never possessed international powers." *Id.* The Court then traced the source of the federal government's sovereign immigration power to Great Britain. *Id.* For a view critical of this interpretation, see Lofgren, United States v. Curtiss-Wright Export Corporation: An Historical Reassessment, 83 Yale L.J. 1 (1973).

doing so, the Court countenanced the remarkable doctrine that limitations on that authority were to be found not in the text of the Constitution but in international law, custom, and practice.[229] This doctrine fails to offer a persuasive justification for unlimited legislative prerogative for at least two reasons. First, the theory demonstrably conflicts with the Court's review of the exercise of the foreign affairs power in nonimmigration contexts.[230] Second, no credible argument suggests that the government's exercise of an inherent power, which may not derive from the Constitution, is unconstrained by the Bill of Rights.[231]

Nor does the political character of immigration legislation insulate it from constitutional review. In *Baker v. Carr,* a case involving a constitutional challenge to a state legislature's redistricting plan, the Supreme Court formulated a test to determine whether a case presented an unreviewable "political question."[232] The Court emphasized "the impossibility of resolution by semantic cataloguing" and instead required a "discriminating inquiry into the precise facts and posture of the particular case."[233] The political question doctrine does not support pervasive judicial deference since the bulk of immigration litigation does not affect foreign policy. *Baker* requires a case-by-case analysis of the degree to which judicial intervention might impair foreign policy concerns. Such an inquiry should encompass not only review of legislative history and governmental assertions but also consideration of whether "the provision in question distinguishes between immigrants of selected nationalities."[234] Recent case law suggests that the Court will not mechanically use the political question doctrine to immunize immigration laws from judicial scrutiny.[235]

The right-privilege doctrine presents a more challenging obstacle to constitutional review of immigration statutes. In contrast to the doctrines discussed above, its influence is not limited to immigration law but extends throughout constitutional jurisprudence.[236] The doctrine is based on the internally consistent logic that if the

229. *See, e.g.,* Constitutional Limits, *supra* note 226, at 968.

230. *See* Legomsky, *supra* note 213, at 264; Spousal Due Process, *supra* note 225, at 1764; Constitutional Limits, *supra* note 226, at 973-74.

231. *See* L. Tribe, *supra* note 213, § 5-3, at 305.

232. 369 U.S. 186, 208 (1962).

233. 369 U.S. at 217.

234. Legomsky, *supra* note 213, at 268.

235. *Id.* at 299-303 (discussing I.N.S. v. Chadha, 462 U.S. 919 (1983)).

236. *See, e.g.,* Arnett v. Kennedy, 416 U.S. 134 (1974) (plurality opinion); *but cf.* Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).

government may entirely withhold a benefit, it may attach any conditions it deems appropriate to the grant of the benefit.[237] In the context of immigration law, this reasoning has provided a rationale for sanctioning arbitrary legislative and executive action.

United States ex rel. Knauff v. Shaughnessy[238] offered the Supreme Court the opportunity to apply the right-privilege doctrine to the INA. Ellen Knauff was the war bride of a United States citizen. She sought admission in 1948 for naturalization but was detained at Ellis Island without a hearing. The INS attempted to exclude Knauff permanently on the basis that "her admission would be prejudicial to the interests of the United States."[239] Justice Minton aptly framed the issue for the Court: "May the United States exclude without hearing . . . the alien wife of a citizen who had served honorably in the armed forces of the United States during World War II?"[240] The Court decided the issue by stating, "an alien who seeks admission to this country may not do so under any claim of right."[241] Cautioning that it was not addressing the circumstance where the foreigner had already entered the country, the Court found that the decision to exclude an alien seeking entry belonged to Congress.[242]

---

237. The most cogent judicial statement of the doctrine is attributed to Justice Holmes, speaking for the Massachusetts Supreme Court in McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892), *discussed in* Van Alstyne, The Demise of the Right Privilege Distinction In Constitutional Law, 81 Harv. L. Rev. 1439, 1439-40, 1458-64 (1968). Holmes offered the doctrine as an explanation for dismissing the complaint of a petitioner terminated from employment as a police officer for allegedly violating a regulation limiting political activities of the police. Justice Holmes's view was that "petitioner may have a constitutional right to talk politics, but has no constitutional right to be a policeman." 155 Mass. at 220, 29 N.E. at 517. Professor Van Alsytne demonstrated, however, that if Holmes's assertion is too broadly applied it becomes a tautology:

> Because the public force will not be brought to bear upon those who discharged petitioner, he has no right to be a policeman. And because petitioner therefore has no right to be a policeman, the public force will not be brought to bear upon those who discharged him.

Van Alstyne, *supra*, at 1460. Van Alstyne points out that the "epigram scarcely presents itself as an adequate basis for extinguishing constitutional review" since it fails to provide a reason why the "dismissal was constitutionally tolerable." *Id.* Professor Van Alstyne also argues that the tautology is an inaccurate representation of Holmes's overall constitutional jurisprudence. *Id.* at 1458-62.

Right-privilege reasoning is important in the immigration field since it forms the basis for classical immigration law's theory of "restrictive nationalism," which in turn justifies the judiciary's refusal to acknowledge rights independent of legislative grace. *See, e.g.*, Schuck, *supra* note 209, at 48.

238. 338 U.S. 537 (1950).

239. 338 U.S. at 539-40.

240. 338 U.S. at 539.

241. 338 U.S. at 542.

242. 338 U.S. at 543.

The Court then made what has probably been the most cited proclamation in immigration case law: "Whatever the procedure authorized by Congress is, it is due process as far as an alien *denied entry* is concerned."[243]

The Court utilized the *Knauff* rationale three years later in *Shaughnessy v. United States ex rel. Mezei.*[244] The Attorney General ordered Mezei, who had resided in the United States for 25 years, permanently excluded upon his return from a trip abroad. Mezei was unable to contest his exclusion since the Attorney General ordered his departure without hearing, on the "basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest."[245] The Court refused to require the government to disclose its confidential information, citing *Knauff* for the proposition that aliens "on the threshold of initial entry" are entitled only to congressionally granted procedures.[246] In effect, the Court sanctioned the indefinite detention, without a hearing, of aliens seeking entry.

Knauff and *Mezei* stand as testaments to the dangers of agency execution of the laws unrestrained by the Constitution. In each case some evidence suggests that substantive administrative errors were made, and, in fact, both aliens eventually gained entry after extensive congressional and public protest.[247] *Knauff* and *Mezei* demonstrate the necessity of a review system capable of correcting egregious administrative error, without the prompt of public outcry.

Although the basis for the *Knauff* and *Mezei* holdings has been described as a "scandalous doctrine, deserving to be distinguished, limited, or ignored," the Court has never overruled these cases and

243. 338 U.S. at 544 (emphasis added).
244. 345 U.S. 206 (1953).
245. 345 U.S. at 208.
246. 345 U.S. at 212.
247. *See, e.g.*, Immigration Process & Policy, *supra* note 13, at 253. Mezei was eventually "paroled" into the country after spending four years in administrative detention. *Id.* In Knauff's case, largely due to newspaper exposure of her case, "administrative and congressional hearings brought to light the tenuous nature of the evidence on which exclusion was based." Rosenfield, *supra* note 143, at 165 (quoting Kimball, Rights of Aliens in Exclusion Proceedings, 3 Utah L. Rev. 349, 354 (1953)). After two and one-half years Knauff finally received a hearing before a Board of Inquiry and was informed of the charge against her: "that allegedly she passed secret data to an Iron Curtain country." *Id.* Eventually the Board of Immigration Appeals ruled that she must be admitted because of a lack of adequate evidence to support the exclusion. *Id.*

still cites them as authority.[248] A careful reading of the cases, however, does not foreclose application of the atrium principle. Of key importance is the *Knauff* Court's distinction between aliens, like Ellen Knauff, who are seeking admission and aliens who have already "gained entry." In *Kwong Hai Chew v. Colding.*[249] the Court considered INS detention, without hearing, of a permanent resident spouse of a citizen returning from service as a seaman on an American vessel. The Court held that *Knauff* was inapplicable since it relates "to the rights of an alien entrant and does not deal with the question of a resident alien's right to be heard."[250] Interpreting the government regulations as not applicable to permanent residents, the *Chew* Court ruled that Chew was "entitled to due process."[251] The Court stated that although the immigration law might change a resident alien's rights on the basis of a voyage abroad, "it does not follow that he is thereby deprived of his constitutional right to procedural due process."[252]

