The Right to Family Unification in French and United States Immigration Law

John Guendelsberger
The Right to Family Unification in French and United States Immigration Law

I. INTRODUCTION ........................................... 2

II. STATISTICAL OVERVIEW ............................... 4

III. DEVELOPMENT OF FAMILY UNIFICATION PROTECTIONS IN UNITED STATES IMMIGRATION LAW ........................................ 7
A. Overview ............................................. 7
B. Early Immigration Regulations and Family Unification—Race, Social Class, and Sex as Determinants ........................................ 8
C. Quantitative Limits on Immigration ................. 13
D. Qualitative Grounds for Exclusion and Deportation ........................................ 22

IV. DEVELOPMENT OF FAMILY UNIFICATION PROVISIONS IN FRENCH IMMIGRATION LAW ........... 25
A. Major Differences in U.S. and French Immigration Law ........................................ 26
B. French Immigration Policy: Exclusion and Expulsion ........................................ 31
C. Family Unification ..................................... 36
D. Features Common to Both U.S. and French Family Unification Law ....................... 42

† J.D. Ohio State University (1977), Diplome d'Etudes Approfondes, University of Paris I (Pantheon-Sorbonne) (1986); L.L.M. Columbia University (1987). Associate Professor of Law, Ohio Northern University College of Law.

The author wishes to acknowledge the assistance of Columbia University's Jervey Fellowship in Foreign and Comparative Law, which allowed him to complete the piece in residence at Columbia and the University of Paris 1 (Pantheon-Sorbonne). This article was written in partial fulfillment of the requirements for the degree of doctor of science in the faculty of law, Columbia University. The author thanks Professors George A. Bermann, Richard Briffault, and Arthur W. Murphy of Columbia for their helpful comments on earlier drafts of this article. The author is also grateful to AhLek Ng and to Dawn Goldsmith for their generous support and assistance.

I. Introduction

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.  

This Article examines the problems involved in reconciling the United States’ interest in controlling immigration with a citizen’s or resident alien’s right to be joined by members of his or her immediate family. The United States selects immigrants under a preference system placing annual ceilings on any one nation’s entrants. If an applicant’s country of origin has a high demand for U.S. immigration, the applicant often faces a long wait for a visa to become available. Thus, spouses and minor children of resident aliens from some countries enter immedi-

---

ately, while those from Mexico and the Philippines, for example, must often wait eight years or longer. The recently passed Immigration Reform and Control Act of 1986 exacerbates these inequities. Under the Act, relatives who entered the United States illegally may now, under certain circumstances, become legal residents in preference to those who, obeying the law, remained behind, waiting for a visa to become available.

This Article argues that the right to family unification is a fundamental human right to which permanent resident aliens, as well as citizens, are constitutionally entitled. When immigration legislation interferes with the right to family unity, the customary judicial deference to Congress in the immigration area becomes inappropriate. Even if the federal courts continue to exercise this deference, however, Congress should amend current immigration law to protect this right.

This Article compares the French treatment of family unification with that of the United States. In a landmark decision in 1978, the Conseil d'Etat, the highest French administrative court, recognized the right to a normal family life as a fundamental constitutional right, annulling an administrative regulation that interfered with a resident alien's right to be joined by a spouse or minor child. The Conseil Constitutionnel, the body that reviews proposed legislation for conformity to the Constitution, also recognized the family's constitutionally protected status in a 1986 immigration law decision. The French courts have thus relied upon the French Constitution to protect the right to family unity in immigration law decisions.

Unlike France, no U.S. court has yet recognized a constitutional right to family unification. A long line of decisions has established that the Fifth and Fourteenth Amendment safeguards of liberty protect the family and family integrity. Courts have not extended these decisions, however, to the immigration area.

This Article is divided into five major parts. Parts III and IV compare the principal developments in family unification policy in the United States and France. Although both countries' legislative and administrative frameworks seemingly make generous provisions for fam-

3. See infra notes 133-34 and accompanying text.
6. See infra notes 553-86 and accompanying text.
7. See infra notes 355-78 and accompanying text.
ily unification, France's current protections are stronger in several respects: (1) France lacks numerical ceilings on entry of family members; (2) it narrows grounds for exclusion and expulsion; and (3) it essentially exempts immediate relatives of citizens from expulsion.

Parts V and VI contrast the two countries' sources of constitutional protection of the family and the extent of judicial review of immigration law. Part V argues for constitutional protection of family unity for both permanent residents and citizens, based on the principle that immigration law should protect these family relationships as much as possible consistent with legitimate national objectives. Part V also argues for according preference to the immediate family of resident aliens over the distant relatives of citizens.

Part VII argues that, assuming the right to family unification is a fundamental component of liberty deserving constitutional protection, immigration law provisions interfering with that right may be justified only by compelling national interests and should be narrowly tailored to serve those interests in a manner that interferes as little as possible with family unification. Congress, therefore, should annul or amend the current ceilings. Part VII proposes amendments to eliminate these numerical ceilings (the full text of these amendments appears in the Appendix to this Article). Part VII also assesses whether recognition of a constitutional right to family unification should act to mitigate otherwise enforceable grounds for exclusion or expulsion.

II. Statistical Overview

A brief description of immigration trends in France and the United States places in perspective the discussion of family unification rights. When comparing French and U.S. immigration, one must keep in mind significant differences in scale:

1. The land mass of the United States is approximately seventeen times that of France, a nation about four-fifths the size of the state of Texas.
2. The current population of the United States (241 million) is over four times that of France (55 million).
3. The population density of France (262.3 per sq. mile) is approximately four times greater than that of the United States (68.1 per sq. mile).
4. Immigration to the United States in 1984 totaled 544,000 while that to France was 68,000.

The current level of U.S. immigration is high by recent standards, though still only half the record levels at the turn of the century.

8. For instance, well over half of annual immigration to each country is based on family ties. See infra note 29 and the accompanying table.
9. See infra notes 167, 171-76, 275-87 and accompanying text.
11. Id. at 183, 275.
12. Id.
13. See infra note 29 and the accompanying table.
Approximately 8.8 million immigrants entered between 1901 and 1910, with a peak of 1,285,349 in 1907. Immigration then declined drastically, hitting bottom in the 1930s, when only one-half million entered the country. Since then, however, immigration has increased every decade: approximately one million in the 1940s, 2.5 million in the 1950s, 3.3 million in the 1960s and 4.5 million in the 1970s. In 1978 immigration exceeded 600,000 in a single year for the first time since 1924.

In contrast, French immigration has declined by more than 60 percent in the last two decades. During the 1960s, the number of entrants averaged nearly 200,000 per year. France took drastic measures in 1974, however, to limit the immigration of workers. As a result, immigration to France averaged only about 90,000 from 1975 to 1982. The number continues to decline: 78,000 in 1983 and 68,000 in 1984 and 1985.

The profile of immigration to France has also changed drastically during the last two decades. While nearly 70% of immigrants in the 1960s and early 1970s entered as “workers,” that figure declined to an average of 35% of entrants from 1975 to 1982 and then to 17%, where it stands today. Moreover, over 60% (110,000) of the 172,000 workers who entered from 1980 to 1985 were beneficiaries of the government.
ment's 1981 amnesty program, which legalized the status of clandestine immigrants living in the country before January 1981. Another 33,000 of the 172,000 workers were nationals of member states of the European Economic Community (EEC) and therefore entitled by EEC law to unrestricted entry. Thus, between 1980 and 1985, actual entry of workers from outside the EEC amounted to only 29,000, approximately 5,000 annually. In contrast, refugee entries into France, under 10,000 per year until recently, have increased significantly, reaching 24,000 in 1985. Refugees now account for one-third of total immigration.

As Table I illustrates below, family immigration in France and the United States has remained relatively stable, though of course raw numbers have changed significantly. In France, family entrants have declined from a high of 75,000 in 1972 to 32,500 in 1985. The United States, in contrast, has in the same period seen family immigration rise from 170,000 to 400,000, remaining at about three-fourths of entrants. Percentages for workers and refugees have also stayed fairly constant in the United States, at about 10% and 15% respectively.

\[\text{22. 1981-1986 Une Nouvelle Politique, supra note 19, at 27.}\]
\[\text{23. Id.}\]
\[\text{24. Id.}\]
\[\text{25. Id.}\]
\[\text{26. Id. Family entrants peaked at 75,000 in 1972. Compare this to the 1950s, when the number was only about 2,000 annually. B. Granotier, supra note 18, at 80-82.}\]
\[\text{28. See infra note 29 and the accompanying table. Another revealing comparison is in terms of absolute numbers of family entrants. United States immigration law admits a far wider range of relatives than does French immigration law. Comparing only citizens' and permanent residents' spouses and children, in the twelve-year period from 1972 to 1984, the number of visas issued to U.S. citizens' spouses or children doubled (from 86,332 to 177,783), and the number issued to resident aliens' families tripled (from 36,484 to 112,309). 1984 Statistical Yearbook of the Immigration and Naturalization Service 11; 1975 Annual Report of the Immigration and Naturalization Service 34. This total of 289,000 is approximately seven to eight times the current number of family entrants in France and approximately twice as large in terms of the two countries' relative populations. The higher rate of close family immigration in the United States may be due to the composition of the immigrant base. Over 80% of foreigners in France have resided there for over ten years. 1981-1986 Une Nouvelle Politique, supra note 19, at 12. In the United States, the foreign population is skewed in the other direction—many immigrants have recently entered and thus are more likely to bring in additional relatives. The United States, therefore, has an expanding foreign population base while France's is shrinking.}\]
TABLE I
IMMIGRATION BY CATEGORIES IN FRANCE AND THE UNITED STATES\textsuperscript{29}

<table>
<thead>
<tr>
<th>Year</th>
<th>Immigrant Category</th>
<th>France</th>
<th>United States</th>
<th>France</th>
<th>United States</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Numbers</td>
<td>Percentages</td>
<td>Numbers</td>
<td>Percentages</td>
</tr>
<tr>
<td>1975-1982</td>
<td>Workers</td>
<td>32,000</td>
<td>35%</td>
<td>36,000</td>
<td>7%</td>
</tr>
<tr>
<td>(average for</td>
<td>Family</td>
<td>46,000</td>
<td>50%</td>
<td>310,000</td>
<td>62%</td>
</tr>
<tr>
<td>the period)</td>
<td>Refugee</td>
<td>12,000</td>
<td>15%</td>
<td>77,000</td>
<td>15%</td>
</tr>
<tr>
<td></td>
<td>Other</td>
<td></td>
<td></td>
<td>81,000</td>
<td>16%</td>
</tr>
<tr>
<td></td>
<td>TOTAL</td>
<td>90,000</td>
<td>100%</td>
<td>504,000</td>
<td>100%</td>
</tr>
<tr>
<td>1983</td>
<td>Workers</td>
<td>18,000</td>
<td>23%</td>
<td>55,000</td>
<td>10%</td>
</tr>
<tr>
<td></td>
<td>Family</td>
<td>46,000</td>
<td>60%</td>
<td>395,000</td>
<td>71%</td>
</tr>
<tr>
<td></td>
<td>Refugee</td>
<td>14,000</td>
<td>17%</td>
<td>103,000</td>
<td>18%</td>
</tr>
<tr>
<td></td>
<td>Other</td>
<td></td>
<td></td>
<td>7,000</td>
<td>1%</td>
</tr>
<tr>
<td></td>
<td>TOTAL</td>
<td>78,000</td>
<td>100%</td>
<td>560,000</td>
<td>100%</td>
</tr>
<tr>
<td>1984</td>
<td>Workers</td>
<td>12,000</td>
<td>17%</td>
<td>50,000</td>
<td>9%</td>
</tr>
<tr>
<td></td>
<td>Family</td>
<td>40,000</td>
<td>60%</td>
<td>399,000</td>
<td>73%</td>
</tr>
<tr>
<td></td>
<td>Refugee</td>
<td>16,000</td>
<td>23%</td>
<td>92,000</td>
<td>17%</td>
</tr>
<tr>
<td></td>
<td>Other</td>
<td></td>
<td></td>
<td>3,000</td>
<td>1%</td>
</tr>
<tr>
<td></td>
<td>TOTAL</td>
<td>68,000</td>
<td>100%</td>
<td>544,000</td>
<td>100%</td>
</tr>
<tr>
<td>1985</td>
<td>Workers</td>
<td>11,000</td>
<td>17%</td>
<td>51,000</td>
<td>9%</td>
</tr>
<tr>
<td></td>
<td>Family</td>
<td>33,000</td>
<td>48%</td>
<td>410,000</td>
<td>73%</td>
</tr>
<tr>
<td></td>
<td>Refugee</td>
<td>24,000</td>
<td>35%</td>
<td>95,000</td>
<td>17%</td>
</tr>
<tr>
<td></td>
<td>Other</td>
<td></td>
<td></td>
<td>6,000</td>
<td>1%</td>
</tr>
<tr>
<td></td>
<td>TOTAL</td>
<td>68,000</td>
<td>100%</td>
<td>562,000</td>
<td>100%</td>
</tr>
</tbody>
</table>

III. Development of Family Unification Protections in United States Immigration Law

A. Overview

This section briefly traces the evolution of family unification provisions in U.S. immigration law. Judicial decisions during the late 19th century identified the right of family unification as a "natural" right and strictly construed immigration statutes restricting this right.\textsuperscript{30} Congress, however, becoming concerned with assimilability, and with protecting the nation's work force, enacted increasingly restrictive immigration barri-

\textsuperscript{29} The figures of U.S. immigration from 1975 to 1977 were taken from the 1977 \textit{Annual Report of the Immigration and Naturalization Service}; for 1978, from the 1985 \textit{Statistical Yearbook of the Immigration and Naturalization Service}; and for 1979 to 1985, from the 1984 and 1986 \textit{Statistical Yearbook of the Immigration and Naturalization Service}. The figures for French immigration were taken from 1981-1986 \textit{Une Nouvelle Politique}, supra note 19, at 21, 27. All of the figures have been rounded to the nearest thousand.\textsuperscript{30} See infra notes 53-61 and accompanying text.
ers.\textsuperscript{31} Supreme Court decisions then rejected challenges to the early immigration acts, declaring that the executive and legislative branches had very broad power to regulate immigration in pursuit of national interests.\textsuperscript{32}

Under the authority of these decisions, Congress regulated immigration by drawing lines according to race, sex, and social status.\textsuperscript{33} These regulations inevitably lessened the potential for family unification. Congress made gradual changes in these laws following the Second World War.\textsuperscript{34} The 1952 amendments,\textsuperscript{35} in particular, were designed to provide a "humanitarian" treatment of family unification.\textsuperscript{36} From 1921 until 1965, however, the United States maintained a national origins quota system, giving quotas as small as 100 to many countries, while allowing large numbers of immigrants from other countries, mainly those in northwestern Europe and the Western Hemisphere.\textsuperscript{37} Congress eliminated the blatantly discriminatory system in 1965,\textsuperscript{38} replacing it with a system of preference based on factors other than national origin. A ceiling was placed, however, on the number of preference immigrants who could enter in one year from any particular country.\textsuperscript{39} A major inequity remains under this current system, namely, that the right of resident aliens to be joined by family members depends upon visa demand from their country of origin. A resident alien whose spouse or child lives in a country of high immigration demand, therefore, must wait many years to obtain the visas necessary for family unification.