A month later, considering these same regulations in the *Mezei* case, the Court distinguished *Chew* by stating that the facts of the latter case justified " 'assimilating' [Chew's] status for constitutional purposes to that of continuously present alien residents entitled to hearings. . . . "[253] In the Court's view, Mezei's absence without authorization, and his residence for several months behind the Iron Curtain, provided sufficient rationale for denying him an equivalent "assimilation."[254] Notwithstanding the arguably excessive reliance in *Knauff* and *Mezei* on physical presence rather than relational interests as the trigger for heightened constitutional scrutiny, these cases do not lessen the utility of the atrium principle as a channeling device. The stubborn vitality of *Knauff* and *Mezei* is attributable to the Supreme Court's refusal to invade the political domain of entry and

248. *See, e.g.,* Martin, *supra* note 159, at 173-76 ("[D]espite what it said in Knauff, the Court really could not have meant carte blanche for Congress in the treatment of excludable aliens. . . . Second, the Court was guilty of bad craftsmanship, misreading the cases it invoked and ignoring many others that cannot be squared with the doctrine Knauff announced."); 2 K. Davis, Administrative Law Treatise § 11:5, at 358 (2d ed. 1979) ("the holding that a human being may be incarcerated for life without opportunity to be heard on charges he denies is widely considered to be one of the most shocking decisions the Court has ever rendered"); Hart, *supra* note 226, at 1390-96. Despite this criticism, the Court's continued reference to these cases shows their continuing vitality. *See, e.g.,* Landon v. Plasencia, 459 U.S. 21, 32-33 (1982); Fiallo v. Bell, 430 U.S. 787, 792 (1977); Kleindienst v. Mandel, 408 U.S. 753, 762 (1972).

249. 344 U.S. 590 (1953).

250. 344 U.S. at 596.

251. 344 U.S. at 600.

252. 344 U.S. at 601.

253. 345 U.S. at 214.

254. 345 U.S. at 214.

admission decisions. The atrium principle respects this political boundary but sets limits for the deference that can be accorded legislative prerogative.

Broader analysis reveals persuasive conceptual grounds for limiting application of the right-privilege doctrine. Although the logic of the right-privilege distinction is *internally* consistent, it is not necessarily *externally* justifiable. The theory is based on positivist conceptions of the role of government toward the individual. This positivist view "sees government as prior to the individual, and thus sees the rights of individuals as nonexistent except as recognized by the government."[255] In contrast, the individualistic conception of the role of government "regards the proper sphere of government activity as limited by pre-existing personal rights."[256] Both theories have had a demonstrable influence on the development of immigration law, and it is accordingly inaccurate to assert that either view is "right" in the mutually exclusive sense. Thus an absolutist adherence to positivist theory in constitutional interpretation would be both descriptively and normatively erroneous.

Several commentators have asserted that the right-privilege doctrine no longer offers a viable theory of constitutional analysis.[257]

---

255. L. Tribe, *supra* note 213, § 5-16, at 355. For an excellent discussion of the justifications supporting positivist constitutional doctrine, see Smolla, The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much, 35 Stan. L. Rev. 69, 73-75 (1982). Professor Smolla cites five basic rationales for the right-privilege doctrine. First, courts must have some means of identifying interests that will receive legal protection. Second, government largess can be viewed as a form of charity. As such, "the recipient of a gift must accept it with strings that the giver has attached." *Id.* at 74. Third, a contract analogy could be made that as part of the bargain the recipient of the largess agrees to limited procedural protection. Viewed in the context of "consent," procedural impairments may be considered less onerous. Fourth, closely associated with the contract rationale is the idea that "government should have greater latitude in its dealings with individuals when it acts as the proprietor of the public business rather than as the pandemic regulator." *Id.* at 74-75. Finally, Smolla identifies "deference to majoritarian sovereignty" as the strongest argument for the right-privilege theory. *Id.* at 75.

There are reasons to question the wisdom of applying these rationales to the immigration field. First, the atrium principle provides a channeling function to identify legally protected interests. In addition, given the nature of the immigration statutes, implications of voluntary "consent" to these provisions is at best attenuated. *See* Reich, The New Property, 73 Yale L.J. 733, 737-38 (1964) (describing the dependency on most programs of public largess as involuntary). Finally, the Bill of Rights provides "a set of protections concerned preeminently with the liberal ideal of individual freedom from majoritarian excess." Dignitary Theory, *supra* note 210, at 898.

256. L. Tribe, *supra* note 213, § 5-16, at 355.

257. *See generally* Van Alstyne, Cracks in "the New Property": Adjudicative Due Process in the Administrative State, 62 Cornell L. Rev. 445 (1977); Van Alstyne, The Constitutional Rights of Public Employees: A Comment on the Inappropriate Uses of an Old Analogy, 16 UCLA L. Rev. 751 (1969); Van Alstyne, The Demise of the Right Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968). Similar arguments

Two seminal cases, *Goldberg v. Kelly*[258] and *Bell v. Burson,*[259] have been cited as evidence that the "old right-privilege distinction, a key element in the Court's reasoning in *Knauff*, has received a rude and unceremonious burial."[260] Similar analysis has prompted some commentators to urge its expurgation from judicial review of immigration law based on the overly confident conclusion that "in modern constitutional jurisprudence, the doctrine has been largely abandoned."[261]

The right-privilege distinction, however, has never been abandoned by the Supreme Court, although particular Justices have exhibited varying degrees of fidelity to the doctrine. Chief Justice Rehnquist has served as the Court's most vigorous advocate of the doctrine. Writing for a plurality in *Arnett v. Kennedy,*[262] he applied the principle to uphold the dismissal of a nonprobationary federal civil service employee without a pretermination hearing. In finding that where "the grant of a substantive right is inextricably intertwined with the procedures . . . employed in determining that right, a litigant . . . must take the bitter with the sweet."[263] Since the petitioner had accepted the benefits of the employment under a statutory scheme (the sweet), he could not complain about that provision's termination procedures (the bitter). In effect, the "bitter-with-the-sweet" principle simply restates the *Knauff-Mezei* admonition that whatever procedure Congress provides constitutes constitutional due process.

Arnett has been described as a "rejection" of Justice Rehnquist's positivist theory because only two other Justices joined his opinion.[264] The accuracy of this observation is questionable, though, as the majority of concurring Justices in *Arnett* have used right-privilege reasoning in subsequent cases.[265] A mere two years after *Arnett*, Justice Rehnquist's bitter-with-the-sweet approach could be described

---

have been advanced that the right-privilege doctrine is no longer justifiable in the field of immigration law. *See, e.g.,* Spousal Due Process, *supra* note 225, at 1765-66; Constitutional Limits, *supra* note 226, at 975-77.

258. 397 U.S. 254 (1970) (holding that a welfare recipient has a due process right to a hearing before the cessation of benefits despite the fact that the statute provided no pretermination procedure).

259. 402 U.S. 535 (1971).

260. Martin, *supra* note 159, at 167 (citations omitted).

261. *See, e.g.,* Constitutional Limits, *supra* note 226, at 977.

262. 416 U.S. 134 (1974).

263. 416 U.S. at 153-54 (plurality opinion).

264. *See, e.g.,* L. Tribe, *supra* note 213, § 10-12, at 707-08.

265. *See, e.g.,* Bishop v. Wood, 426 U.S. 341 (1976).

as commanding "a majority of the court."[266] Justice Powell demonstrated his fact-specific willingness to use the doctrine dissenting in *Goss v. Lopez*.[267] Moreover, Justices White, Stevens, and Blackmun have periodically applied variations of bitter-with-the-sweet reasoning.[268] Whether the Court will apply or reject the right-privilege distinction in a particular case apparently depends upon its view of the importance of the interests at issue.

The emergence of the modern administrative state has increased the importance of status acquired through statutory entitlements.[269] Judicial failure to require fair procedure when statutory "rights" are impaired leaves "almost no check on the power of government to limit individual freedom."[270] Several limitations to the right-privilege doctrine serve to curb this extreme. First, vestiges of natural law theory remain. To the extent that individual interests are deemed constitutionally "fundamental," judicial scrutiny of governmental action intensifies. Such interests are either expressly identified in the Constitution or have been implicitly recognized as necessary to protect individual liberty.[271] The doctrine of "unconstitutional conditions" also lessens the impact of the right-privilege distinction by prohibiting the government from indirectly realizing, by conditioning "benefits," results that it may not directly accomplish.[272] Finally, equal protection serves as a constraint against excessively discriminatory programs involving government largess. This constitutional standard operates without regard to the right-privilege doctrine since its essential concern is the discriminatory treatment of similarly situated individuals.[273]

---

266. *See* Smolla, *supra* note 255, at 92.

267. 419 U.S. 565, 584 (1975) (Powell, J., dissenting).

268. *See* Dignitary Theory, *supra* note 210, at 893-94 & accompanying notes.

269. *See* Reich, *supra* note 255, at 733-39.