B. Early Immigration Regulations and Family Unification—Race, Sex and Social Class as Determinants


The issue of family unification first arose in the context of the late 19th century Chinese Exclusion Acts.\textsuperscript{40} The United States and China originally maintained a policy of free migration. The Burlingame Treaty of 1868, for instance, provided that:

The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from one country to

\begin{itemize}
  \item \textsuperscript{31} See infra notes 79-98 and accompanying text.
  \item \textsuperscript{32} See infra notes 439-66 and accompanying text.
  \item \textsuperscript{33} See infra notes 40-51 (race), 52-61 (social class), 62-78 (sex) and accompanying text.
  \item \textsuperscript{34} See infra notes 99-114 and accompanying text.
  \item \textsuperscript{35} See infra note 109 and accompanying text.
  \item \textsuperscript{36} See id.
  \item \textsuperscript{37} See infra notes 79-81, 103 and accompanying text.
  \item \textsuperscript{38} See infra notes 113-14 and accompanying text.
  \item \textsuperscript{39} See infra notes 101-07 and accompanying text.
  \item \textsuperscript{40} See infra notes 44-59 and accompanying text.
\end{itemize}
Within a decade, however, California officials complained that the numbers of Chinese immigrants were becoming unmanageable, that Chinese laborers unfairly competed with Americans for jobs, and that differences of race made assimilation impossible. As a result, the treaty was modified in 1880 to allow the United States to take reasonable measures to "regulate, limit, or suspend" the entry or residence of Chinese laborers whenever their presence would affect or threaten the interests or "good order" of the country. Two years later, Congress enacted the Chinese Restriction and Exclusion Act of 1882, suspending the entry of all Chinese laborers for a period of ten years. The Act, however, excepted laborers who had entered prior to 1880 and wished to temporarily depart the United States, by providing for the issuance of re-entry certificates at the time of departure.

When, in 1888, Congress voided all re-entry certificates that had been issued, Chinese laborers holding such certificates raised the first major challenge to an immigration law. The U.S. Supreme Court, in The Chinese Exclusion Case, rejected their claims that either the treaties or the certificates established a vested right to re-entry, declaring that the power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.

Relying on the practice reported in other countries, including France, the Court suggested that, even in the absence of any statute on the subject, the government possessed inherent power to exclude "paupers, criminals, and persons afflicted with incurable disease" as well as other classes "whose presence is deemed injurious or a source of danger to

---

42. See The Chinese Exclusion Case, 130 U.S. 581, 595 (1889) (noting statements from the California Constitutional Convention, Dec., 1878).
44. Act of May 6, 1882, ch. 126, 22 Stat. 58.
45. Id. § 3, 22 Stat. at 59.
46. The Exclusion Act of Oct 1, 1888, ch. 1064, § 1, 25 Stat. 504. The Exclusion Act provided that: after the passage of this act it shall be unlawful for any Chinese laborer who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed, or shall depart, therefrom, and shall not have returned before the passage of this act, to return to, or remain in, the United States.
47. See infra notes 48-51 and accompanying text.
48. 130 U.S. 581 (1889).
49. Id. at 609.
the country." Indeed, the Court asserted that the government had the power "to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion."  

2. Social Class  
The Chinese Exclusion Act of 1882, while barring immigration of Chinese laborers, allowed free entry of members of the Chinese merchant class. The Act was silent, however, as to whether the merchants or laborers already present might be joined by their immediate families.  

In In re Chung Toy Ho, a federal court in 1890 interpreted the Chinese Exclusion Act to allow the entry of the wife and child of a Chinese merchant, reasoning that "[t]he company of the [spouse], and the care and custody of the [child] are his [the Chinese merchant's] by natural right; and he ought not to be deprived of either, unless the intention of congress to do so is clear and unmistakable." The Supreme Court later approved the reasoning of Chung Toy Ho in a similar case.  

50. Id. at 608.  
51. Id. at 606. Soon after this decision Congress tightened further the restrictions directed against the Chinese. The Act of May 5, 1892, ch. 60, § 6, 27 Stat. 25, provided that all Chinese laborers who failed to obtain a certificate of residence within one year could be deported. In Fong Yue Ting v. United States, 149 U.S. 698 (1893), the Court rejected constitutional challenges to Congress's authority to deport for mere failure to register, declaring that, "the right of a nation to expel or deport foreigners, who have not become naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country." Id. at 707. Three dissenting opinions urged that resident aliens, as "persons" protected by the Fifth amendment and other provisions of the Constitution, could not be summarily deported for failure to obtain a resident permit. Id. at 792, 744, 761.  
52. Act of May 6, 1882, ch. 126, § 6, 22 Stat. 58, 60.  
53. 42 F. 398 (D. Or. 1890).  
54. Id. at 400. The provisions of the Treaty of November 17, 1890, United States-China, 22 Stat. 826, T.S. No. 49, allowed entry of Chinese who were certified to be merchants, students, teachers, or travelers for pleasure. When Chinese immigrants arrived with certification that they were merchants, immigration officials had turned back their wives and children for lack of certification. The court, however, reasoned that the treaty provisions and the statute must be construed to allow entry of family members, stating:  

It is impossible to believe that the parties to this treaty, which permits the servants of a merchant to enter the country with him, ever contemplated the exclusion of his wife and children. And the reason why they are not expressly mentioned, as entitled to such admission, is found in the fact that the domicile of the wife and children is that of the husband and father, and that the concession to the merchant of the right to enter the United States, and dwell therein at pleasure, fairly construed, does include his wife and minor children.  

In re Chung Toy Ho, 42 F. at 399-400.  

Other federal courts, however, upheld the exclusion of the spouses and children of Chinese merchants. See, e.g., In re Ah Quan, 21 F. 182 (D. Cal. 1884).  
55. United States v. Gue Lim, 176 U.S. 459, (1900). The Court held that when the person seeking entry "is in fact the wife or minor child of one of the members of a class mentioned in the treaty as entitled to enter, then that person is entitled to admission without the certificate." Id. at 468-69. The courts, however, interpreted
These decisions, while identifying family unity as a natural right, suggested the right was not absolute and could be limited by Congress. In *United States v. Shu Chee*,56 a federal court explicitly upheld Congress's power to limit the right of family unification. *Shu Chee* also indicated the importance of class status as a determinant. A Chinese laborer resident in the United States brought over his two sons to enroll them in an American school. Their proper status, however, was their father's and they entered without properly fulfilling the entry requirements for laborers.57 The court rejected their claim that, as students, they nevertheless had a right to remain.58 The court held that "they cannot purge themselves of their offense by assuming the occupation of members of the privileged class (students and merchants), and establish their right to remain by proof of that character."59

The Supreme Court extended its recognition of Congress's power to abridge this "natural right" to family unification in *Yee Won v. White*.60 There it explicitly held that the intention of Congress would be defeated by permitting entry of a laborer's wife and children, even though the laborer had himself entered as the son of a resident merchant.61 Family unification rights, therefore, depended upon class privilege.

3. Sex

During this same period, naturalization laws also affected the opportunity for family unification. An 1855 Act provided that "any woman who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen."62 The Supreme Court interpreted the emphasized language as limiting the law's application to "free white women."63 Consequently, until Congress amended the law in 1922,64 a "white" foreign woman who married a U.S. citizen obtained citizenship status automatically. Even where the marriage took place after an exclusion order or during deportation proceedings, the courts generally held that, so long as the marriage was not a sham, the wife's citizenship status acquired this provision as continuing to exclude "non-white" wives of citizens. See infra notes 62-75 and accompanying text.

56. 93 F. 797 (9th Cir. 1899).
57. Id. at 797-98.
58. Id.
59. Id. at 804-05. Social class was fixed by that existing at time of entry rather than at time of arrest. Id.
60. 256 U.S. 399 (1921).
61. The Court reasoned that the "well defined purpose of Congress would be impeded rather than facilitated by permitting entry of the wives and minor children of Chinamen who first came after the ratification of the treaty [Treaty of 1894 securing ascertainment of China to the limitation on residence of Chinese laborers] as members of an exempt class, and later assumed the status of laborers." Id. at 402.
through marriage prevented her exclusion or deportation.\textsuperscript{65}

This legislation did not give automatic citizenship status to non-white women upon marriage to a U.S. citizen. The Ninth Circuit, however, did construe the law to at least protect such wives from deportation in \textit{Tsoi Sim v. United States}.\textsuperscript{66} In that case, the appellant was a Chinese woman who had entered the United States as a child before the Chinese Exclusion Acts.\textsuperscript{67} She failed to comply with a later law requiring her to register within six months or be deported.\textsuperscript{68} She had, however, married a U.S. citizen before her arrest.\textsuperscript{69}

The circuit court relied on \textit{In re Chung Toy Ho's}\textsuperscript{70} holding that a Chinese merchant's wife and children are permitted to accompany him when he enters the United States.\textsuperscript{71} The court reasoned that a U.S. citizen must certainly be entitled to the same privilege to live with his wife

\begin{footnotes}
\item[65] See, e.g., United States \textit{ex rel.} Sejensky v. Tod, 285 F. 523 (2d Cir. 1922), in which a woman who had been excluded as feeble-minded at entry and who was allowed to visit relatives in the United States after posting a bond, subsequently married a U.S. citizen. Even though the marriage took place after the exclusion order, the court held that "such an order is a mere administrative provision. . . . If the circumstances change prior to the order being carried into effect, it cannot be executed." \textit{Id.} at 529; see also, e.g., Hopkins v. Fachant, 130 F. 839 (9th Cir. 1904), holding that the marriage of a woman to a U.S. citizen, even after an order of deportation and pending application for release on habeas corpus, prevented deportation; \textit{Ex parte Grayson}, 215 F. 449 (W.D. Wash. 1914), \textit{aff'd}, 219 F. 1022 (9th Cir. 1915), holding that a prostitute, who was a native of France, and who married a citizen of the United States during the course of deportation proceedings, was not subject to deportation until her citizenship was revoked by law. The court held that the question of whether or not her marriage was fraudulent had to be established in a court of competent jurisdiction, rather than in an immigration proceeding; Leonard v. Grant, 5 F. 11 (D. Or. 1880), holding that admission to citizenship by marriage has the same force and effect as if the woman had been naturalized by a judge of a competent court. \textit{But see In re Rustigan}, 165 F. 980 (D.R.I. 1908), holding that it was not the intent of the naturalization law to annul or override the immigration law; \textit{Ex parte Kaprelian}, 188 F. 694 (D. Mass. 1910), holding that a marriage entered into after an order of deportation could hardly be free from intent to avoid deportation whether otherwise in good faith or not. See generally Annotation, \textit{Effect of marriage of alien woman to one then an American citizen on right to enter or remain in this country}, 26 A.L.R. 1324 (1923), supplemented by 71 A.L.R. 1213 (1931).

\item[66] 116 F. 920 (9th Cir. 1902).
\item[67] \textit{Id.} at 921.
\item[68] \textit{Id.}
\item[69] \textit{Id.}
\item[70] 42 F. 398, 400 (D. Or. 1890).
\item[71] \textit{Tsoi Sim}, 116 F. at 922-23. The court also referred to the existing law that the domicile and the status of the wife is fixed by that of her husband:

The theoretic identity of person and of interest between husband and wife, as established by law, and the presumption that from the nature of that relation, the home of the one is that of the other, and intended to promote, strengthen, and secure their interests in this relation, as it ordinarily exists, where union and harmony prevail.

\textit{Id.} at 923 (quoting Harteau v. Harteau, 14 Pick. 181, 185, 25 Am. Dec. 372 (Mass. 1833)). Noting that the marriage was not fraudulent and was not designed to evade the immigration law, the court found that her status was changed from that of a Chinese laborer to that of a wife of a native-born American. Though the husband was not a party to the action, the court noted that his rights as well as the rights of his spouse were involved, thus incorporating natural rights language. \textit{Id.} at 925.
\end{footnotes}
as would be accorded a resident alien, and asserted that Congress could never have intended the Chinese restrictions to apply to such a case.

Significantly, the court used natural rights language to describe the rights of the husband and wife:

The wife has the right to live with her husband; enjoy his society; receive his support and maintenance and all the comforts and privileges of the marriage relations. These are her, as well as his, natural rights. By virtue of her marriage, her husband's domicile became her domicile, and thereafter she was entitled to live with her husband and remain in this country.

The court's reliance on rules of statutory construction, however, implied a recognition that Congress could act to abridge this natural right if it explicitly chose to do so.

Shortly after suffrage was extended to women by the nineteenth amendment, Congress in 1922 amended the naturalization law. Congress did not grant women citizens the same rights to family unification as men had enjoyed; rather, Congress eliminated the provision that a woman acquired citizenship through marriage to a U.S. citizen. Marriage no longer entitled a spouse to automatic entry; therefore all immigrant spouses of American citizens could be excluded or deported.