270. Constitutional Law, *supra* note 216, § 13.2, at 453-54.

271. *See, e.g., id.* § 11.7, at 367:

> [J]ustices of the Supreme Court will apply strict forms of review under the due process clause and the equal protection clause to any governmental actions which limit exercise of "fundamental" constitutional rights. These are rights which the Court recognizes as having a value so essential to individual liberty . . . that they justify the justices reviewing the acts . . . in a manner quite similar to the substantive due process approach of the pre-1937 period. Little more can be said to accurately describe the nature of a fundamental right, because . . . [the] analysis is simply no more than the modern recognition of the natural law.

272. *See, e.g.*, O'Neil, Unconstitutional Conditions: Welfare Benefits with Strings Attached, 54 Calif. L. Rev. 443 (1966); Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595 (1960).

273. *See, e.g.*, Wieman v. Updegraff, 344 U.S. 183, 192 (1952).

C. *Evolutionary Concepts in Search of the "Transformation"*

Professor Schuck has described the development of a communitarian concept that may lead to the transformation of immigration law.[274] The embryonic communitarian ideal is not susceptible to a precise definition, but is "a hazy term used to describe any number of different political theories, which may range from conservative Burkean notions to radical left conceptions of the state."[275] The hallmark of communitarianism, however, is its focus on the assimilative connections and communal interrelations that the alien has established. Although judicial precedent has recognized that the alien is afforded "a generous and ascending scale of rights as he increases his identity with our society," historically the courts have deferred to the legislature's political decisions in ascertaining whether the alien had any claim to the scale.[276] Communitarian theory does not permit the courts to acquiesce in statutory classification when measuring the nature of the alien's legally cognizable interests. Instead it advocates use of a "functional" analysis evaluating the importance of relationships irrespective of legislative categorization.

Communitarian theory pressures the judiciary to moderate the doctrine of absolute sovereignty by insisting on balancing the individual's communal relationships against state actions restraining individual liberty. Schuck has located the origins of communitarian ideals in classical liberal ideology.[277] Since classical liberal theory traced individual rights to the human dignity inherent in all persons,

---

274. *See* Schuck, *supra* note 209. For other works either applying Schuck's analysis of the applicability of communitarian influences on immigration law or considering related concepts, see Aleinikoff, Theories of Loss of Citizenship, 84 Mich. L. Rev. 1471, 1494-98 (1986); Schauer, Community, Citizenship, and the Search for National Identity, 84 Mich. L. Rev. 1504 (1986); Legomsky, *supra* note 213, at 304-06; Verkuil, *supra* note 175, at 1144; Martin, *supra* note 159, at 193-200; Note, Extended Voluntary Departure: Limiting the Attorney General's Discretion in Immigration Matters, 85 Mich. L. Rev. 152, 167-76 (1986) [hereinafter Voluntary Departure]; Developments in the Law—Immigration Policy and the Rights of Aliens, 96 Harv. L. Rev. 1286, 1292-94, 1303-08 (1983).

275. Aleinikoff, *supra* note 274, at 1494.

276. *See* Johnson v. Eisentrager, 339 U.S. 763, 770 (1950); Schuck, *supra* note 209, at 13-14 ("[T]he classical conception of the national community . . . is that it was preeminently a political, not a judicial, artifact. Congress defined the qualifications for, and attributes of, each of the legal statutes that comprised it, and the Attorney General administered that definition.").

277. Schuck, *supra* note 209, at 2. In discussing the nation's expansive immigration policy and open borders that existed through the 1880s, Schuck notes the relationship to "Lockean liberal theory":

> The liberalism of America's first century conceived of persons as autonomous, self-defining individuals possessing equal moral worth and dignity and equally entitled to society's consideration and respect. This entitlement was in principle universally shared, a natural right deriving not from the particularities of one's time, place, or status, but from one's irreducible humanity.

rather than to state recognition, government restrictions on individual interactions or contractual associations were viewed as illegitimate.[278]

Although communitarian theory as a facet of immigration law "is as yet only embryonic, tentative and fragmentary,"[279] it has been noted that "the first faint flickerings of this new ideology are apparent" in the implementation of immigration law.[280] Communitarian principles provide the most coherent explanation for an otherwise baffling series of Constitution-based cases recognizing alien rights. Although the lower federal courts have been the most active in protecting communitarian concerns,[281] the Supreme Court has also responded to these interests. In *Plyler v. Doe*[282] the Court overturned on equal protection grounds a Texas statute that limited the access of children of undocumented aliens to public education by authorizing local school districts to charge them tuition. This decision was remarkable in light of the petitioners' illegal status under the INA, the Court's refusal to hold that alienage is a *per se* suspect classification mandating strict scrutiny,[283] and the Court's longstanding refusal to find that public education is a fundamental right.[284] To provide relief, the Court in effect "cross-bred alienage, a sometimes 'suspect' classification, with poverty, a normally non-suspect classification, to produce a quasi-suspect class comprising the children of illegal aliens who had no control over their unlawful presence in this

Id. (citations omitted). Although Schuck uses the term "liberalism" to refer to these principles, it is clear that he does not use the term in its modern sense. "Classical liberal" is a more helpful description of this theory in order to differentiate it from the commonly used descriptions, "liberal" and "conservative." *See* Malloy, Equating Human Rights and Property Rights—The Need for Moral Judgment in an Economic Analysis of Law and Social Policy, 47 Ohio St. L.J. 163, 164 (1986).

278. In Schuck's view, however, the excessive zeal of classical liberal theory and its inability to distinguish between invalid state regulations and legitimate attempts to define the limits of the national community permitted the emergence of "restrictive nationalism." *See* Schuck, *supra* note 209, at 85-88.

279. Schuck, Immigration Law and the Problem of Community, in Clamor at the Gates 298 (1985).

280. Voluntary Departure, *supra* note 274, at 170.

281. *See, e.g.,* Schuck, *supra* note 209, at 58, 59-85 ("the emergent judicial assertiveness in the face of federal regulation of immigration essentially remains a lower court phenomenon"); Legomsky, *supra* note 213, at 304.

282. 457 U.S. 202 (1982).

283. The Court indicated that, under appropriate circumstances, the state could permissibly make legislative choices based on unlawful immigration status. 457 U.S. at 220. *See also* L. Tribe, *supra* note 213, § 16-23.

284. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

country."[285] To avoid the likely results of the state statute—the creation of a permanent caste of politically and economically disadvantaged persons—the Court apparently decided that Texas could be constitutionally required to expend public money to provide free education to these children.[286] Justice Powell, concurring in the decision, was careful to note the "unique circumstances" justifying relief.[287] Chief Justice Burger, in his dissent, predicted that because of "such a unique confluence of theories and rationales" the case would be of questionable precedential value.[288] Professor Schuck has opined, however, that *Plyler* could constitute "the most powerful rejection to date of classical immigration law's notion of plenary national sovereignty over our borders."[289] To the degree that *Plyler* evaluated the true communal posture and social interrelations of the individuals involved, and recognized that their residence would likely continue even without legal authorization, the case exemplifies an overwhelming array of communitarian factors "trumping" a legislative classification. In addition, *Plyler* signals the Court's unwillingness to sanction a legislative classification based on alienage where "its efficacy was dubious and its goals insubstantial."[290]

Plyler's usefulness as a barometer of the constitutional influence of communitarian principles could be questioned since it invalidated a state, not federal, statute. Prior Supreme Court immigration decisions have not afforded the same degree of judicial deference to states as to the federal government.[291] That characterization is not persuasive, however, given the Supreme Court's decision in *Landon v. Plasencia.*[292] Plasencia was the permanent resident spouse of a United States citizen, and the mother of their minor children. She and her husband traveled to Tijuana, Mexico, and attempted to assist the unlawful entry into the United States of several Mexican and

285. L. Tribe, *supra* note 213, § 16-52, at 1657.
286. 457 U.S. at 218-19.
287. 457 U.S. at 239 (Powell, J., concurring).
288. 457 U.S. at 243 (Burger, C.J., dissenting).
289. Schuck, *supra* note 209, at 58. For other sources discussing the significance of *Plyler*, see, e.g., Perry, Equal Protection, Judicial Activism, and the Intellectual Agenda of Constitutional Theory: Reflections On, and Beyond Plyler v. Doe, 44 U. Pitt. L. Rev. 329 (1983); Lichtenberg, Within The Pale: Aliens, Illegal Aliens, and Equal Protection, 44 U. Pitt. L. Rev. 351 (1983); Gerety, Children in the Labyrinth: The Complexities of Plyler v. Doe, 44 U. Pitt. L. Rev. 379 (1983).
290. L. Tribe, *supra* note 213, § 16-3, at 1445.
291. *See, e.g.*, Bernal v. Fainter, 467 U.S. 216 (1984); In re Griffiths, 413 U.S. 717 (1973); Graham v. Richardson, 403 U.S. 365 (1971). *But cf.* Schuck, *supra* note 209, at 66 ("*Plyler v. Doe,* although involving a state classification, may evince an increasing judicial hostility to federal alienage classifications as well, at least where the power to define 'political community' is not plausibly at issue." (citation omitted)).
292. 459 U.S. 21 (1982).

Salvadoran nationals. The INS found the aliens in the Plasencias' car at the border and detained Plasencia. Since she was entering the country, the INS subjected her to exclusion rather than to deportation proceedings. Plasencia asserted that subjecting her to the lesser procedural protections of exclusion[293] violated due process.

The Court held that the INA's failure to afford returning residents a full hearing did not foreclose the necessity of determining the *constitutionally* required procedures due a returning resident alien. The Court distinguished *Knauff* by noting that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."[294] Refusing to find that the statute that admitted Plasencia also defined her constitutional procedural protections, the Court held that application of the test elaborated in *Mathews v. Eldridge* was required to balance Plasencia's interests against the government's need for summary procedures.[295] The Court noted that her "weighty" interests encompassed "the right to stay and live and work" in the United States and "the right to rejoin her immediate family, a right that ranks high among the interests of the individual."[296] *Plasencia,* therefore, confirms that the Supreme Court will decline to apply bitter-with-the-sweet reasoning even when subjecting federal law to constitutional review if it considers the regulated interests sufficiently substantial.

The lower federal courts have also recognized the importance of communitarian interests in constitutional review of the INA. Section 212(c)[297] of the INA provided a waiver of certain statutory exclusions to long-time permanent resident aliens returning after travel abroad, but denied the benefit to such residents who had not left the country. In *Francis v. I.N.S.,* the Court of Appeals for the Second Circuit found that the provision constituted a violation of

293. *See* Matter of Lam, 18 I. & N. Dec. 15 (BIA 1981) (explaining the procedural differences between exclusion and deportation hearings); *see generally* Comment, "Entry" as an Issue in Immigration Law, 21 San Diego L. Rev. 137 (1983).

294. *Plasencia,* 459 U.S. at 32. It is also worthy of note that the Court cited to *Chew* and stated that although its "holdings was one of regulatory interpretation, the rationale was one of constitutional law." 459 U.S. at 33. Pursuant to the Court's reasoning, *Chew* was entitled to greater procedural protection because his status was "assimilate[d] . . . to that of an alien continuously residing and physically present in the United States." 459 U.S. at 33.

295. 459 U.S. at 34 (citing Mathews v. Eldridge, 424 U.S. 319 (1976)).

296. 459 U.S. at 34.

297. 8 U.S.C. § 1182(c) (1982).

the equal protection component of the due process clause.[298] Acknowledging congressional authority to apply different admission standards to different classes of aliens, the court held that "once those choices are made, individuals within a particular group may not be subjected to disparate treatment on criteria wholly unrelated to any legitimate governmental interest."[299] Although the court determined that the constitutional standard of review for federal immigration statutes differentiating among aliens was the "rational basis" test, it deemed the statute irrational.[300] The court held that the benefit at issue must be extended to petitioner, since it was illogical to distinguish the alien "*whose ties with this country are so strong* that he has never departed," from an alien "who may leave and return from time to time."[301] As in this case, long-standing communitarian relationships have influenced administrative interpretation of the INA, often disguised as orthodox statutory construction.[302]

The atrium principle, however, limits judicial expansion of communitarian interests. In *Tovar v. I.N.S.*[303] an alien sought review of an INS denial of suspension of deportation based on her inability to show that deportation would result in extreme hardship to a citizen child. Tovar argued that her citizen grandchild should be treated as her functional child since their relationship closely resembled that of parent and child. The court, in agreeing that the INS should consider hardship to the grandchild, ignored the clearly defined statutory meaning of the term "child." Although the decision recognized important relational interests, it did so in a manner that invaded the domain of political policymaking. The atrium principle checks such expansion. For purposes of *Tovar,* grandparents have not been accorded entry under political admission decisionmaking and,

298. 532 F.2d 268 (2d Cir. 1976). Although the court referred to "equal protection," its opinion was actually based on the judicially recognized equal protection component of the fifth amendment's due process clause. *See* 532 F.2d at 272 & n.5.

299. 532 F.2d at 273.

300. 532 F.2d at 271-73.

301. 532 F.2d at 273 (emphasis added). *Accord* Tapia-Acuna v. I.N.S., 640 F.2d 223 (9th Cir. 1981); Matter of Marin, 16 I. & N. Dec. 581 (BIA 1978).

302. For example, in Matter of Pagnerre, 13 I. & N. Dec. 688 (BIA 1971), the BIA held that because of the continuing relationship between the parties, a stepmother could file an immigration petition for her stepdaughter, even though the stepmother had remarried after the death of her former husband, who was the beneficiary's father. The holding is remarkable in that it does not necessarily follow from an express reading of the INA.

303. 612 F.2d 794 (3d Cir. 1980).

therefore, have not reached a point "beyond the atrium." It is not surprising that the Supreme Court rejected the *Tovar* approach.[304]

The *Knauff-Mezei* doctrine represents a cogent but brutal decision to avoid both judicial policymaking and further burdening of the immigration bureaucracy. Accordingly, it "is no small thing to upset a precedent that, formally at least, has set the terms of due process application to a defined class of problems for thirty years."[305] Although the doctrine's draconian effect has not been entirely eliminated, evolving communitarian and dignitary concerns have mitigated its severity. The atrium principle offers a rudimentary theory to support a concomitant limit on political decisionmaking by channeling judicial intervention on behalf of communitarian and dignitary interests. This analysis identifies the minimum requirements of a successful constitutional challenge to the IMFA. First, aliens affected by the IMFA must be deemed to have passed beyond the atrium of political admission. Second, to defeat right-privilege reasoning in the face of undeniable governmental need to regulate fraud, the judiciary must consider the interests of concerned parties as sufficiently important to justify more than a "rational basis" standard of constitutional review.

D. The Constitutionality of the IMFA

Contemporary constitutional doctrine does not require that the government provide procedural protection unless a recognized loss of "liberty, or property" is threatened. Aliens denied the opportunity to establish marital validity to avoid deportation satisfy the prerequisites of the atrium principle. Congress already has decided to admit the spouses of citizens and permanent residents; the courts then should recognize the communitarian and dignitary interests of these persons. If these interests were acknowledged, individual familial associational rights would be balanced against the government's need for summary procedure. The first part of this section indicates that such balancing would probably result in the grant of a marital validity hearing to affected individuals. To the extent that

304. *See* I.N.S. v. Hector, 479 U.S. 85 (1986) (per curiam) (reversing a lower federal court decision that considered hardship to the alien's two nieces in determining extreme hardship under the suspension of deportation statute). The Court held that the statutory definition of child is "particularly exhaustive" and limited to an unmarried legitimate or legitimated child or stepchild under twenty-one years of age." 479 U.S. at 88 & n.5.

305. Martin, *supra* note 159, at 171.

evolving transformational values have not been sufficiently established, however, courts might apply right-privilege reasoning and decline to balance interests to determine individual procedural entitlement.

The equal protection clause, however, may provide process protection even without the delineation of a discernable "right." The IMFA's impairment of a combination of important interests suggests that the statute should be subjected to intermediate scrutiny. Supreme Court precedent, however, indicates that the court may be unprepared to apply this level of review to federal immigration legislation. Nevertheless, this Article argues that relief should be afforded under the irrebuttable presumption doctrine. Applied in the context of this doctrine, equal protection functions like due process, since the relief in the event of the state's failure to provide necessary individualization is a constitutionally mandated hearing.[306] The second part of this section contends that the IMFA presents appropriate circumstances for application of this doctrine.

1. Due process. Under the due process clause, aliens have a constitutional liberty interest that must be recognized when expulsion proceedings are instituted against them.[307] Furthermore, citizens and permanent residents may have the fundamental right to marry and associate with the mate of their choice without forfeiting residence in the United States. Under some circumstances the IMFA permits aliens to contest expulsion and present evidence in their behalf. Aliens who marry during the pendency of proceedings contesting their right to remain in the country, however, are denied any opportunity to establish the validity of their marriages. These aliens have already passed "beyond the atrium" because Congress has made the political decision to admit applicants with similar marital relationships. Whether Congress can constitutionally deny procedural safeguards based on the timing of the marriage is not a fundamental political choice but rather "conditioning" a right. This condition should be subject to the same type of scrutiny that *Plasencia* applied to the congressional decision to deny returning permanent residents full procedural protection.

Aliens denied a marital validity hearing have due process liberty interests that should be balanced against the government's asserted

306. Under the equal protection clause, a court can render an irrebuttable presumption rebuttable by affording the affected individual the opportunity to contest the matter in contention. *See* Note, The Irrebuttable Presumption Doctrine In the Supreme Court, 87 Harv. L. Rev. 1534, 1536 (1974).