C. Quantitative Limits on Immigration

1. The Quota Acts of 1921 and 1924

Concerned that the source of immigration had shifted from Northern to Southern Europe, Congress acted in 1921 to freeze the ethnic profile of

---

72. Id. at 925.
73. Id. at 926. The court said that, if appellant were to be deported for failing to register, she would still be entitled to return and remain in the United States, on the sole ground that she is the lawful wife of a U.S. citizen. Such a result would be absurd, and thus, precluded according to the principle that courts should construe a statute so it makes sense. Thus, the court held the appellant was not subject to deportation because it refused to find that Congress intended such a result.
74. Id. at 925.
75. See, e.g., Low Wah Suey v. Backus, 225 U.S. 460 (1912) (upholding deportation of a U.S. citizen's wife under terms of a federal statute requiring the deportation of any alien found to have been involved in prostitution within three years subsequent to entry to the United States).
77. The Cable Act provided in section 2 "[t]hat any woman who marries a citizen of the United States after the passage of this act, . . . shall not become a citizen of the United States by reason of such marriage." Id. § 2, 42 Stat. at 1022. The Act also provided that it would not apply retroactively to terminate citizenship acquired under the predecessor act. Id.
78. After passage of the Cable Act, alien wives of U.S. citizens could be denied entry, United States ex rel. Ulrich v. Kellogg, 30 F.2d 984 (D.C. Cir. 1928), or deported, Gomez v. Nagle, 6 F.2d 520 (9th Cir. 1925), under provisions of the immigration law. See Smith v. United States ex rel. Grisius, 58 F.2d 1, 9 (7th Cir. 1932) ("an alien female unlawfully entering the United States after the Cable Act of 1922 is subject to deportation if she enter this country unlawfully, notwithstanding her marriage to a citizen of the United States").
the United States. It limited the number of immigrants of each nationality to three percent of the foreign-born population of the same national origin residing in the United States in 1910. Congress then in 1924 fixed a ceiling of 150,000 immigrants per year, setting quotas for each nationality under the following formula:

The annual quota of any nationality . . . shall be a number which bears the same ratio to 150,000 as the number of inhabitants in continental United States in 1920 having that national origin . . . bears to the number of inhabitants in continental United States in 1920, but the minimum quota of any nationality shall be 100.

These acts ended the era of massive world-wide immigration to the United States while favoring immigration from Northern Europe, particularly England, Germany and Ireland.

In enacting the quota system, Congress paid particular attention to family unification. Minor children of citizens were exempted from the quota limitation. The 1921 Act counted other relatives of citizens and permanent resident aliens toward the quota ceilings, but provided that preference be given to

the wives, parents, brothers, sisters, children under eighteen years of age, and fiancées, (1) of citizens of the United States, (2) of aliens now in the United States who have applied for citizenship in the manner provided by law, or (3) of persons eligible to United States citizenship who served in the military or naval forces of the United States. . . .

Significantly, the 1921 Act afforded preferential treatment to entering wives of citizens, but not to entering husbands of citizens, reflecting the discriminatory provisions of the naturalization law. Foreign wives were perhaps considered less of a threat to the labor force. They may also have been viewed as more easily assimilable.

The 1924 Act both broadened and narrowed family unification opportunities. It broadened opportunities by adding wives to unmarried minor children of citizens as persons exempted from the quota system. Other relatives of citizens—parents, unmarried children eighteen to twenty-one, and husbands—were entitled to preference

81. See supra note 79 and accompanying text.
82. Minors are those under the age of 18. The Quota Act of 1921, ch. 8, § 2(a)(8), 42 Stat. 5.
83. Id.
84. Id. § 2(d), 42 Stat. at 6.
85. Id.
86. See supra notes 76-78 and accompanying text.
87. The Quota Act of May 26, 1924, ch. 190, § 4(a), 43 Stat. 153, 155. The courts, however, interpreted this provision as continuing to exclude "non-white" wives of citizens. See supra notes 62-75 and accompanying text; see also infra notes 94-95 and accompanying text.
within the quotas for each nationality. The 1924 Act narrowed family unification opportunities by eliminating the 1921 Act's preference for relatives of aliens who had applied for citizenship. This distinction between treatment of relatives of citizens and relatives of permanent resident aliens remains fundamental to current immigration law.

Two exceptions to the quota system should be noted. First, the 1924 Act exempted Western Hemisphere nations (Canada, Mexico, and other independent countries of Central and South America) from the quota provisions. This exception continued until 1965 when an annual quota of 120,000 was set for the Western Hemisphere. Conversely, the sentiment against Oriental immigration had resulted already in the total exclusion of the inhabitants of the Asian continent and its adjacent islands, an exclusion the 1924 Act did not ameliorate.

The general exemption of wives and children of U.S. citizens from the immigration quotas raised the question of whether such relatives from Asian countries could freely enter the United States. In 1925, in Chang Chan v. Nagle, the Supreme Court held that a Chinese wife of a U.S. citizen was barred from entry. The Court reasoned that the 1924 Act barred immigration of aliens "ineligible to citizenship" except under specified conditions, and none of these conditions included the relationship of an Asian relative to a U.S. citizen.

88. The Act of 1924 provided: "In the issuance of immigration visas to quota immigrants, preference shall be given—(1) to a quota immigrant who is the unmarried child under 21 years of age, the father, the mother, the husband, or the wife of a citizen of the United States who is 21 years of age or over. . . ." The Quota Act of May 26, 1924, ch. 190, § 6(a), 43 Stat. 153, 155.
89. See id.
90. See infra notes 115-22, 128-31 and accompanying text.
93. Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 875-77, excluded immigration from a large portion of Asia and its adjacent islands (the "Asiatic Barred Zone"). Ministers, professors, merchants, travelers for pleasure, as well as immediate members of their families, however, were excepted from the "Asiatic" bar. Id.
94. 268 U.S. 346 (1925).
95. The Quota Act of 1924 provided that:
No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under provisions of subdivision (b), (d), or (e) of section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in section 3.

The Quota Act of May 26, 1924, ch. 190, § 13(c), 43 Stat. 153, 162.

The wife of a U.S. citizen did not qualify under any of the three subdivisions of section 13(c) quoted above. Section 13(c)(1) referred to returning immigrants, ministers, professors and students. Section 13(c)(2) concerned family members of ministers and professors. Section 13(c)(3) referred to a definition of immigrant which excepted only the family members of government officials. In Chung Fook v. White, 264 U.S. 443 (1924), the Court denied a writ of habeas corpus to a Chinese woman seeking to enter to join her husband. The husband was a native-born U.S. citizen.
Several unsuccessful attempts were made in the late 1920s on behalf of Chinese-Americans to amend the 1924 Act to permit entry of Asian relatives of citizens and to ease the quota restrictions for other categories of relatives. National sentiment, however, was not hospitable to easing immigration restrictions. For example, the following commentary appeared in a legal journal in response to legislative proposals to relax entry restrictions for family members:

The alien who comes here leaving a family in Europe is by that fact identified as an economic failure. . . . Such a man should never be allowed to enter the country, but since many such are now here, the best we can do is see that their families who are presumably at the same low level, should be given no assistance in an effort to join them, particularly since the reunion usually leads to the birth on our soil of more defectives to fill our prisons and asylums.

Thus, although the 1924 Act was concerned about family unification, it restricted the right to "white" wives and children of citizens. Not until after the Second World War did significant amendments to the law gradually expand both the range of citizens and residents entitled to family unification and the circle of relatives who might enter to join them.

2. The Move Toward Equality of Treatment Under the Quota System

The original quota system's treatment of family unification contained numerous inconsistencies. The quota's applicability varied, depending upon whether one's country of origin was within the Western Hemisphere, the Asiatic-barred zone, or a country subject to the general regime of quota limits. For those from countries subject to the quotas, entering wives were treated more favorably than entering husbands.

Had he instead been a naturalized citizen, the law would have permitted his wife's entry. The Court justified this result by concluding that:

The words of the statute being clear, if it unjustly discriminates against the native-born citizen, or is cruel and inhuman in its results, as forcefully contended, the remedy lies with Congress and not with the courts. Their duty is simply to enforce the law as it is written, unless clearly unconstitutional.

Id. at 446. Surprisingly, in another decision handed down the same day, the Court interpreted the 1924 Act as permitting the entry of a Chinese merchant's family. Cheung Sum Shee v. Nagle, 268 U.S. 336 (1925). In Cheung Sum Shee, the Court construed the same Act as in Chung Fook, but read it as preserving treaty rights afforded Chinese merchants since 1880. The Court rejected arguments challenging the rationality of an immigration law that permits relatives of Chinese merchants to immigrate while barring those of U.S. citizens. The Court therefore concluded that wives and children of resident alien Chinese merchants could enter the United States as non-quota immigrants so long as the resident alien was lawfully domiciled in the United States prior to the passage of the 1924 Act. Id. at 345.


98. See infra notes 99-114 and accompanying text.
Additionally, neither illegitimate nor adopted children were included in the quota exemptions and preferences for children.

Congress has been removing these inequities since the early 1940s. For example, discrimination in the quota system based on race, sex, or legitimacy is now forbidden.\footnote{See infra note 113 and accompanying text. See generally notes 101-14 and accompanying text.} Similarly, the quota system based on the 1920 ethnic composition of the United States has been replaced by a uniform ceiling for each country.\footnote{See infra note 116 and accompanying text.}

Elimination of some of the major disparities began with the repeal in 1943 of the Chinese Exclusion Act.\footnote{Act of Dec. 17, 1943, ch. 344, 57 Stat. 600.} Although the repeal removed the absolute bar to Chinese immigration, and lifted the ban on eligibility to citizenship, it set a token quota of 105 immigrants per year.\footnote{Before the repeal of the Chinese Exclusion Act, China had a quota of 100 immigrants per year. This quota, however, applied only for non-Chinese persons born in China and eligible for naturalization (Chinese were not eligible for immigration and naturalization because of the Chinese Exclusion Act). The Quota Act of May 26, 1924, ch. 190, 43 Stat. 153, provided the original quota system. Quotas for national origin were based on a number bearing the same ratio to 150,000 as the number of inhabitants in the continental United States in 1920 having that national origin to the number of inhabitants in the continental United States in 1920 (minus, of course, persons from the Asiatic Barred Zone). Id. § 11, 43 Stat. at 155. After determinations of the quotas by the Secretary of State, Secretary of Commerce, and the Secretary of Labor, President Hoover issued the original quota figures in a Presidential Proclamation. Proclamation of March 22, 1929, reprinted in 46 Stat. at 2984. Similarly, when the Chinese Exclusion Acts were repealed in 1943, the officials responsible for issuing quotas were given the power to then determine the appropriate quota figure for persons of Chinese ancestry. See Proclamation No. 2603, I-X C.F.R. 13 (1944 Supp.), reprinted in 58 Stat. at 1125 (1944). The token figure of 105 Chinese was in addition to the 100 figure for non-Chinese born in China. See F. Auerbach, Immigration Laws of the United States 11 (1955).} In 1952, the Asian ban was lifted and replaced by an overall ceiling of 2,000 immigrants per year for the area, with ceilings of 100 for each Asian nation.\footnote{Immigration and Nationality Act, ch. 477, §§ 201(a), 202(b)-(e), 66 Stat. 163, 175-78 (1952).} Finally, in 1965 Congress afforded Asian nations annual ceilings equal to those of other nations.\footnote{Act of Oct. 3, 1965, Pub. L. No. 89-236, § 2, 79 Stat. 911.} Congress further equalized treatment of national origin at that time by limiting immigration from the Western Hemisphere to 120,000 annually,\footnote{Id. §§ 2, 21(e), 79 Stat. at 911, 921. In addition to the annual quota of 120,000, Western Hemisphere immigrants were required to meet qualitative requirements and obtain labor certification. U.S. Comm. On Civil Rights, supra note 79, at 14.} and in 1978, by setting a unified annual world quota at 290,000 with ceilings of 20,000 for each nation.\footnote{Act of Oct. 5, 1978, Pub. L. No. 96-212, §§ 201, 203, 94 Stat. 102, 103, 106-07.} In 1980, the world quota was reduced to 270,000, with an independent quota of 50,000 added for refugees.\footnote{Refugee Act of 1980, Pub. L. No. 96-212, §§ 201, 203, 94 Stat. 102, 103, 106-07.}
Sex distinctions were removed by the 1952 amendments exempting all entering spouses of U.S. citizens (i.e., both wives and husbands) from quotas and granting preference status within the quotas for spouses of permanent resident aliens. Illegitimate and adopted children received equal treatment beginning in 1957 when Congress expanded the definition of child under the Immigration Act. That reform included an illegitimate child only if the benefit sought was by virtue of the child's relationship to the mother. The Immigration Reform and Control Act of 1986, in contrast, extends preferential treatment to natural fathers of illegitimate children who demonstrate a bona fide parent-child relationship.

Since 1965, immigration law has specifically prohibited certain forms of discrimination, stating, "[n]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of

108. The distinctions previously based on sex can be seen, for example, in sections 4(a) and 6(a)(1) of the Immigration Act of 1924, which defined non-quota immigrants as including "the unmarried child under 18 years of age, or the wife, of a citizen of the United States," but providing mere preference status within the quotas to husbands of U.S. citizens. The Quota Act of May 26, 1924, ch. 190, §§ 4(a), 6(a)(1), 43 Stat. 153, 155. For a discussion of the elimination of legitimacy distinctions, see infra notes 109-11 and accompanying text.


   (A) a legitimate child;
   (B) a stepchild, whether or not born out of wedlock . . . ;
   (C) a child legitimated under the law of the child’s residence or domicile, or under the law of the father’s residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation.
   (D) an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother or to its natural father if the father has had a bona fide parent-child relationship with the person.
   (E) [certain adopted children]; or
   (F) [certain orphan children].


Emphasized language was not part of the 1957 reform but was added by the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 3359.