307. *See* Galvan v. Press, 347 U.S. 522, 530 (1954).

need for summary procedures. The Supreme Court has never sanctioned the deportation of a permanent resident alien without a hearing.[308] The important determination remaining is whether aliens married to citizens or permanent residents can be constitutionally viewed as functionally equivalent to permanent residents. It is difficult to distinguish the relational interests of the two classes. Congress has not convincingly supported the presumption that aliens marrying during expulsion proceedings have more incentive to marry for immigration benefits than aliens overseas waiting for admission under backlogged quota categories.

Claimants denied a marital validity hearing present sufficiently powerful relational interests and ties to the country to be constitutionally "assimilated" to the status of permanent resident aliens, as in *Chew*. This conclusion is faithful to the spirit of *Plasencia*. Although Plasencia was a permanent resident, the INS sought to adjudicate her right to remain in the country under statutory procedures Congress deemed sufficient. The Court, however, refused to defer to this legislative choice and required an independent constitutional balancing of procedural entitlement. The IMFA provides no procedural protection to individuals whose interests are identical to those of permanent residents. In weighing the constitutional liberty interests of these parties, the Court could consider the statutory design constitutionally inadequate.

Under *Plasencia*, important communitarian and dignitary concerns require that the IMFA's hearing denial be subjected to the three-part balancing test of *Mathews v. Eldridge*[309] to ascertain what process is *constitutionally* due aliens under these circumstances. Otherwise, functional social relationships and individual interests of constitutional importance would be subsumed under a statutory category rendering them irrelevant. In *Mathews*, the Court considered:

> first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[310]

Under the first *Mathews* criteria, there is little doubt that an alien's interests in remaining in the country and maintaining immediate

308. *See* Constitutional Law, *supra* note 216, § 13.4, at 470 & n.62.

309. 424 U.S. 319, 332-35 (1976).

310. 424 U.S. at 335.

family unity are "weighty" concerns.[311] The claims of citizen and permanent resident spouses are similarly important since the Court has described marriage as "the most important relation in life . . . having more to do with the morals and civilization of a people than any other institution."[312] The strain of enforced separation might lead to dissolution of legitimate marriages. In addition, the alien is deprived of judicial protection under the IMFA's banishment since judicial review of consular officer visa denial is unavailable.

In contrast, the government's interest in the IMFA's statutory presumption must be carefully identified. To find that judicial review of the IMFA would impinge upon governmental foreign affairs decisionmaking would be erroneous. Such "semantic cataloguing" would ignore the IMFA's overriding domestic focus and the fact that the Act does not distinguish between "immigrants of selected nationalities."[313] The government does, however, have a significant interest in preventing fraud. Although the government has offered some statistical support for the assertion that three of ten immigration marriages are fraudulent, it has never offered empirical evidence to even suggest a high incidence of fraud among individuals marrying during the pendency of expulsion proceedings. The "risk of erroneous deprivation" may in fact be unacceptably high since the expulsion process can continue for years. The presumption that any relationship formed during this period is fraudulent is probably over-inclusive.

The claim that the IMFA reduces administrative and fiscal burdens is also problematic. The IMFA actually requires increased expenditure of administrative resources in tracking potential immigrants during the period of exile rather than immediately adjudicating marriage validity. The burden of determining marital validity is not avoided, but merely delayed, and ultimately shifted from the INS to the State Department. This reallocation of administrative burdens explains the former agency's support of the IMFA and the latter's opposition. The only real conservation of administrative resources occurs when the statute entirely discourages the filing of admission petitions. Although arguably the two year requirement might remove the incentive to marry during expulsion proceedings, it also deters valid marriages. Finally, analysis of the administrative

311. *See, e.g.*, 424 U.S. at 334-35.
312. Maynard v. Hill, 125 U.S. 190, 205 (1888).
313. *See supra* notes 233-34 and accompanying text.

burdens resulting from affording procedural protection does not validate the IMFA's statutory scheme.

The alternative procedure is a marriage validity hearing. Such a hearing would probably prove less of an administrative burden than current expulsion proceedings. Determination of marriage validity would not be outside the scope of the INS's competence or experience. The IMFA requires the INS to make the same type of finding in terminating conditional status. The marriage validity hearing could properly consider such issues as length of relationship, existence of children, and commingling of assets. Couples who could successfully demonstrate marital legitimacy would be spared separation.

The IMFA's denial of such a hearing derives from Congress's preference for using time rather than investigation as a means of determining marriage validity. This choice, however, has been made at the expense of communitarian and dignitary concerns. If immigration law has evolved to the point of considering actual relationships, then a statutory classification will not *per se* foreclose judicial balancing of the communitarian interests at stake. The IMFA's refusal to provide a process permitting individuals even the slimmest possibility of demonstrating marital validity is incompatible with dignitary values. A balancing of the uncertain benefits accruing to the state when hearings are denied against the resulting injury to family associations does not favor the government's position.

On the other hand, if transformational values are insufficiently entrenched, the courts may simply fail to reach the point of balancing the competing interests. The judiciary's decision depends upon the remaining strength of the *Knauff-Mezei* doctrine. *Knauff* countenances deference to statutory classification without consideration of relational interests, while *Mezei* denies the existence of "rights" of aliens seeking admission. It is difficult, however, to rely on *Knauff-Mezei* to buttress the IMFA. Such an approach would require distinguishing *Chew* and *Plasencia,* and a persuasive explanation of why these aliens have not passed "beyond the atrium" of political prerogative to the realm of constitutional protection. If consideration is given to the functional social interactions and associations of aliens married to citizens and permanent residents, then bitter-with-the-sweet reasoning must give way to judicial balancing.

2. Equal protection. The equal protection clause mandates that persons similarly situated receive equal treatment. Unlike due process analysis, it does not require identification of a definitive "right" before statutory discrimination may be subjected to judicial scrutiny. The IMFA's obviously over-inclusive distinction is its differentiation between those who marry before the institution of proceedings and those who marry afterward. The former are permitted to show marital validity, while the latter are denied that opportunity, irrespective of the marriage's legitimacy. In subjecting this statutory classification to equal protection analysis, however, several important factors must be recognized.

Doctrinal equal protection analysis is bounded by the degree of judicial scrutiny to be afforded to the interests at issue. In determining the legitimacy of the IMFA, the courts must decide whether a standard of judicial scrutiny higher than a "rational basis" should be applied. Since it is "rational" for the state to presume the existence of possible fraud on the part of individuals marrying under the threat of expulsion proceedings, the statute is probably not vulnerable to constitutional challenge under this standard. In contrast, if the IMFA infringes on a fundamental right or discriminates against a "suspect class," the statute is unconstitutional since it does not protect a compelling governmental interest by the least restrictive means.[314] Although the Supreme Court has never held that alienage *per se* is a suspect classification, the IMFA also implicates fundamental associational, privacy, and marital rights of citizens and permanent residents. In other circumstances, the Court has subjected state impairment of these interests to the highest degree of scrutiny.

The Supreme Court has recognized fundamental constitutional interests in the marital and familial context, both with respect to the right to marry and to privacy interests deriving from that relationship.[315] It has not, however, found marriage to be so "fundamental" that the state may not regulate it. Moreover, there are

314. *See, e.g.,* Through the Looking Glass, *supra* note 94, at 7.

315. *See, e.g.,* Zablocki v. Redhail, 434 U.S. 374 (1978) (invalidating a state statute barring marriage of a noncustodial parent except upon the parent's demonstration that his children would not become public welfare recipients); Griswold v. Connecticut, 381 U.S. 479 (1965) (holding unconstitutional a state law that prohibited the use of contraceptives as an invalid restriction on marital privacy); *accord* Whalen v. Roe, 429 U.S. 589, 598-600 & n.26 (1977) (reaffirming marital privacy interest); Roe v. Wade, 410 U.S. 113 (1973) (right to privacy found to limit the state's regulation of abortion); Loving v. Virgina, 388 U.S. 1 (1967) (striking down a state miscegenation statute on due process and equal protection grounds). *See also* Wilkinson & White, Constitutional Protection for Personal Lifestyles, 62 Cornell L. Rev. 563, 569 (1977) (stating that if the Court had merely based *Loving* on equal protection grounds it would have been "a case addressed

suggestions in the Court's jurisprudence that the further one moves from "intimate places, such as the marital bedroom or, more generally, the home,"[316] the greater the probability that state restraint of marital privacy interests will be sanctioned. In *Zablocki v. Redhail*,[317] the Court distinguished between statutes that significantly impair the individual choice to marry and regulations that merely have an incidental effect on that right. The *Zablocki* Court deemed violative of equal protection a Wisconsin statute that prohibited the marriage of any noncustodial parent absent a showing that the children were not likely to become public charges. In *Califano v. Jobst*,[318] however, the Court found the impairment of marital rights too indirect to constitute a constitutional violation. The *Jobst* Court upheld the Social Security Act's denial of benefits to disabled person who married someone ineligible for such benefits. The Court's obvious concern about protection of the public purse should be distinguished from the interests implicated by the IMFA.