111. Act of Sept. 11, 1957, Pub. L. No. 85-316, § 2(d), 71 Stat. 639. In Fiallo v. Bell, 430 U.S. 787 (1977), the Supreme Court rejected equal protection claims that the statute impermissibly discriminated on the grounds of legitimacy and gender. Acknowledging only "limited judicial review" of legislative distinctions in the immigration area, the Court noted that either a presumption of absence of close family ties or concerns with problems of proof of paternity could justify the less favorable treatment of the father-illegitimate child relationship. Id. at 799.

residence. . ." The text immediately qualifies this broad statement, however, by adding, "except as specifically provided in [three sections]," which give preference in allocating visas based on relationship to a citizen, place of birth, or residence.\textsuperscript{114}

Today, no serious consideration would be given to a proposal to return to racial or sexual distinctions in family unification. This Article argues that the expanded recognition of individual rights in matters concerning the family similarly limits Congressional line-drawing that might cause or prolong separation of immediate family members because of national origin. The current visa allocation system's adverse impact on some families of permanent resident aliens is discussed in the following sections.

3. The Preference System for Allocating Visas

Under current immigration law, certain "immediate relatives" of U.S. citizens may obtain immigration visas without regard to numerical limitations. These are, "the children, spouses, and parents of a citizen of the United States, \textit{Provided}, That in the case of parents, such citizen must be at least twenty-one years of age."\textsuperscript{115} All other relatives of citizens and all relatives of resident aliens must enter subject to the annual numerical limits: 270,000 visas worldwide and 20,000 visas per nation.\textsuperscript{116} The law allocates these 270,000 visas within the framework of a six-tiered preference system.\textsuperscript{117} Four of the six tiers allocate 80% of the total available visas on the basis of relationship to a family member in the United States.\textsuperscript{118} The other two tiers allocate the remaining 20 percent according to labor needs.\textsuperscript{119}

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


\textsuperscript{114} \textit{Id.} Section 101(a)(27), which defines "special immigrants," section 201(b), which defines "immediate relatives," and section 203, which allocates immigrant visas according to preference categories, are specifically excepted from the anti-discrimination provisions.

\textsuperscript{115} 8 U.S.C. \textsection 1151(b) (1982). "Children" includes only unmarried persons under twenty-one years of age. 8 U.S.C.A. \textsection 1101(b) (West Supp. 1987).

\textsuperscript{116} 8 U.S.C. \textsections 1151(a), 1152(a) (1982).

\textsuperscript{117} \textit{Id.} \textsection 1153.

\textsuperscript{118} \textit{Id.} \textsection 1153(a)(1), (2), (4), (5).

\textsuperscript{119} \textit{Id.} \textsection 1153(a)(3), (6).
<table>
<thead>
<tr>
<th>Preference Category</th>
<th>Visas Reserved</th>
<th>Annually</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Unmarried Sons or Daughters (over 21 years of age) of Citizens</td>
<td>54,000</td>
<td>20%</td>
</tr>
<tr>
<td>2. Spouses and Unmarried Sons or Daughters of Permanent Residents</td>
<td>70,200</td>
<td>26%</td>
</tr>
<tr>
<td>3. (certain workers)</td>
<td>27,000</td>
<td>10%</td>
</tr>
<tr>
<td>4. Married Sons or Daughters of Citizens</td>
<td>27,000</td>
<td>10%</td>
</tr>
<tr>
<td>5. Brothers or Sisters of Adult Citizens</td>
<td>64,800</td>
<td>24%</td>
</tr>
<tr>
<td>6. (certain workers)</td>
<td>27,000</td>
<td>10%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>270,000</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

Within the six preference groups, visas are issued to eligible aliens in the order in which their visa petitions are filed. Since a citizen's child who is unmarried and under twenty-one years of age is an "immediate family member" exempt from numerical limits on entry, the first preference group includes only unmarried sons and daughters of citizens twenty-one years of age or older. The number of visas reserved for this preference category is substantially greater than the demand. Unused first-preference visas are added to those available for the second preference group. The allocation process continues similarly through the remaining four preference groups, except that unused visas from the second preference group pass to the fourth preference group rather than to the third. Table II, at the end of this section, compares the number of visas reserved per group to the number per group actually issued.

The maximum number of preference visas available in a fiscal year to any one country's citizens is 20,000. No restriction, however, limits the number of those 20,000 visas that can be allocated to any one preference group. As a result, in countries such as Mexico where the demand is heavy in the higher preference groups, often no visas remain for applicants in the lower groups. To remedy this inequity, the Act provides that, if the maximum number of visas (20,000) is issued to a country during one fiscal year, in the following fiscal year the country's allotment of 20,000 visas is to be distributed by percentage allocation among the six preference groups in the same proportions as for the 270,000 visas available worldwide. This provision assures visa availa-
bility to lower preference-group applicants, but prolongs the delay for those in higher preference groups.

The only preference category including families of permanent resident aliens is the second, which limits the preference to spouses and unmarried sons or daughters. This difference creates serious disparities between residents and citizens, especially resident aliens from countries of high immigration demand. The wait for second-preference visas for Mexican applicants, for instance, has been estimated at approximately eight years. While these spouses and children wait, the law reserves 24% of the total visas for the siblings of citizens. As the Select Commission on Immigration and Refugee Policy (SCIRP) concluded in its Final Report in 1981: "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."

To remedy this inequity, the SCIRP report suggested eliminating the per-nation ceilings for spouses and minor children of permanent resident aliens while retaining a world limit to be filled on a first-come, first-served basis. The Immigration Reform and Control Act of 1986 provides an amnesty program for illegal aliens who have resided in the country continuously since January 1, 1982. The Act's impact on the backlog of Mexicans and Central Americans waiting for second-preference visas is uncertain. The waiting list will be shorter to the extent that some aliens on the waiting list have been living in the United States already and will qualify for amnesty. The backlog will increase to the extent that clan-

second-preference category applicants, 10% (2,000) to third, fourth and sixth-preference applicants, respectively, and 24% (4,800) to fifth-preference applicants.

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

129. 8 U.S.C. § 1153(a)(5) (1982). The fifth-preference category, which currently accounts for an immigration backlog of 1.5 million visa applications, has been criticized for taking family reunification too far and for leading to a potential mushrooming of preference eligibility. On the other hand, the admission of siblings has been defended as an integral part of the family unification concept for Italians and other ethnic groups. See The Preference System, 1981: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 169 (1981) (statement of Rev. Joseph Coga, Nat'l Executive Secretary, Am. Comm. of Italian Migration).

130. SELECT COMMISSION, supra note 1, at 15.

131. Id. at 14-15. The SCIRP Report also recommended eliminating the backlog by raising the number of preference visas from 270,000 to 350,000 with an additional 100,000 visas for each of the next five years. Id. at 106. In 1981 nearly 70% of the one million persons waiting for preference visas were relatives of U.S. citizens or of permanent resident aliens. Id. at 14-15.


133. Senator Simpson of Wyoming, the sponsor of the Immigration Reform and Control Act of 1986, explained that the categories of those who may qualify for
destine aliens, having obtained permanent resident status through the amnesty program, will then petition for entry of their immediate family members.134

TABLE II

1984—UNITED STATES IMMIGRATION BY CATEGORY

EXEMPT STATUS:135

<table>
<thead>
<tr>
<th>Category</th>
<th>ISSUED</th>
<th>RESERVED</th>
</tr>
</thead>
<tbody>
<tr>
<td>Spouses, Children, and Parents of Citizens</td>
<td>177,783</td>
<td></td>
</tr>
<tr>
<td>Refugees</td>
<td>92,127</td>
<td></td>
</tr>
<tr>
<td>Others</td>
<td>11,977</td>
<td></td>
</tr>
<tr>
<td><strong>TOTAL IMMIGRANTS</strong></td>
<td>281,887</td>
<td></td>
</tr>
</tbody>
</table>

PREFERENCE STATUS:

<table>
<thead>
<tr>
<th>Preference Category</th>
<th>ISSUED</th>
<th>RESERVED</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st Unmarried Sons or Daughters of U.S. Citizens</td>
<td>7,569</td>
<td>54,000</td>
</tr>
<tr>
<td>(3%) (20%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2nd Spouses and Unmarried Children of Alien</td>
<td>112,309</td>
<td>70,200</td>
</tr>
<tr>
<td>(42%) (26%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3rd Professional or Highly Skilled Workers</td>
<td>24,852</td>
<td>27,000</td>
</tr>
<tr>
<td>(9%) (10%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4th Married Sons or Daughters of U.S. Citizens</td>
<td>14,681</td>
<td>27,000</td>
</tr>
<tr>
<td>(6%) (10%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5th Brothers or Sisters of U.S. Citizens</td>
<td>77,765</td>
<td>64,800</td>
</tr>
<tr>
<td>(30%) (24%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6th Needed Workers</td>
<td>24,669</td>
<td>27,000</td>
</tr>
<tr>
<td>(9%) (10%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>TOTAL IMMIGRANTS</strong></td>
<td>262,016</td>
<td>270,000</td>
</tr>
<tr>
<td>(100%) (100%)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

D. Qualitative Grounds for Exclusion and Deportation

Congress can, in its discretion, exclude or deport different classes of immigrants. For example, Congress excluded convicts and prostitutes

amnesty may overlap with those whose names are on the visa-preference waiting list: “85 percent are already here. When their number is called, they go back to Mexico to get it and come back up into the United States.” 132 Cong. Rec. S16889 (daily ed. Oct. 17, 1986) (emphasis added) (statement of Sen. Simpson). No one really knows how many aliens may be eligible under the amnesty program for eventual permanent resident status. Estimates are in the millions.

134. The potential impact of the 1986 amendments is discussed further in Part VII.

135. 1984 Statistical Yearbook of the Immigration and Naturalization Service 11-14. The figure of 262,016 for the preference status immigrants reflects, in addition to the six preference categories, 171 immigrants from other incidental categories. Of the 171 immigrants in the “other” categories, 161 came from the suspension of deportation proceedings, 4 came as a result of private congressional bills, and 6 were other incidentals.
in 1875,\textsuperscript{136} and paupers, lunatics and idiots in 1882.\textsuperscript{137} By 1917, the number of excluded classes had increased to thirteen.\textsuperscript{138} Today the list of reasons for exclusion has expanded to thirty-three paragraphs of the immigration law.\textsuperscript{139} Congress has also expanded the grounds for deportation so that the law now includes nineteen paragraphs.\textsuperscript{140}

In enacting grounds for exclusion or deportation, Congress created exceptions protecting immediate relatives of citizens or permanent resident aliens in certain circumstances.\textsuperscript{141} The following section describes these exceptions, which, unless otherwise indicated, refer to the immediate family: spouse, parent, or minor unmarried child of a citizen or permanent resident alien.

1. \textit{Waiver of Exclusion to Preserve Family Unity}

The immigration law grants the Attorney General discretion to waive exclusion for several classes of excluded aliens to preserve family unity.\textsuperscript{142} These include exclusion for:

1. mental retardation, mental illness, or tuberculosis;
2. certain past criminal activity; and
3. fraud, misrepresentation, or perjury in connection with attempts to enter the United States.\textsuperscript{143}

Few statutory guidelines govern the Attorney General's discretion.\textsuperscript{144} If an alien has a history of mental illness, the Attorney General must obtain a certificate from the Surgeon General indicating a finding of recovery.\textsuperscript{145} For those with serious criminal records or a history of prostitution, the Attorney General may waive exclusion if convinced that relatives in the United States would suffer "extreme hardship" as a result of the exclusion and that admission "would not be contrary to the national welfare, safety, or security of the United States."\textsuperscript{146}

2. \textit{Waiver of Deportability and Suspension of Deportation}

Aliens still remain vulnerable to deportation provisions after obtaining permanent resident status.\textsuperscript{147} The Attorney General has discretion to

\begin{footnotes}

\textsuperscript{136} Act of March 3, 1875, ch. 141, §§ 3, 5, 18 Stat. 477.


\textsuperscript{138} Immigration Acts, ch. 29, 39 Stat. 874 (1917). The 1917 Act also specifically provided that the marriage of a "sexually immoral" woman to a U.S. citizen would not invest such a woman with citizenship "if solemnized after her arrest or after the commission of acts which make her liable to deportation under the Act." Id. § 19, 39 Stat. at 889.


\textsuperscript{140} See id. § 1251.

\textsuperscript{141} See infra notes 142-59 and accompanying text.

\textsuperscript{142} See 8 U.S.C. § 1182(g), (h), (i) (1982).

\textsuperscript{143} Id.

\textsuperscript{144} Only six of the thirty-three exclusion provisions afford special protections to immediate family members seeking entry. See id.

\textsuperscript{145} 8 U.S.C. § 1182(g) (1982).

\textsuperscript{146} See id. § 1182(h).

\textsuperscript{147} See 8 U.S.C. § 1251 (1982) and text accompanying note 140.
\end{footnotes}
waive deportation in two situations: when the resident alien has been convicted of possession of small amounts of marijuana,\textsuperscript{148} or for fraud or misrepresentation in obtaining entry.\textsuperscript{149} For possession of 30 grams or less of marijuana, the waiver standard is equivalent to that for aliens seeking entry with a serious criminal record or a history of prostitution,\textsuperscript{150} namely: "that the alien’s deportation would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, or child of such alien and that such waiver would not be contrary to the national welfare, safety, or security of the United States."\textsuperscript{151} For those who procured visas through fraud or misrepresentation, the only standard governing the Attorney General's discretion is that they be the immediate relative of a citizen or permanent resident and that they were otherwise admissible to the United States at time of entry.\textsuperscript{152}

The Attorney General also may suspend deportation for other deportable aliens in what are called section 244 suspensions of deportation.\textsuperscript{153} Section 244 suspensions fall into two groups. The first group includes, for example, aliens who are deportable for irregular entries or for overstaying a temporary admission.\textsuperscript{154} The Attorney General may suspend deportation for this group if the alien meets the following minimum requirements:

1. proof of physical presence in the United States for a continuous period of not less than seven years immediately preceding the date of such application; and
2. proof that during all of such period he was and is a person of good moral character; and
3. proof that deportation would result in extreme hardship to the alien or to his spouse, parent, or child who is a citizen of the United States or an alien lawfully admitted for permanent residence.\textsuperscript{155}

The second group of section 244 suspensions includes aliens who are involved in aggravated violations, including involvement after entry in criminal acts, narcotics, subversive activity, or prostitution.\textsuperscript{156} In these aggravated cases, the alien must fulfill stricter requirements: ten rather than seven years' residence and a finding that the U.S. relative will suffer "exceptional and unusually extreme hardship" rather than "extreme hardship."\textsuperscript{157}

In determining the existence of "extreme hardship" under section 244, courts have required the Attorney General to consider not only

\begin{itemize}
\item \textsuperscript{148} 8 U.S.C. § 1251(f)(2) (1982).
\item \textsuperscript{149} Id. § 1251(f)(1).
\item \textsuperscript{150} See 8 U.S.C. § 1182(h) (1982) and text accompanying note 146.
\item \textsuperscript{151} 8 U.S.C. § 1251(f) (1982).
\item \textsuperscript{152} Id.
\item \textsuperscript{153} See generally C. Gordon & H. Rosenfield, \textit{2 Immigration Law and Procedure} ch. 7.9b, at 7-135 (1986).
\item \textsuperscript{154} Id. at 7-135-36.
\item \textsuperscript{156} C. Gordon & H. Rosenfield, \textit{supra} note 153, at 7-137-40.
\item \textsuperscript{157} 8 U.S.C. § 1254(a)(2) (1982).
\end{itemize}
economic hardship but also the emotional hardship resulting from the separation of family members.\textsuperscript{158} In *Bastidas v. INS*,\textsuperscript{159} the Third Circuit reversed an administrative finding of no hardship, reasoning as follows:

The family and relationship between family members occupy a place of central importance in our nation's history and are a fundamental part of the values which underlie our society [citation omitted]. Accordingly, we view the separation of family members from one another as a serious matter requiring close and careful scrutiny. Although we do not go so far as to hold that the separation of a father from his child is, as a matter of law, extreme hardship for purposes of § 244(a)(1), we do hold that where a father expresses deep affection for his child and where the record demonstrates that his actions are consistent with and supportive of his expression of affection, a finding of no extreme hardship will not be affirmed by this court unless the reasons for such a finding are made clear.\textsuperscript{160}

The Third Circuit requires courts to apply careful scrutiny in family unification cases and also requires them to consider the importance of the family to society. This contrasts with the early Chinese Exclusion decisions, which emphasized the protection of the individual's "natural rights" to a family life. In these cases, however, the natural right of the individual to family life, and the importance of the family to society, were merely principles aiding statutory interpretation. Neither approach addresses the more fundamental issue of whether the Constitution provides protection to family members from exclusion or deportation.

Family unification has been an issue in U.S. immigration law for over a century. Though inequities remain, the law in recent decades has greatly advanced in the direction of more favorable and more uniform treatment of family members. Some disparities remain. "Immediate" family members of citizens enter without regard to numerical limits but those of resident aliens must await visas through the preference system. Consequently, resident aliens from countries of high immigration demand may face long delays before their spouses or children may join them.

\textbf{IV. Development of Family Unification Provisions in French Immigration Law}

Family unification has emerged in France, as well as in the United States, as a major criterion of immigration policy. This part discusses the framework of French law governing family unification. The first section compares the French approach to immigration control with that of the

---

\textsuperscript{158} See, e.g., Zamora-Garcia v. INS, 737 F.2d 488 (5th Cir. 1984); Majia-Carillo v. INS, 656 F.2d 520, 522 (9th Cir. 1981) (stating that for extreme hardship "the most important single factor may be the separation of the alien from family living in the United States" and that "separation from family alone may establish extreme hardship"); Bastidas v. INS, 609 F.2d 101 (3rd Cir. 1979).

\textsuperscript{159} *Bastidas*, 609 F.2d at 101.

\textsuperscript{160} \textit{Id.} at 105.
United States. Subsequent sections describe the administrative and legislative evolution of French immigration law and the right of family unification. The part concludes by summarizing the major similarities and differences between French and U.S. law.

A. Major Differences in U.S. and French Immigration Law

After giving a brief history, this section explores three major features of French law not found in U.S. law: 1) the absence of quotas and detailed qualitative restrictions for either entry or expulsion; 2) greater administrative discretion to expel aliens; and 3) the diversity of French regimes which control immigration.

1. Early History

Nineteenth century mining and steel-producing companies established the pattern of early immigration to France—recruitment of foreign workers on a temporary basis. These workers were normally single men recruited collectively in their countries of origin by an employer for a specified period of time. French employers even created a private organization, the Societe General d’Immigration, to recruit foreign workers. The sparse accommodations afforded by employers, however, usually prevented workers from living with their families.

Not until after the Second World War, under the Ordonnance of November 2, 1945, did the state assume responsibility for the recruitment of foreign workers. Regulations implementing the 1945 Ordonnance required a prospective employer to demonstrate that no French workers were available to fill the position before hiring foreign workers. The employer was also required to provide adequate housing.

2. Absence of Quotas

The 1945 Ordonnance continues to provide the basic framework for French immigration law. Its 36 articles form an astonishingly compact document, partly because immigration to France is not limited by quotas, ceilings, or preferences. Aliens who obtain the necessary work authorizations, who have certain family ties, or who have refugee status may enter without regard to numerical limits. From the end of the Second World War to the late 1960s, many immigrants obtained entry

---

162. Id. at 23-26.
163. Id.; see also B. Granotier, Les Travailleurs Immigres en France 31 (5th ed. 1979).
166. Id.
on the basis of work authorization\textsuperscript{168} or entered without work authoriza-
tion and later regularized their status after obtaining employment.\textsuperscript{169} With the economic downturn of the early 1970s, however, possibilities for worker entry dwindled, ending altogether in 1974.\textsuperscript{170}

3. Exclusion and Expulsion of Aliens on the Basis of Ordre Public

Although French law does not contain the numerous and detailed grounds for exclusion or deportation present in U.S. law, it does require that the foreigner not pose a danger to the \textit{ordre public}.\textsuperscript{171} The term \textit{ordre public}, as used in French administrative law, connotes the minimum conditions necessary for a society to function properly.\textsuperscript{172} These minimum conditions, which necessarily vary according to social beliefs and expectations, include conditions preserving the security of persons and property and the maintenance of health and tranquility.\textsuperscript{173}

Notably, the focus of \textit{ordre public} is preventive. It does not require harm to have occurred, only that a danger to \textit{ordre public} might occur. In practice, the \textit{ordre public} concept affords the administration broad discretion to exclude or expel foreigners.\textsuperscript{174}

In France, the reasons for exclusion and expulsion are first determined at the administrative level. Because the concept of \textit{ordre public} is so amorphous, French administrators necessarily exercise more discretion than their American counterparts who are governed by complex statutory guidelines. Of course, U.S. immigration officials also exercise a great deal of discretion. Several of the 33 specified grounds for exclusion from the United States are as indeterminate as the French notion of \textit{ordre public}.\textsuperscript{175} Generally, however, the United States Congress has a more commanding role in shaping the details of immigration law than its French counterpart. Only within the last decade have the French Par-

\textsuperscript{168} A. Cordeiro, supra note 161, at 27-48.
\textsuperscript{169} \textit{Id.} at 38-48. In 1968, for example, 82\% of those awarded work contracts obtained them after entry into France rather than through the channels of the Office National d'Immigration. \textit{Id.} at 38.
\textsuperscript{170} The circular of July 5, 1974, 1974 J.O. 7275, barred entry of all workers from nations outside the European Economic Community. See A. Cordeiro, supra note 161, at 88; see also \textit{infra} note 210 and accompanying text.
\textsuperscript{173} G. Vedel, supra note 171, at 61.
\textsuperscript{174} See \textit{infra} notes 212-15 and accompanying text. The Interior Minister might presume from rumor or from mere suspicion that \textit{ordre public} would be disrupted if a particular individual remained in France. G.I.S.T.I., \textit{Les expulsions}, No. 5 DROIT SOCIAL 73, 74 (1976) [hereinafter \textit{Les Expulsions}].
\textsuperscript{175} See, e.g., 8 U.S.C. § 1182(a)(27) (1982) (excluding "[a]liens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States").
liament and judiciary assumed more active roles in defining the contours of \textit{ordre public}.

4. Status of Aliens: Greater French Discretion to Expel

United States immigration law provides more security from expulsion than does French law because: 1) once immigration status is granted, the U.S. immigrant has fewer hurdles to clear to become a citizen; and 2) U.S. policy is to encourage permanent settlement and integration of immigrants.

The United States classifies entrants as either immigrants or non-immigrants. The latter term implies a temporary visit; the former, by definition, confers permanent resident status and the opportunity to apply for citizenship after five years of residence.

In France, the immigrant normally does not obtain permanent resident status at the time of entry. The 1945 Ordonnance provides that an alien intending to stay longer than three months is classified as one of the following: 1) temporary resident, 2) ordinary resident, or 3) privileged resident. Temporary residents include tourists, students, or seasonal workers intending to stay between three months and one year. Temporary residents must obtain a \textit{carte de sejour} (residence card) from the local prefecture, renewable after one year. Ordinary residents are entrants authorized to work or who prove sufficient resources. Ordinary residents can obtain a \textit{carte de sejour}, valid for up to three years and renewable. Privileged residents are those residents who have resided in France for at least three years. The privileged resident can obtain a \textit{carte de sejour} valid for ten years, renewable automatically. Because France retains the power of refusing to renew the immigrant's \textit{carte de sejour} for at least three years, the status of the French immigrant is less secure than that of the U.S. immigrant.

The United States bases its approach to granting permanent resident status to immigrants on the deliberate policy of encouraging immigrants to settle permanently in the United States.

\begin{itemize}
\item \footnote{176. See infra notes 212-19 and accompanying text.}
\item \footnote{177. See 8 U.S.C.A. § 1101(a)(15) (West Supp. 1987) (immigrant is "every alien except an alien who is within one of the . . . classes of nonimmigrant aliens").}
\item \footnote{178. See 8 U.S.C. §§ 1151, 1427 (1982).}
\item \footnote{179. Ordonnance No. 45-2658 of Nov. 2, 1945, arts. 9-18, 1945 J.O. 7225, 7225-26.}
\item \footnote{180. Id. art. 10.}
\item \footnote{181. Id. art. 11.}
\item \footnote{182. Id. arts. 14, 15.}
\item \footnote{183. Id. art. 16. The 1984 amendments increase the security for certain family members of immigrants and some long-term residents by providing that entry to France can only be refused under particular, specified circumstances. Decret No. 1080 of Dec. 4, 1984, 1984 J.O. 3754.}
\item \footnote{184. D. Lochak, \textit{Etrangers: de quel droit?} 146 (1985).}
\end{itemize}

The unique character of immigration in the American context confers upon foreign residents a status different from that given foreigners in Europe. Neither socially nor psychologically can the situation of American immigrants be compared to that of European foreign workers; as to the legal aspects,
resident status encourages immigrants to establish connections with the new country and break ties with the old.\textsuperscript{185} France, however, has wavered between the policy of promoting the integration of its foreign population and the policy of encouraging foreign laborers to return to their countries of origin after providing temporary labor.\textsuperscript{186} Currently, the Mitterrand regime\textsuperscript{187} is committed to integrating the foreign population already settled in France and to discouraging further immigration.\textsuperscript{188}

The illegal aliens in the French immigrant population have had several opportunities to legalize their status.\textsuperscript{189} As a result, these immigrants enjoy a much greater level of security and protection from exploitation than enjoyed by illegal aliens in the United States. After regularization of over 120,000 immigrants in 1981,\textsuperscript{190} the number remaining in irregular situations in France is estimated at a few hundred thousand in contrast to the projections between four to eight million in the United States.\textsuperscript{191} The recent tightening of immigration controls in France, however, suggests that future amnesty measures are unlikely.

5. Diversity of Regimes

Whereas U.S. immigration legislation applies uniformly to entrants from most countries,\textsuperscript{192} France regulates immigration in part through bilateral and multilateral agreements with other countries. The most significant agreement is the Treaty of Rome,\textsuperscript{193} which provides that nationals of the twelve member states of the European Economic Community (EEC) are entitled to free access to member states in seeking employ-
ment. French immigration law, therefore, applies to EEC nationals only to the extent provided by the provisions of the Treaty of Rome. The problems of family unification among EEC nations are governed by regulations promulgated under the Treaty.

Special agreements also govern immigration from many former French colonies. Algeria was long viewed as an integral part of France, and independence accord provided for free movement of Algerians between Algeria and France. These accords were later modified. Agreements were made with Tunisia and Morocco in 1963 to fill the need for workers in France. Several other African states, including Mali, Mauritania, and Senegal, are also subject to a regime of originally generous, but increasingly restrictive bilateral accords.

The following chart provides the share of total immigration in 1982 for which each regime was responsible:

<table>
<thead>
<tr>
<th>Regime</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>General Regime</td>
<td>60%</td>
</tr>
<tr>
<td>Algerian Accords</td>
<td>18%</td>
</tr>
<tr>
<td>European Economic Community</td>
<td>15%</td>
</tr>
<tr>
<td>African nations</td>
<td>3%</td>
</tr>
<tr>
<td>Refugees</td>
<td>3%</td>
</tr>
<tr>
<td>Total</td>
<td>100%</td>
</tr>
</tbody>
</table>

Although Spain and Portugal joined the EEC in 1986, their nationals will not benefit from the EEC freedom of movement provisions until at

200. B. GRANOTIER, supra note 163, at 62.
201. Id. at 63. Since January 1, 1975, the nationals of most African states must obtain a carte de sejour in order to reside and work in France. This necessitates obtaining a work contract prior to entry. Id.
least 1991. If the 1982 proportional figures remain constant, the change will be significant, reducing to about 30% the immigration subject to the general regime, and increasing that subject to the Treaty of Rome to 45%.