Precedent suggests that the Supreme Court may be willing to sanction more intrusive regulation of family associations in the immigration area. The Court has recognized the "interest of a parent in the companionship, care, [and] custody of his children" in *Stanley v. Illinois* and prohibited the denial of parental rights to putative fathers without a hearing.[319] Yet similar interests were inadequate to invalidate an analogous INA provision in *Fiallo v. Bell*.[320] *Fiallo* affirmed the INA's denial of immigration benefits to putative fathers seeking to enable their alien children to immigrate, although the statute provided the same benefit to the natural mothers of illegitimate children.[321] In addition, lower federal courts have permitted the INA's separation of citizen minor children and alien parents on the basis of a statutory requirement that a person be 21 or older to file a visa petition for admission of an immediate relative.[322] These

more to the evils of racial discrimination than to the blessings of marriage"—the Court affirmed the fundamental importance of marriage by also finding a violation of due process).

316. *See* Wilkinson & White, *supra* note 315, at 588-89 (arguing that "the concept of seclusion implies protected acts as well as protected places").

317. 434 U.S. 374, 386 (1978).

318. 434 U.S. 47 (1977).

319. 405 U.S. 645, 651 (1972).

320. 430 U.S. 787 (1977).

321. The Court, though it reviewed the issue, applied only a rational basis test, holding that the political choice of admission would be affirmed if supported "on the basis of a facially legitimate and bona fide reason." 430 U.S. at 794 (citing Kleindienst v. Mandel, 408 U.S. 753, 770 (1972)).

322. *See, e.g.*, Acosta v. Gaffney, 558 F.2d 1153 (3d Cir. 1977); *see also* Newton v. I.N.S., 736 F.2d 336 (6th Cir. 1984).

courts reasoned that the INA did not directly mandate the banishment of minor citizens, even though it was probable under the statutory scheme that they would in fact depart with their parents. In *Kleindienst v. Mandel,* the Court stated that the Attorney General need only provide a "facially legitimate and bona fide reason" for the exclusion of a nonimmigrant scheduled to speak publicly, even though first amendment associational rights were implicated.[323] This test in effect required nothing more of the government than provision of a "rational basis" for the exclusion. The courts refused "to look behind the exercise of . . . discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant."[324]

These cases indicate, first, that the courts will not second-guess a congressional entry choice, and second, that even if such a decision has been made, the judiciary will not engage in meaningful scrutiny of conditions placed upon the grant of entry, unless it views the constraints as significantly impairing important interests. In these cases either Congress had not made the political entry decision necessary to satisfy the atrium principle, as it has in the case of IMFA aliens, or the courts failed to view the congressional constraint as a substantial impairment of a significant interest. If the illegitimate children in *Fiallo* had been admitted, for example, their admission would have been wholly judicial.

Although the IMFA does not forbid marriage, it directly constrains it by requiring aliens who marry during the pendency of proceedings to leave the country for two years before receiving immigration benefits. The state-imposed separation is intended to test the legitimacy of the relationship itself rather than to protect welfare largess, as in *Jobst.* The fact that the couple has the "option" of leaving the country does not change the constitutional analysis. Such reasoning ignores the substantial burdens of avoidance, has been deemed inadequate to foreclose review in the analogous circumstances of state impairment of family relationships,[325] and is overbroad since almost any constitutional violation could be avoided by the assumption of this type of burden.

323. 408 U.S. 753, 766-70 (1972).

324. 408 U.S. at 770.

325. In Moore v. City of East Cleveland, 431 U.S. 494 (1977), the Court did not find that a city zoning ordinance restricting housing occupancy to nuclear families was an "indirect" constitutional impairment because the petitioner and her grandsons could have moved out of the city to avoid its effect.

Communitarian and dignitary values, applied in the context of the atrium principle, suggest that an extraordinary combination of interests can overcome deep-seated judicial reluctance to subject immigration legislation to meaningful review. Accordingly, "intermediate scrutiny" should apply to review of the IMFA. Often applied in the context of gender discrimination, intermediate scrutiny has also been used to determine the constitutionality of laws regulating aliens.[326] Under this standard, a statutory classification will withstand review only if it is "substantially related to a legitimate state interest."[327] As in *Plyler,* the IMFA regulates an extraordinary merger of interests that implicate a "cross-breeding" of alienage, a sometimes suspect classification, and marriage, a usually fundamental right.[328]

Notwithstanding the apparent appropriateness of equal protection intermediate scrutiny, the Supreme Court has never shown willingness to invalidate a federal statutory alienage classification under that standard. The Court has voided several state alienage classification enactments, but commentators have questioned its "seriousness" in providing equal protection to aliens in those cases, suggesting that the holdings could be more rationally attributed to federal preemption concerns.[329] Preemption, however, is not a satisfactory explanation, since the Court has invalidated on due process and equal protection grounds a federal regulation discriminating against aliens.[330] The fact that the Court has historically declined to use intermediate scrutiny only against *congressional* alienage enactments has resulted in a troubling inconsistency. *Francis v. I.N.S.* provides evidence that the lower federal courts have been driven by

326. *See* Constitutional Law, *supra* note 216, § 14.3, at 532; L. Tribe, *supra* note 213, § 16-33, at 1613-14.

327. Constitutional Law, *supra* note 216, § 14.3, at 532.

328. *See supra* note 285 and accompanying text.

329. *See* Nyquist v. Mauclet, 432 U.S. 1 (1977) (holding unconstitutional New York's denial of student financial aid to aliens who would not affirm their intention to apply for citizenship); Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976) (invalidating a state ban against licensing aliens as civil engineers); Sugarman v. Dougall, 413 U.S. 634 (1973) (invalidating a state exclusion of aliens from civil service employment); In re Griffiths, 413 U.S. 717, 729 (1973) (striking down a state ban against the practice of law by noncitizens). *But cf.* Martin, *supra* note 159, at 196-99 (citing a line of cases permitting state preclusion of aliens from certain positions imbued with political connotations as falling under the Supreme Court's "political function" exception); Bernal v. Fainter, 467 U.S. 216 (1984) (finding that the states may limit alien participation in functions intrinsically related to the governing process since they are not "full fledged members of the national community").

330. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (holding unconstitutional a federal civil service regulation prohibiting the employment of resident aliens).

this inconsistency to stretch the concept of "rationality" to invalidate unjustifiable congressional immigration provisions. This has produced constitutional incoherence.[331]

The IMFA presents powerful pressures to reconsider the scope of plenary congressional immigration authority and the impact of immigration law on political foreign policy decisionmaking. The Act's predominantly domestic focus does not impinge on foreign policy concerns. Moreover, the atrium principle suggests that the statutory classification can be subject to review since Congress has decided to admit the spouses of citizens and permanent residents. Given the importance of the regulated interests, Congress should be required to justify denying these particular alien spouses procedural entitlements afforded to similar persons. If the interests of affected parties are balanced against the alleged governmental need to deny procedural entitlements, then, under a *Mathews* balancing analysis, the government's position cannot be justified.

The irrebuttable presumption doctrine of equal protection jurisprudence provides a vehicle for redress of procedural deficiencies that would avoid the necessity of invalidating the offensive IMFA provision, but still grant a marital validity hearing. The doctrine has been indiscriminately applied to over-inclusive state and federal legislation.[332] In recent years, however, it has fallen into disuse, perhaps in recognition that practically every statute must at some level "irrebuttably presume" a problem or classification. Unable to perceive the conceptual limits of the doctrine, commentators have warned that it has the potential to "gnaw its way through most of the United States Code."[333]

At least two factors can serve to restrain potentially overbroad application of the irrebuttable presumption doctrine while permitting its beneficial use. First, the United States Code has survived because the courts have applied the doctrine only when strict or intermediate scrutiny was warranted by the presence of "a sensitive classification or . . . an important liberty or benefit."[334] Second, the doctrine's continuing utility lies in the distinction between its hybrid

331. Constitutional Law, *supra* note 216, § 14.12, at 644 (indicating that consistency could be obtained by application of intermediate scrutiny to appropriate alienage cases "but the split among the justices concerning the proper judicial role in reviewing alienage classifications may mean that this area will remain one of great theoretical confusion"). For a discussion of Francis v. I.N.S., 532 F.2d 268 (2d Cir. 1976), see *supra* note 298 and accompanying text.

332. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); United States Dep't of Agric. v. Murry, 413 U.S. 508 (1973); Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Bell v. Burson, 402 U.S. 535 (1971).

333. Dignitary Theory, *supra* note 210, at 897.

334. L. Tribe, *supra* note 213, § 16-34, at 1622-24 (citations omitted).

procedural/due process remedy and orthodox equal protection rule invalidation. Absolute rule invalidation implies a message from the court that any use of the over-inclusive factor is impermissible, while grant of a hearing under the irrebuttable presumption doctrine merely indicates that the state may make the presumption at issue, but cannot give it conclusive effect.[335]

This analysis supports revival of the irrebuttable presumption doctrine in the context of the IMFA. Intermediate scrutiny is warranted because of the importance of the interests effected. The governmental interest in regulating immigration fraud allows it to consider the timing of marriage formation as a relevant factor, but not to give this element conclusive effect. The irrebuttable presumption doctrine offers a moderate resolution of the constitutional problems presented by the IMFA. By invalidating the statute's over-inclusive classification and mandating that conditional status holders be afforded a marriage validity hearing, use of the doctrine preserves the bulk of the Act's regulatory design.

Weinburger v. Salfi[336] seems to present an obstacle to application of the irrebuttable presumption doctrine to the IMFA. In *Salfi,* the Supreme Court held that the Social Security Act's denial of death benefits to a spouse who had not been married to a wage-earner for at least nine months prior to his death did not constitute an invalid statutory presumption. The Court found that "the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule."[337] The Social Security Act's refusal to accord spouses an opportunity to show that they had not married solely to receive benefits is superficially analogous to the IMFA's statutory presumption against marriage validity. Nonetheless, the interests affected by the statutes are distinguishable. The rule in *Salfi* was concerned with preservation of the public treasury[338] and, like *Jobst,* did not intend to sanction direct impairment of marital interests or family unity. In contrast, the IMFA presumption does not avoid administrative costs by eliminating individualized determinations since the INS must bring deportation proceedings to effect the alien's departure.

3. Constitutional concerns of conditional status holders. The IMFA raises other constitutional issues beyond the scope of this Article

335. *Id.* at 1622.
336. 422 U.S. 749 (1975).
337. 422 U.S. at 777.
338. 422 U.S. at 771-72 (distinguishing prior cases granting relief against irrebuttable presumptions on the basis that "a noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status").

that deserve mention. The complexity of the IMFA has led some legal scholars either to focus on its denial of a marital validity hearing as the only constitutionally relevant issue or to underestimate the hardships imposed by conditional residence.[339] Conditional status holders, however, are subject to several significant discriminatory statutory classifications. Conditional status holders and permanent residents are essentially afforded the same legal rights and privileges, have similar interests, and should therefore be considered functionally equivalent for constitutional purposes. Conditional status aliens whose familial relationships and liberty interests have been legislatively impaired should receive the same degree of judicial protection accorded permanent residents. Some of the IMFA's provisions relating to conditional status holders may even fail to satisfy the lesser standard of "rationality." Conditioning the section 216(c)(4)(B) waiver on the fortuity of which spouse files for divorce may be irrational. In addition, the section 204(a)(2) restriction on the right of former conditional status aliens to marry other aliens may trigger constitutional concerns. This provision applies to a very limited class while exempting others who have similar incentives to engage in fraud; it appears to raise at least a prima facie case for an equal protection challenge. The courts can be expected, however, to use the "narrowing by construction"[340] doctrine to interpret the IMFA in a manner avoiding unnecessary constitutional inquiry.

By allowing the government to effectuate deportation based upon a mere preponderance of the evidence, the IMFA impels a constitutional resolution of whether conditional status aliens have a right to a higher proof standard. In *Woodby v. I.N.S.*,[341] the Supreme Court held that INA sections providing that deportation be based on "reasonable, substantial, and probative evidence" governed only the scope of judicial review and not the government's burden of proof.[342] The Court refused to close "its eyes to the drastic deprivations that may follow when a resident" is deported, and required the government to support its case by "clear, unequivocal and convincing evidence."[343] Although ostensibly a case of statutory interpretation, *Woodby* is constitutionally influenced. Similarly, in *Santosky v. Kramer*[344] the Court invalidated on due process grounds a New York

339. *See, e.g.*, Congress Do Us Part, *supra* note 64, at 1115-16.
340. *See, e.g.*, National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336 (1974).
341. 385 U.S. 276 (1966).
342. 385 U.S. at 282-83.
343. 385 U.S. at 285-86.
344. 455 U.S. 745 (1982).

statute that authorized termination of parental custody by mere "preponderance of the evidence," holding that a showing of "clear and convincing evidence" was required. Since the IMFA is injurious to interests of family unity, a comparable burden of proof may be constitutionally mandated. To the degree that the INA affords permanent residents the protection of higher proof requirements, an equal protection argument might also be raised.

Although the IMFA is neutral on its face, its application will have a disparate impact on women. Given the long history of sexual discrimination under the immigration laws,[345] the judiciary should be especially sensitive to this problem. Since 1930, women have comprised more than half of legal immigrants; two-thirds of all those legally admitted are women and children.[346] These individuals will undoubtedly constitute the largest class of conditional status holders. This is a troubling situation because the IMFA provides a distinct strategic advantage to citizen and permanent resident spouses—statistically likely to be men—in the event of domestic dispute. As a consequence, there is a high probability that the IMFA will foster conditions of spousal abuse.[347] Women who are conditional status holders may either accept physical abuse during the two year conditional residence period or leave their husbands and risk deportation. Moreover, INS rulemaking has failed to declare that spousal abuse may constitute "good cause" for divorce or for failure to jointly file a petition to remove conditional status. Under these conditions, it is not surprising that, despite legal counsel, some women have continued to tolerate abuse rather than risk deportation.[348]

Under Supreme Court precedent, however, statistical proof of the disproportionate impact of a facially neutral statute is insufficient to support a gender-based equal protection challenge without demonstration of discriminatory purpose.[349] "Purpose" in this context connotes more than the mere awareness of discriminatory effect.

345. For example, a 1907 immigration statute provided that a female citizen lost her citizenship upon marriage to an alien, and women citizens could not extend citizenship to their children born abroad until 1934. 3 C. Gordon & H. Rosenfield, *supra* note 1, §§ 18.5b, 11.6b.

346. Houston, Kramer & Barrett, Female Predominance in Immigration to the United States Since 1930: A First Look, 18 Int'l Migration Rev. 908 (1984).

347. *See* Recent Development, Immigration Marriage Fraud Amendments of 1986: The Overlooked Immigration Bill, 10 Harv. Women's L.J. 319, 323-24 (1987) (citing L. Okun, Woman Abuse: Facts Replacing Myths 37 (1986) (statistics indicate that "36.8% to 66% of all women seeking divorce alleged physical abuse by their spouse")).

348. Interview with Timothy Clark, Attorney for the Legal Services Corporation of Indiana, Inc. (Sept. 17, 1988).

349. *See* Constitutional Law, *supra* note 216, § 14.4, at 543-55.

Congress must have enacted the law "because of" rather than "in spite of" its impact upon women.[350] The legislative history of the IMFA is devoid of evidence suggesting such intent. A similar analysis would probably apply to other arguably inequitable classifications and distinctions instituted under the IMFA.

Although the above observations indicate the limits of judicial competence in enforcing constitutional rights, Congress clearly has a responsibility to ensure that its enactments respect constitutional standards. Given the absence of an effective "due process of lawmaking" theory, however, legislators are not constitutionally required to search rationally for the truth.[351] Lack of such a theory is regrettable, and as evidenced by a pending recommendation to the United States Administrative Conference, study and evaluation of the IMFA should continue.[352]

E. Constitutional Commentary

Rarely has any single legislative enactment raised as many broad constitutional concerns as the IMFA. The Act challenges the judiciary either to abdicate its responsibility to review congressional enactments or to bring immigration law into the mainstream of constitutional jurisprudence. The preceding section of the Article has attempted to show that the judiciary can fulfill its constitutional role without unnecessary involvement in the intricacies of political decisionmaking. Since the IMFA does not significantly involve foreign policy considerations, and the importance of the interests at stake precludes the use of right-privilege reasoning, there is no persuasive reason to defer to Congress's choice of procedural protections. Furthermore, since the atrium principle demonstrates that judicial scrutiny of the IMFA can be undertaken without usurping congressional admission prerogatives, the communitarian and dignitary interests of concerned parties may and must be considered. At a minimum, the judiciary should balance important individual marital and associational rights against the government's asserted need for summary procedure. It is the position of this Article that

350. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

351. *See* Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197, 225 (1976). *But cf.* L. Tribe, *supra* note 213, § 17-3 & n.2 (arguing for a more expansive concept of due process lawmaking).