B. French Immigration Policy: Exclusion and Expulsion

1. "Laissez-Faire" Regulation: 1945-1970

After 1945, and until the late 1960s, France's economy needed and could absorb new entrants. As a result, the regulation of immigration remained lax. Eighty to ninety percent of immigrants in the late 1960s entered clandestinely and then regularized their status. This laissez-faire approach to enforcement made the right to family unification essentially an academic issue until the late 1960s, when social disturbances and an economic downturn raised concerns about immigration controls.

Beginning in the early 1970s, the government implemented a series of severe measures to control immigration. In 1972, circulars prohibited foreign workers who entered without authorization from regularizing their status. In 1974, the government responded to the political pressures resulting from an increasingly severe recession and high unemployment by barring the further entry of foreign workers. The

---

203. Spain and Portugal joined the EEC by virtue of the Treaty Concerning the Accession of the Kingdom of Spain and the Portuguese Republic to the European Economic Community and to the European Atomic Energy Community, June 12, 1985, reprinted in BII ENCYCLOPEDIA OF EUROPEAN COMMUNITY LAW B9315 (1986). The conditions of accession are set out in the Act Concerning the Conditions of Accession and the Adjustment to the Treaties, reprinted in id. at B9320. Articles 55 through 60 govern the application of the freedom of worker provisions to Spain and Portugal. Id. at B9338 to B9340.

204. For a breakdown of the principal nationalities of the foreign population in France, see 1981-1986 UNE NOUVELLE POLITIQUE, supra note 19, at 24 (25% Portuguese and 8.8% Spanish in 1982).

205. From 1900 to 1939 France experienced only a 3% increase in its population. After the Second World War, the need for rebuilding and repopulating led to provisions encouraging worker and family immigration. In 1966, M. Jeanneney, the Minister of Social Affairs, declared that "clandestine immigration is not 'inutile' because if it were strictly dealt with according to the letter of the law we could well experience a labor shortage." Id. at 10.

206. Many workers, for example, entered without work authorization and later regularized their status. See supra note 169 and accompanying text.

207. B. Granotier, supra note 163, at 65.

208. L. Richer, LES DROITS DE L'HOMME ET DU CITOYEN 138-39 (1982). France expelled many foreigners in the aftermath of the disturbances of May 1968, and limited the number of Algerian immigrants to 1,000 per month. Id.


210. On Nov. 26, 1974, the Minister of the Interior ordered prefets to deny extended stay requests for foreigners who entered as tourists and then attempted to
government also encouraged foreigners to return to their countries of origin.211

2. The Crackdown of the 1970s: Attempts to Expand Use of Ordre Public

In the early 1970s, the State used the ordre public standard to remove foreigners deemed undesirable.212 It ordered expulsions for such minor offenses as petty theft, public intoxication, and failure to remain "politically neutral."213

The administrative courts,214 however, began to review actively expulsion orders and to define the contours of ordre public.215 In 1975, the Conseil d'Etat held that indigence, unemployment, and conviction for minor offenses were insufficient reasons to support an order of expulsion.216 A 1979 law required the administrator to explain the motivation for all administrative decisions, including expulsion change or regularize their status. In a circular of July 5, 1974, 1974 J.O. 7275, the Labor Minister terminated the introduction of all new foreign workers. The Conseil annulled both of the above circulars for "exces de pouvoir" in a decision of November 24, 1978, Confederation generale du travail et autres, req. No. 98.340, 98.698 and 98.700. The Conseil determined that the administrative officials had imposed restrictions beyond those established in the law and decrees.

211. See generally A. Cordeiro, supra note 161, at 87-88; L. Richer, supra note 208, at 139.

212. Evans, supra note 172, at 136. The Administration could bar entry of any foreigner who might present a danger to ordre public. The Administration used its broad discretion to exclude politically undesirable aliens such as the pro-IRA political figure, Bernadette Devlin, British trade unionists protesting British entry to the European Community in 1972, and West German Amnesty International officials in 1975. Others were admitted on condition that they refrain from political activity. Id.

213. For instance, the administration used the ordre public standard to expel a Tunisian activist for working with a group defending rights of immigrants, and a worker who participated in an information network benefitting U.S. deserters from the Vietnam war. Additionally, the vagueness of the "political neutrality" standard left aliens vulnerable to intimidation through threats of expulsion. See Les Expulsions, supra note 174, at 75.

214. For a discussion of the French judicial system, see infra notes 489-504 and accompanying text.


Traditionally, the administrative court exercised only a minimum level of review. It could examine the materiality of the facts underlying administrative decisions, but did not review the sufficiency of facts in supporting its legal conclusions. Development of the concept of erreur manifest during the last thirty years has resulted, however, in some court reversals of administrative findings of danger to ordre public. G. Vedel, supra note 171, at 799.

216. Ministre de l'Interieur v. Pardov, Conseil d'Etat, 1975 Lebon 83 (Pardov, a Bulgarian refugee, was ordered deported on the grounds that he had neither regular activity nor resources and that he had entered and remained in France illegally; the Conseil d'Etat's decision annulled the deportation order for erreur manifest); see also Ministre de l'Interieur v. Benouaret, Conseil d'Etat, 1978 Lebon 502 (annulling order of expulsion based on the use of false documents to enter the country because entering with false documents is not, in itself, a danger to ordre public); Ministre de l'Interieur v. Dridi, Conseil d'Etat, 1977 Lebon 38 (in deciding that there was no erreur manifest in an expulsion order, the Conseil noted "the penal infractions of an alien do not in themselves legally justify a measure of expulsion").
orders. In 1981, a major amendment to the 1945 Ordonnance considerably lessened the danger of arbitrary expulsion. It required the administration to find, before ordering expulsion, both a "grave" danger to ordre public and that the alien had served at least one year in prison. The same amendment exempted from expulsion several categories of persons with established ties to France.

3. **Multiplying the Grounds for Expulsion**

Concurrent with these judicial and legislative protections from arbitrary expulsion, the executive and legislature moved to find new ways of more effectively controlling immigration. In 1980, at the end of the seven-year term of Valery Giscard d'Estaing, the Parliament amended the immigration law. The amendments expanded the grounds for exclusion and expulsion and vested the administration with greater authority to expel aliens. The 1980 amendments sought to remove the barriers to expulsion of foreigners remaining in France without proper documentation erected by the 1945 Ordonnance and the decisions of the Conseil d'Etat.

The 1980 amendments permitted the Minister of the Interior to expel most aliens residing illegally in France. These amendments led

---

219. Id. art. 25.
221. Id.
222. The 1945 law limited the grounds for expulsion to situations in which an alien presented a danger to ordre public. The Conseil d'Etat established, however, that improper documentation or mere clandestine status was not a violation of ordre public. See cases cited supra note 216. Administrative authorities, therefore, could not expel illegal aliens for these reasons. Rather, the authorities had to afford aliens an opportunity to depart voluntarily or go through the criminal courts process for violations of the immigration law. Voluntary departure or "administrative refoulement" left no judicial record and no prohibition on returning to France or on eventually obtaining French citizenship. Expulsion through the administrative process, however, left a record and interfered with opportunities for citizenship and reentry. See generally Vincent, Le nouveau regime de l'entree et du sejour des etrangers en France, 33 REVUE ADMINISTRATIVE 363, 372 (1980).

If the request to leave the country voluntarily was ignored, then judicial refoulement after criminal conviction for the violation of immigration law could be imposed. Only in cases of urgency could the administration itself force the removal of a person from the country. Id. If convicted, the illegal could be expelled. Article 19 of the Ordonnance of 1945 provided for a fine or imprisonment for those who entered irregularly or remained in France for three months without obtaining the proper carte de sejour. Ordonnance of Nov. 2, 1945, art. 19, 1945 J.O. 7225, 7226. The 1981 amendments clarified that the criminal sentence for conviction for lack of documentation could include a judicial order of expulsion. Law No. 81-973 of Oct. 29, 1981, art. 1, 1981 J.O. 2970. The criminal process is, of course, much slower, more costly and more uncertain than administrative expulsion.

223. The five new grounds for expulsion under the 1980 amendments were:
1. counterfeiting, falsifying or altering a carte de sejour (paragraph 2);
2. lack of proper documentation (undocumented) (paragraph 3);
3. failure to obtain a carte de sejour after three months in France (paragraph 4);
to a three-to-four-fold increase in the expulsion rate. The threat of massive expulsions caused considerable insecurity among the foreign population and may have prompted the voluntary departure of some aliens.

4. Post-1980: The Impact of Shifting Political Power

Immigration policy in France is tied to political ideology, ranging from the far right views of Jean Marie le Pen, who uses immigrants as scapegoats for all the nation's problems, to the more humanitarian emphasis of the socialists and communists. This spectrum is nevertheless a relatively narrow one—no political group argues for more open borders. The focus of debate centers primarily on how to treat immigrants already residing in France.

One purpose of the recent restrictive amendments was to limit the Arab immigrant population. In the 1970s the source of immigration to France shifted from European countries to the former colonies in North Africa. Growing pockets of Arabs in France have retained their language, culture, and religion and have been the targets of a marked xenophobic reaction. The tension between the native French and the Arab immigrants is particularly acute because of religious and cultural differences and because of the ill-feeling generated by the war of liberation in Algeria.

Thus, at least one commentator characterized the debate as concerning the extent to which France should permit itself to become either a pluralistic society or a "melting pot." In addressing these issues in 1981, the newly elected socialist regime of Francois Mitterrand promised to implement a humanitarian immigration policy that would discourage clandestine entry while protecting the rights of foreigners already in France. The socialist-controlled coalition in Parliament promptly repealed the restrictive 1980 legislation and reinstated ordre
public as the sole ground for expulsion. In addition, the 1981 amendments required that, before expulsion could occur, the violation of ordre public must be "grave" and that the person facing expulsion must have served a prison term of at least one year for a criminal offense.

By 1986 political power had shifted to the right. During the 1986 campaign for seats in the National Assembly, the victorious coalition of center-right parties (RPR and UDF) blamed the socialists for lax enforcement of the immigration law. The extreme right, Jean Marie Le Pen's National Front, asserted that immigration threatened national security and campaigned for measures to safeguard French culture and French workers from aliens. In elections that year, the socialists lost their majority in the National Assembly to a coalition of center-right parties. The new conservative government promptly obtained legislative approval to amend the immigration law, reinstating the broader 1980 grounds for expulsion and imposing stricter requirements for obtaining long-term resident status.

The socialist deputies, however, sought review of the new amendments by the Conseil Constitutionnel. They challenged both the constitutionality of the new grounds for administrative expulsion, and the withdrawal from family members of certain protections from expulsion afforded under the prior 1981 law. The Conseil Constitutionnel rejected the challenges to the 1986 amendments, holding that under the conditions specified by the amendments, the legislature could constitutionally authorize the executive branch to expel foreigners, including family members, who were living irregularly in France.

236. Id. art. 25(7). Article 26 makes an exception to the usual requirements for extraordinary situations, allowing expulsion when there is an "imperious necessity for the surety of the state or public security." Id. art. 26.
237. Le RPR et L'UDF sont en mesure de former le gouvernement: 44.89% des voix et 288 députés pour la droite, 31.48% et 215 pour le PS, Le Monde, March 18, 1986, at 1.
240. The RPR (Rassemblement pour la Republique) and the UDF (Union pour la Democratie Francaise) garnered nearly half of the seats in the National Assembly in the March, 1986 elections.
242. Id.; see also Les textes 'securitaires' ont été adoucis par le Senat, Le Monde, Aug. 9, 1986, at 5, col. 1.
244. Id.
245. Id. Two relatively minor provisions, one involving the treaty power and another involving the extension of the time for administrative detention during the process of deportation, were declared invalid. Id.
C. Family Unification

1. 1945: The Principle Established

Family unification was not a pressing issue in France prior to the Ordonnance of 1945. Family unification became a part of French policy when, under the Ordonnance of 1945, circulars of the Ministry of Public Health and Population established categories of family members entitled to join workers in France:

1. wives
2. sons under 18 years of age
3. daughters under 21 years of age
4. ascendants over 50 years of age
5. collaterals or in-laws, if over 50 years of age or under 18 for males or under 21 for females.

The Minister also retained discretion to waive conditions of age and relationship.

The early circulars established one condition to family unification—adequate lodging. Before a resident worker could request entry for family members, he needed to have accommodations suitable for their needs. The Office National d'Immigration would then help the family move and would reimburse the travel and adjustment costs. The worker who wanted to enter with his family needed to have adequate

---

246. French law did, however, address the problem of fraudulent marriages. The French Civil Code provided that a woman marrying a French citizen automatically obtained French citizenship, reportedly even in cases where the sole purpose of the marriage was to circumvent an order of expulsion. See A. Martini, L'Expulsion des Étrangers: Études de Droit Comparé 200-01 (1909). The prevalence of marriages designed to avoid immigration restrictions prompted the government in 1938 to amend the automatic citizenship provision for foreign wives to allow the government to challenge the marriage's validity. See Herchenroder, The Alien Regulations in France, 21 Comp. Legis. & Int'l L. 220, 227 (1939). A decret-loi of Nov. 12, 1938, provided that foreigners must be authorized to reside for more than one year in France in order to marry there. It also provided that an alien woman marrying a French man could not automatically become a French citizen but must specifically apply in writing. Though naturalization was possible six months after the marriage, the application could be disapproved during that interval. Id. Until 1973, a foreign woman marrying a French citizen could thereby obtain access to French citizenship. 1981-1986 Une Nouvelle Politique, supra note 19, at 34. The 1973 Amendments equalized the sexes, allowing all spouses to obtain French citizenship by declaration. After such a declaration for citizenship, the government now has one year in which to challenge the validity of the marriage. Law No. 73-42 of Jan. 9, 1973, 1973 J.O. 467; see also Ministère de la Justice, La Nationalité Française 25-26 (1984). In 1981, the government repealed article 13 of the Ordonnance of Nov. 2, 1945, which had required that all foreigners residing in France seek the permission of the administration prior to marriage. Law No. 81-973 of Oct. 29, 1981, art. 9, 1981 J.O. 2970, 2972.


248. A. Romeu-Ploblot, supra note 165, at 58.

249. Id. at 60.

250. Id.

251. Id. at 59.
advance lodging. Nevertheless, family members often joined a resident worker as tourists or clandestines and then regularized their status once settled in the country.

2. 1974: Restrictions on Family Unification Rights

The Giscard administration issued a series of circulars in 1974 continuing the ban on entry of foreign workers and, in addition, barring the entry of family members of legal residents. The administration, however, later lifted the prohibition on family unification. In 1976, the administration even issued a decree recognizing a right to family unification.

The abrupt change of position by the Giscard regime was doubly motivated. First, it was materially impossible (because of insufficient police forces) to prevent family members from entering. They could not be stopped from entering as tourists, and once they had joined their families, forcing separation violated the most elementary principles of humanity. Second, allowing family members to join the worker could stabilize the worker's personal life and thereby ease the social integration process. Indeed, former Secretary of State for Foreign Workers Paul Dijoud suggested that the government should allow family members to determine when they wanted to join the worker, limiting its role to providing assistance and support to arriving family members. The early Giscard regime thus relaxed barriers to entry but encouraged foreigners to return to their countries of origin by offering significant lump sum payments—aide au retour.

3. Policy Swings of the Mid-1970s

Under Dijoud's leadership, the administration issued a decree on April 29, 1976, which provides the current framework for regulating the entry of family members. For the first time the decree made the rules official,
public, and free from arbitrary amendment without notice by adminis-
trative officials. Most significantly, the decret established a right to
family unification if specified conditions were met. The state could
exclude or deport eligible relatives of a foreigner only for one of the
following reasons:

1. The foreigner seeking family unification has not resided in France in
a regular situation for at least one year;
2. He lacks sufficient resources to support the arriving family members;
3. The conditions of lodging which he proposes for the family are
inadequate;
4. The results of medical examinations of the family members seeking
entry indicate a danger to public health, order or security;
5. Presence of the family members in France could conflict with consid-
erations related to ordre public;
6. The motive for seeking entry is other than for family unification.

Although the decret recognized only spouses and minor children as eli-
gible relatives, the Office National d’Immigration had discretion to allow
other family members to enter. Family members already present in
France were entitled to legalization of their status if the above condi-
tions had been met at the time of the request.

This humanistic policy was short-lived. Secretary Stoleru replaced
Dijoud in 1977. Confronted with increasing economic difficulties
and political pressures, Stoleru sought new means to limit immigration,
including family immigration. In June, 1977, therefore, Secretary
Stoleru reinitiated a strategy aimed at discouraging the entry of foreign
workers. A November 10, 1977 decret added a new “no work” condi-
tion to the six conditions contained in the 1976 decret. The effect of
this decret was essentially symbolic. In reality, entering family members
affect French employment only marginally, if at all. Total family
immigration to France in the late 1970s represented only about 50,000
persons per year, one fifth of whom might be expected to seek employ-
ment. Furthermore, the decret did not apply to families of residents

---

264. Id.
265. Id. art. 1.
266. Id. art. 2.
267. See Circular No. 81-50 of July 10, 1981, 1981 J.O. 8716, clarifying that the
head of a family could demand legalization of status of the spouse and children who
had entered and joined him or her in France. Thus, adjustment of status could be
accomplished in France.
269. Id.; G.I.S.T.I., supra note 199, at 3-4.
270. Decret No. 77-1239, 1977 J.O. 5397 (suspending temporarily provisions of
decret No. 76-383 of Apr. 29, 1976).
271. It is somewhat ironic that such an important decision as GISTI (see infra notes
274-76, and accompanying text), was taken in regard to a decret which had largely
symbolic value. The decret was actually a formal declaration of the government’s
policy to discourage foreign workers from settling and encouraging their return to
their country of origin.
272. Dondoux, Le Droit a Une Vie Familiale Normale, No. 1 DROIT SOCIAL 57 (1979)
(conclusion of Commissaire du Gouvernement Philippe Dondoux).
of the EEC, Algeria, or other nations with which France maintained a bilateral accord on the issue. The 1977 decree's main effect was production of a counterreaction. It led to litigation, resulting in a decision by the Conseil d'État significantly protecting family unification rights in France.

4. The GISTI Decision: Judicial Establishment of a Right to Family Unity

The Conseil d'État's review of the 1977 decree's "no-work" condition resulted in a landmark decision, Groupe d'Information et de Soutien des Travailleurs Immigres et Autres (GISTI). In GISTI, the Conseil d'État held that the right to live a normal family life was a general principle of constitutional law applicable not only to citizens, but also to foreigners regularly residing in France. In the succinct fashion of French court decisions, the reasoning in GISTI proceeded as follows:

1. "General principles of law, especially those of the Preamble of the 1946 Constitution, provide foreigners residing in France, as well as citizens, the right to lead a normal family life."
2. "The right to a normal family life includes, in particular, the option of a foreigner to be joined by a spouse and minor children."
3. "Although the government may define the conditions for exercising the right to be joined by the spouse and children in reconciling this principle with the necessities of ordre public and the social protection of foreigners and their families, it may not forbid by a general measure the employment of family members of foreign residents."
4. "Thus, the challenged decree is illegal and must be annulled."

The GISTI decision's recognition of a right to a normal family life raises three questions. First, if instead of an executive decree, Parliament enacted the same measure into law, would it survive constitutional review? A different court would review a parliamentary measure; while the Conseil d'État reviews decrees, the Conseil Constitutionnel resolves the constitutionality of a parliamentary enactment. The GISTI decision would therefore not control the Conseil Constitutionnel's determination. One can speculate, however, that even with the heightened

273. Id.
275. M. Long, supra note 4, at 588.
276. Id. at 587-88 (translation by author).
277. The Conseil d'État is restricted to determination of the constitutionality of texts issued at the administrative level. See G. Vedel, supra note 171, at 379.
278. Id. at 88. Although the Conseil d'État and the Conseil Constitutionnel may take contradictory positions on the same issue, at times the Conseil Constitutionnel may closely follow the lead of the Conseil d'État. Id. at 296. In some domains the legislature possesses greater authority to balance competing governmental concerns than does the executive. See Constitution of 1958, arts. 21, 34, 37, reprinted in French Law, infra note 490, at 2-14, 2-17 to 2-19 (establishing separate domains of legislative and executive control). For an example of the Conseil Constitutionnel tracking the Conseil d'État, see Decision of July 25, 1979, Con. const., 1980 Dalloz-Sirey, jurisprudence [D.S. Jur.] 201 (1979), in which the Conseil Constitutionnel recognized a right to strike in language tracking nearly word for word the Conseil d'État's decision in Dehaene, Conseil d'État, 1950 Lebon 426.
legitimacy of clear legislative intent, the Conseil Constitutionnel would apply reasoning similar to that in GISTI. The Conseil Constitutionnel recently held, in a decision concerning the 1986 immigration law, that the "family" provision in the 1946 preamble to the Constitution has constitutional value.\textsuperscript{279}

Second, which relatives are covered by the right to a normal family life? In GISTI, the Conseil d'Etat mentioned only the right to be united with the spouse and minor children.\textsuperscript{280} It is unclear whether this right extends to other relatives who have established close family ties.

Third, what restrictions may be imposed on the right to family unification? The Conseil d'Etat in GISTI held that the government may restrict the right to family unification to protect either ordre public or the welfare of foreigners and their families.\textsuperscript{281} The Conseil d'Etat has already upheld one such restriction, a 1984 decret requiring that applications for family unification be approved while family members are still in the country of origin.\textsuperscript{282}

5. Family Unification After GISTI: Shifting Policies

The Mitterrand regime premised its immigration policy upon the belief that improvement of the foreign resident's sense of security would lead to a stable and integrated foreign population.\textsuperscript{283} To implement its immigration policy, the government amended the 1945 Ordonnance in 1981, 1984 and 1986.\textsuperscript{284}

The 1981 amendments completely exempted the following categories of foreigners in France from the threat of expulsion:

1. Minors under 18 years of age;
2. Habitual residents of France since the age of 10;
3. Habitual residents of France for over 15 years;
4. Spouses married to a French citizen for over 6 months;
5. Parents of a French child who resides in France;
6. Certain injured workers.\textsuperscript{285}

Notably, these protections are afforded to relatives of French citizens—spouses, parents, and children—in greater measure than to resident foreigners.

In 1984 the Mitterrand administration took two major steps, both expanding and restricting the right to family unity: although it provided new protection for foreigners wanting to renew resident permits, it ended the practice of regularizing the situation of family members who

\textsuperscript{279} Decision of Sept. 3, 1986, Con. const., No. 86-216 (available on LEXIS, French Public library, Consti file) (discussed infra, at notes 570-73 and accompanying text).
\textsuperscript{280} Id.
\textsuperscript{281} Id.
\textsuperscript{282} Groupe d'Information et de Soutien des Travailleurs Immigres, Conseil d'Etat, Sept. 26, 1986 (LEXIS, French Public library, Conset file).
\textsuperscript{283} See Le Regroupement Familial, Le Monde, Oct. 11, 1984, at 12.
\textsuperscript{284} See infra notes 286, 297-302.
entered without authorization. The end to regularizing the status of unauthorized family entrants came in a December 4, 1984 decree. As implemented by a Circular of January 4, 1985, family members will no longer be able to enter as "false tourists" and obtain long-term visas after establishing themselves in France. The determination that the foreign worker has sufficient resources, medical certification, and arrangements for lodging must now occur before the relatives leave the country of origin. This requirement is a significant barrier to family unification. In the past, a family could live in small quarters until the income of the additional family members enabled them to afford more comfortable accommodations. Now workers with a single income face a scarcity of adequate housing units. When coupled with existing discrimination against foreigners, it will now be more difficult for the worker to obtain advance approval for family unification.

Many criticized this new restriction upon family unification as a repudiation of the promise by leftist politicians to accord immigrants the same respect and dignity accorded French citizens. In the 1985 circular implementing the decree, however, the government declared that it intended to continue to guarantee the exercise of the right to family unification under conditions which permit orderly insertion. The Conseil d'Etat also held that this restriction did not violate the right to a normal family life, noting that the restriction helped maintain the ordre public and protected entering family members.

6. Legislative Protection for Family Unification

New protections for family members also came from the 1984 Amendments to the 1945 Ordonnance. Before 1984, all foreigners remaining in France for more than three months needed to obtain a resident permit [carte de sejour], normally renewable after one year. The local prefet had discretion to renew the permit. In the 1970s, during the campaign to reduce the number of foreign workers, the local prefet often refused renewal.

The 1984 amendments conferred the equivalent of permanent resident status at time of entry to several categories of relatives of French

---


293. Law No. 84-622 of July 17, 1984, 1984 J.O. 2924.

294. D. Lochak, supra note 191, at 166-68.

295. Id.

296. Id.
citizens and residents. Protected relatives included:

1. Alien spouses of French citizens residing in France;
2. Alien minor children (under 21) of French citizens in France;
3. Alien parents of French children in France;
4. Alien spouses and minor children (under 18) of resident aliens with a carte de resident.298

Because these relatives no longer needed to renew their resident cards [cartes de sejours] after entry, their position in France was significantly more secure than previously.

The 1986 amendments to the immigration law indicate some retrenchment from the 1984 protections.299 Although the amendments retain the 1984 provisions exempting certain close family members from expulsion, as well as the provisions expediting access to permanent resident status,300 they require that such exempt relatives meet certain new conditions, thereby reducing the number of relatives exempt from expulsion.301 This retrenchment is only partial, however. The post-1986 law still provides more protection for family unity than the pre-1981 law.302

D. Features Common to Both United States and French Family Unification Law

Though French family unification policy developed more recently and under different circumstances than U.S. policy, the broad contours of the two systems are similar. Current immigration to both countries is primarily family immigration.303 Both systems also share several basic principles. These include:

300. Id. art. 2.
301. See id. art. 2 (amending article 15 of the 1945 Ordonnance), and art. 9 (amending article 25 of the 1945 Ordonnance). The new conditions are as follows:
   1. A foreigner married for at least one year to a French citizen on condition that the relationship between the two spouses remains viable;
   2. The foreign father or mother of a French child residing in France on condition that he or she exercises at least partial parental responsibility for the child or that he or she has provided adequately for the support of the child;
   3. A foreign child under the age of eighteen years except if the persons who provide for the child are themselves the object of a measure of expulsion and there is no other person residing in France who is able to care for the child.
Id. art. 9 (emphasis added) (translation by author).
302. For a discussion of the pre-1981 law, see supra notes 246-73 and accompanying text.
303. 1981-1986 UNE NOUVELLE POLITIQUE, supra note 19, at 21, 46. Each year, over 100,000 spouses and children of U.S. citizens enter the United States; 216,000, or 80% of the total allocated preference visas are reserved for family members. See supra notes 115-24 and accompanying text. France has admitted nearly 500,000 family members over the last ten years.
a) Distinctions between citizens and permanent resident aliens in treatment of their relatives, with particularly favorable provisions for the spouse and minor children of citizens.
b) For resident aliens, limitation of family unification to the spouse and unmarried children.
c) Exemption from the normal regime of exclusion and expulsion for immediate relatives.
d) Conditions on entry limiting the flow of family immigration.