352. Legomsky, A Research Agenda for Immigration Law: A Report to the Administrative Conference of the United States, 25 San Diego L. Rev. 227, 251-52 (1988) (recommending that a study be conducted of the procedures the INS will employ when it investigates or adjudicates marital validity). The appropriateness of this recommendation is reinforced by the past constitutional problems in this area. *See, e.g.*, Sham Marriage Investigation, *supra* note 30.

the interests of administrative convenience do not outweigh the importance of protecting fundamental relational rights from arbitrary impairment.

The analysis presented by this Article suggests that the federal district court dismissal of the Smiths' claim in *Smith v. I.N.S.*,[353] was improper. The court affirmed use of the IMFA's two year banishment provision against due process and equal protection challenge by citing *Mezei* and *Fiallo* without sufficient consideration of the applicability of those cases.[354] Likewise, the court held that *Plasencia* stood only for the principle that "a resident alien is entitled to fair procedures before he or she can be expelled or excluded" but that it "does not purport to allow courts to substitute their judgments as to who may remain in this country" for those of the legislature.[355] The illogical implication of the court's holding is that, irrespective of relational interest and ties to the country, *under the constitution* only aliens *statutorily* designated as permanent residents need be accorded fair procedure. The court neither discussed *Chew* nor explained why Mr. Smith's interests could not constitutionally "assimilate" him to functional permanent resident status—at least to the extent of requiring a marriage validity hearing. Moreover, applying bitter-with-the-sweet reasoning, the court found no due process liberty or property interest[356] and therefore failed to apply the *Mathews* balancing test. The court also mischaracterized the Smiths' claim. The couple did not seek to challenge Congress's political decision to admit only bona fide citizens' spouses, but sought evaluation of the constitutional legitimacy of its presumption that the timing of their marriage disqualified them from this class. The court, however, dismissed the couple's equal protection argument by holding that *Salfi* precluded application of the irrebuttable presumption doctrine.

Smith stands as a testament to the fact that some courts are still unprepared to recognize that immigration law is subject to principles of constitutional jurisprudence. The court effectively sanctioned the government's separation of a family *without a hearing* and declined to balance the injury to individual interests against asserted state need. In failing to fully analyze the principles of relevant cases,

353. 684 F. Supp. 1113 (D. Mass. 1988). *See supra* notes 1-8 and accompanying text for a description of the Smiths' situation.

354. 684 F. Supp. at 1116-17.

355. 684 F. Supp. at 1117.

356. 684 F. Supp. at 1118.

the court refused to recognize that the law has "undergone considerable change since the decisions were rendered in . . . *Knauff* and *Mezei*."[357] The *Smith* decision abdicates judicial responsibility by permitting Congress to decide what procedures are constitutionally sufficient even though it has impaired fundamentally important interests.

V. Conclusion and Recommendations

Although it is the prerogative of the legislature to correct what it perceives as an imbalance in immigration admission policy, in so doing it may not treat the alien's relationships and communal interests as completely irrelevant. The IMFA's damaging effect on fundamental relationships raises substantial questions concerning its constitutionality. The IMFA and the IRCA adjustment of status provisions engraft an unduly complex statutory framework onto the already top-heavy INA. In addition, the new laws are unnecessarily severe and were enacted without adequate consideration of past administrative experience. An effective immigration policy would attempt to identify fraud early in the administrative process rather than late. Delaying investigative efforts permits communal and associational interests to accrue and intensify, exponentially increasing the hardships resulting from subsequent expulsion. The potential conservation of administrative resources does not provide adequate justification for this result.

There is strong reason to doubt that the IMFA and adjustment of status statutes contribute to immigration reform in an equitable, efficient, or constitutional manner. Even if Congress has no immediate intention of repealing these laws, certain ameliorative amendments could improve them. The following provisions would reduce the unnecessary inequity of these laws, enhance their implementation, and preserve Congress's fundamental regulatory purpose—without constitutional violation.

The irrebuttable presumption IMFA sections should be repealed and the "extreme hardship" waivers for failure to jointly file a petition to remove conditional status should be amended. Opportunity for hearing should be provided to permit individuals to show marital good faith. The hearing should be patterned after the informal showing permitted aliens who seek waiver of the joint petition filing requirement.[358] Couples who have entered into "11th hour weddings" primarily for

357. Immigration Process & Policy, *supra* note 13, at 207.
358. *See supra* note 127 and accompanying text.

immigration benefits would be hard-pressed to demonstrate a legitimate marriage. In contrast, couples like the Smiths might well be able to demonstrate the bona fide nature of their marriage. It would also reduce the risk of termination of probationary status through the failure of a good faith marriage before its second anniversary. The "extreme hardship waiver" is unworkable as an ameliorative device to avoid expulsion in such a situation, and the administrative costs of applying this vague standard are too high. An amended waiver should be patterned after the lesser standard implemented under INA section 212(i).[359] "Hardship" should be considered without the necessity of showing "extreme" hardship. The INS also needs to provide guidance as to what constitutes equitable grounds for waiver, and these grounds should permit recognition of the interests of children born before the grant of conditional status.

The IMFA's incompatibility with domestic family law should be eliminated. The statute should be amended to render irrelevant distinctions as to which spouse actually files for a divorce. The INS should define the concept of "good cause" to file for a divorce, explicitly including physical and extreme emotional abuse as such grounds. The requirement of demonstrating "fault" should be repealed. It is duplicative in the sense that if one has "good cause" to seek a divorce, a fault determination is unnecessary, and it is contrary to the requirements of domestic no-fault divorces. Finally, the fault concept is too "inaccessible" to be efficiently implemented.

The discriminatory application of IMFA conditional status should be removed. It is incongruous to permit permanent residents' spouses to avoid conditional status through manipulation of waiting periods inapplicable to the spouses of citizens, since the former class of immigrants have similar incentives to engage in fraud. The statutory exemption of spouses and children of occupational immigrants is also inconsistent. Since the concern of fraud prevention is ignored, the only logical explanation for the exception appears to derive from a preference for occupation-based immigration. The adoption of two proposals could eliminate these disparities. First, the quota system should be revised to reduce the backlog of permanent resident nuclear family relatives. These individuals should be afforded the same immediate entry as immediate relatives of citizens, or at minimum their visa wait should be reduced to no more than a year. If the admission delay is equalized between the two groups then disparate treatment will no longer exist. Moreover, a more reasonable

359. *See supra* note 79.

visa waiting period will reduce the incentive to engage in fraud. Second, cessation of the IMFA's preferential treatment of occupational immigrants would promote rule "congruence."

Burdens of proof that raise constitutional questions should be modified and children should be provided relief from deportation. Discriminatory statutory burdens of proof that deprive conditional status holders of immigration benefits or effectuate their expulsion are of questionable constitutional validity and should be repealed. Since these individuals have ties to the United States and important associational interests, the statutory procedural burdens that exist for permanent residents should be applied to conditional status holders. In addition, children, who may have established substantial contacts and roots in the country during the period of conditional residence, should not be automatically deported when marital fraud is discovered. Particularly when the fraud is unilateral rather than bilateral, the deceived citizen or permanent resident spouse may have formed a sincere parent-child relationship with his stepchild. Irrespective of the immigration status of the parent who committed fraud, the legal relationship of stepchild and parent exists between the innocent parties and should be sufficient to support the receipt of immigration benefits if the interested parties consent. This benefit would require a showing of a genuine relationship between the stepchild and parent.[360]

The INS needs to revise questionable administrative interpretations exacerbating an already severe statute.[361] The INS should expressly affirm that the two year IMFA banishment is inapplicable to aliens who win expulsion proceedings. Neither the statute nor its legislative history support a contrary interpretation, which is also unlikely to survive challenge in the federal courts. Furthermore, the agency should not seek to apply the two year banishment to aliens who marry during administrative proceedings other than exclusion and deportation hearings. In addition, the INS interpretation that an individual serving her exile overseas cannot file an immigrant petition until the termination of the two year period has questionable statutory support and is needlessly severe. Its deleterious effect in the case of the second preference applicant, already subject to an extended visa wait, is particularly onerous. If Congress retains the two year exile

360. This recommendation would effectively repeal decisions like Matter of Awwal, I.D. No. 3056 (BIA, Apr. 4, 1988) (holding that a steprelationship cannot be recognized where a marriage creating the steprelationship was a sham from its inception, even if it can be shown that there is a familial relationship).

361. The administrative interpretations referred to are discussed *supra* at note 137.

statute, then it should exempt aliens who have served their two year banishment under the visa system. The tribulations of waiting couples should end if they have maintained their marital status and still desire to be reunited in the United States after two years. These aliens should be assimilated to the status of immediate relatives and entitled to immediate entry.