United States law exempts the spouse and minor children of citizens from the quota system.\textsuperscript{304} Also, the preference categories allow entry of more distant relatives of citizens.\textsuperscript{305} France accords relatives of citizens special status at the time of entry, and such relatives are essentially secure from the threat of expulsion.\textsuperscript{306}

Under both U.S. and French law, permanent resident aliens have a family unification preference only for the spouse and children.\textsuperscript{307} The United States, despite according these relatives preference, restricts their entry through numerical ceilings and qualitative limits.\textsuperscript{308} France is more liberal and has no numerical limits.\textsuperscript{309} Both countries, however, require the resident alien to demonstrate his ability to support the entering relative.\textsuperscript{310}

A close relative facing exclusion or expulsion may find relief in both the U.S. and French regimes. In the United States the Board of Immigration Appeals, under the authority of the Attorney General, exercises discretion to exempt the closest relatives of both citizens and permanent resident aliens.\textsuperscript{311} France is again somewhat more liberal. The French government specifically exempts from expulsion the closest relatives of citizens and aliens who have resided in France for over three years.\textsuperscript{312}

The U.S. quotas and the French lodging requirement both have an arbitrary impact on the opportunity for family unification. The U.S. quota system may delay for years the entry of immigrants from countries of high immigration demand.\textsuperscript{313} In France, the immigrant's economic

\textsuperscript{304} See supra note 115 and accompanying text.
\textsuperscript{305} See supra note 167 and accompanying text.
\textsuperscript{306} See supra notes 299-302 and accompanying text. In France, relatives of citizens are afforded the more favorable protections of the provisions of the European Economic Community law which, for example, provide a broader definition of relatives entitled to family unification than does the French law. Under the rules of the EEC, the spouse, dependent children under 21 years of age, and ascendants who are dependent or under the care of the receiving family, are entitled to enter along with those who were dependent or who lived in the same household in the country of origin. See infra notes 540-44 and accompanying text.
\textsuperscript{307} See supra notes 115-29, 298 and accompanying text.
\textsuperscript{308} See supra notes 115-29 and accompanying text.
\textsuperscript{309} See supra note 167 and accompanying text.
\textsuperscript{310} See supra note 270.
\textsuperscript{311} See 8 U.S.C. § 1154(a) (1982) (providing that a citizen or an alien lawfully admitted as a permanent resident may petition the Attorney General for admission of relatives under exempt or preference status).
\textsuperscript{312} See generally supra notes 297-302 and accompanying text.
\textsuperscript{313} See supra notes 125-31 and accompanying text.
situation determines whether he will be able to provide adequate housing in advance, and thus, whether his relatives will be admitted.314

Overall, however, the French system provides greater protection of family unification in three respects. Two of these emerge from the above discussion: the lack of quota restrictions, and the greater protection from expulsion in France. The third aspect, judicial enforcement of constitutional protections of family unification, will be explored in Part VI.

V. Protection of the Family under the United States Constitution

Two conflicting tendencies meet when courts analyze the constitutional limits of family unification in the immigration context. On the one hand, although the Constitution never mentions "the family", the Supreme Court has over the years afforded the family unit considerable constitutional protection. On the other hand, the Court normally exhibits extreme deference to legislative and executive regulation of immigration.

This part first identifies the grounds for claiming a constitutional right to family unification, and the circle of family members to whom such constitutional protection would extend. It then examines the traditionally deferential approach of the federal courts in their review of immigration law. Finally, it considers the judicial response to the assertion of a constitutional right to family unification in immigration cases.

A. The Sources of Constitutional Protection of Family Rights

In a long line of decisions, the Supreme Court has recognized a right to privacy.315 A number of these decisions relate to privacy regarding the family: the right to marry (Loving v. Virginia);316 procreation (Skinner v. Oklahoma);317 contraception (Eisenstadt v. Baird318 and Griswold v. Connecticut);319 abortion (Roe v. Wade);320 and child rearing and education (Pierce v. Society of Sisters321 and Meyer v. Nebraska).322 In these cases, the Court, or individual justices, have identified various sources for the right to privacy, including the penumbras of the Bill of Rights,323 the ninth amendment,324 the liberty clause of the fourteenth amendment,325 and

314. See supra notes 249-53 and accompanying text.
315. For general discussions of the cases involving a right to privacy, see Fried, Privacy, 77 YALE L.J. 475 (1968); Gevety, Redefining Privacy, 12 HARV. C.R.-C.L. L. REV. 233 (1977).
316. 388 U.S. 1, 12 (1967).
320. 410 U.S. 113 (1972).
322. 262 U.S. 390 (1923).
323. Griswold, 381 U.S. at 483 (Douglas, J.).
324. Id. at 486-87 (Goldberg, J., concurring).
the equal protection clause. Despite this variance, the Court has asserted that these decisions "make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty', are included in this guarantee of personal privacy." These family privacy cases can be organized under three categories: (1) those involving parental authority over the raising and educating of children; (2) those involving freedom of choice in marriage and procreation; and (3) those relating to the integrity of the family unit.

1. The Scope of Parental Authority

The Court recognized parents' right to control the upbringing of their children as against the state in Meyer v. Nebraska and Pierce v. Society of Sisters. In both cases the Court grounded this right in the due process clause of the fourteenth amendment. Meyer concerned a statute prohibiting the teaching of foreign languages in school before the eighth grade. In striking down the law, the Court acknowledged that, although a state has broad discretion in regulating its citizens, it must respect certain fundamental rights. These rights included:

- the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Pierce struck down a state law requiring attendance at public rather than parochial schools. Relying on Meyer, the Court determined that there were "no peculiar circumstances or present emergencies" justifying the state's interference with the parents' right to direct the upbringing and

---

325. Meyer, 262 U.S. at 399.
328. See infra notes 332-42 and accompanying text.
329. See infra notes 343-54 and accompanying text.
330. See infra notes 355-78 and accompanying text.
331. 262 U.S. 390 (1923).
332. 268 U.S. 510 (1925).
333. Pierce, 268 U.S. at 535; Meyer, 262 U.S. at 399.
335. Id. at 399.
336. Id. (emphasis added). The Court concluded that the statute as applied was arbitrary and unreasonable, "[n]o emergency having arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition." Id. at 403.
337. Pierce, 268 U.S. at 530. The Court reasoned that the state law unreasonably interfered with the parents' liberty interest, noting that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Id. at 535.
education of their children.\textsuperscript{338}

Although the Court has never defined the scope of this parental right, subsequent cases indicate the right is not absolute. In \textit{Prince v. Massachusetts},\textsuperscript{339} for example, the Court upheld the conviction of a guardian who violated the state's child labor law by allowing her minor ward to assist her in selling religious literature.\textsuperscript{340} Although the Court affirmed the holdings of \textit{Meyer} and \textit{Pierce},\textsuperscript{341} it determined that the state's "wide range of power for limiting parental freedom and authority in things affecting the child's welfare" justified the limited regulation of the family and of matters of conscience and religious conviction.\textsuperscript{342} Consequently, the Court has recognized both a right of parental authority and the right of the state to regulate matters affecting the child's welfare. Just how the Court would balance these competing interests in specific situations is as yet unclear.

2. \textit{Freedom of Choice With Respect to Marriage and Procreation}

The decisions involving the freedom to marry are also grounded in the fourteenth amendment's protection of liberty. In determining that miscegenation statutes violate the fourteenth amendment's equal protection and due process clauses, the Court has referred to the freedom to marry as "one of the vital personal rights essential to the orderly pursuit of happiness by free men" and "one of the 'basic civil rights of man', fundamental to our very existence and survival."\textsuperscript{343}

\textsuperscript{338} \textit{Id.} at 534.
\textsuperscript{339} 321 U.S. 158 (1944).
\textsuperscript{340} \textit{Id.} at 161-63.
\textsuperscript{341} The Court noted that:

\begin{quote}
It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.
\end{quote}

\textit{Id.} at 166; \textit{see also} Ginsburg v. New York, 390 U.S. 629 (1968), in which the Court referred to the right of parents to assume the primary role in decisions concerning the rearing of their children as "basic in the structure of our society." \textit{Id.} at 639; \textit{see} Wisconsin v. Yoder, 406 U.S. 205 (1972), in which the Court struck down a state law, challenged by Amish parents, that required school attendance of their children after the eighth grade, noting that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." \textit{Id.} at 232. Though the decision was based primarily on the first amendment free exercise clause, the Court relied partly on the constitutional right of parents to assume the primary role in decision-making concerning their children.

\textsuperscript{342} \textit{Prince}, 321 U.S. at 167. The child believed "it was her religious duty to perform this work and failure would bring condemnation 'to everlasting destruction at Armageddon.'" \textit{Id.} at 165. The Court rejected claims that the state law impermissibly infringed upon freedom of religion under the first amendment or upon parental rights under the fourteenth amendment.

\textsuperscript{343} \textit{Loving v. Virginia}, 388 U.S. 1, 12 (1967). Though neither marriage nor the family are specifically mentioned in the Constitution, the Supreme Court, as early as 1888, referred to marriage as "the most important relation in life. . . ." \textit{Maynard v.}
The Court has struck down other marital restrictions, including one banning marriage for persons who fail to pay child support. Nevertheless, the Court has upheld a statute with a less direct impact on the decision to marry, finding that restricting eligibility for dependent child benefits upon remarriage does not violate the Constitution.

Griswold v. Connecticut, the landmark procreative case, recognized procreative freedom not as a personal right, but as part of the "privacy surrounding the marriage relationship" and the "right of marital privacy." Identifying the Constitutional source of this privacy right has been the source of disagreement. Justice Douglas, after characterizing Meyer and Pierce as First Amendment cases, found that "the First Amendment has a penumbra where privacy is protected from governmental intrusion." Justice Goldberg, writing for three members of the Court, located the right in both the fourteen amendment's concept of liberty, which protects fundamental rights, and in the ninth amendment. Justice Harlan, concurring, emphasized more exclusively the Fourteenth Amendment protection of "basic values 'implicit in the concept of ordered liberty' that are protected from state interference by heightened judicial scrutiny." By the time of Roe v. Wade, the Court had adopted Harlan's approach in matters involving procreation and had expanded the procreative privacy rights to include individual privacy rights, as well as marital and family privacy.

3. The Family Integrity Decisions

A series of decisions beginning in the early 1970's afforded procedural due process protection to the integrity of the family unit. These decisions can be characterized as finding "a constitutionally protected right

---

Hill, 125 U.S. 190, 205 (1888). The Court also referred to marriage as "the foundation of the family and of society, without which there would be neither civilization nor progress." Id. at 211.

344. See Zablocki v. Redhail, 434 U.S. 374, 387 (1978), in which the Court subjected a regulation which "directly and substantially interfered with the right to marry" to rigorous scrutiny. The regulation at issue did not merely establish a classification based on marital status but directly affected the right to marry by prohibiting marriage in the event of failure to fulfill support obligations of minor children.

345. See Califano v. Jobst, 434 U.S. 47 (1977) in which the Court upheld the constitutionality of a statute calling for termination of disabled dependent child benefits upon marriage as only indirectly affecting the right to marry. The classification was upheld as a rational means of determining who was in need of benefits.

346. 381 U.S. 479 (1965).


348. Griswold, 381 U.S. at 482.

349. Id. at 483.

350. Id. at 486-87.

351. Id. at 500 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).


353. Id. at 152.

354. Id. at 154. Procreative rights were first recognized as personal privacy rights in Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1971).

355. See infra notes 356-78 and accompanying text.
to family association."

Stanley v. Illinois, for instance, held that the due process clause protects an unwed father's right to retain custody of his illegitimate children. An Illinois statute made illegitimate children wards of the state upon their mother's death. The Court struck down the statute because it failed to provide unwed fathers an opportunity to prove their competence as parents. The language the Court used in reaching this decision plainly recognized the importance of the right to family association: "the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' "

The Court also held that even a provisionally dissolved family unit (i.e., a family separated when the state temporarily removes a child from his home pending a final judicial determination that the child is permanently neglected), retains its vital interest in the continuation of the family relationship. Therefore, the state must prove that the child suffers from permanent neglect by "clear and convincing evidence" before the state may, in effect, permanently dissolve the family. Again, the Court used strong language in finding a fundamental fourteenth amendment liberty interest meriting due process protection:

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing irretrievable destruction of their family life.

In 1976, in Moore v. City of East Cleveland, the Supreme Court issued its strongest decision yet regarding the constitutional protection of family rights. The Court invalidated a zoning regulation that interfered with the integrity of an established family unit. The city of East Cleveland had applied a zoning provision, which restricted occupancy of single family dwellings to the immediate nuclear family, to prohibit a grandmother from living with her two grandsons. Since the city zon-
ing ordinance did not force a dissolution of the family unit, the Court could have characterized the burden on the family as indirect. As Justice White argued in his dissent, the family could have remained together by moving to a location where the zoning law would permit their living arrangement.\textsuperscript{366} Similar reasoning had been used in response to arguments presented in immigration cases that deportation of a family member would destroy the family unit.\textsuperscript{367} The Court's plurality opinion, however, took a different approach, emphasizing the substantive liberties protected by the due process clause,\textsuperscript{368} and noting that, "[a]ppropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.' "\textsuperscript{369} In concluding that the sanctity of the family was in fact one of these values, the plurality opinion noted that the family institution was "deeply rooted in this Nation's history and tradition."\textsuperscript{370} Because of the regulation's impact on the family, the Court applied heightened judicial scrutiny, examining both "the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."\textsuperscript{371} East Cleveland's ordinance could not withstand this scrutiny.

Since \textit{East Cleveland}, a new kind of action has arisen with regard to the right to association with family members. These are section 1983 actions\textsuperscript{372} seeking redress for deprivations resulting from state interference with family relationships.\textsuperscript{373} \textit{Myres v. Rask,}\textsuperscript{374} for example, dealt with parents who sued police officers under the civil rights statute for violation of the constitutional right to family association because of their eighteen-year-old son's wrongful death at the hands of the police. The defendants argued that the parents could not assert civil rights claims

criminally prosecuted, assessed a fine, and sentenced to a term of imprisonment. \textit{Id.} at 496-97.

367. \textit{See infra} notes 422-23 and accompanying text.
370. \textit{Id.} at 504.
371. \textit{Id.} at 499.
373. \textit{See generally} \textit{Note, Section 1983 Actions by Family Members Based on Deprivation of the Constitutional Right to “Family Association” Resulting from Wrongful Death: Who has Standing?}, 14 \textit{FORDHAM URBAN} L.J. 441 (1985-86). Most courts considering this issue have relied upon cases such as \textit{East Cleveland} in recognizing a constitutional right to association of close family members. \textit{See, e.g.}, Bell v. City of Milwaukee, 746 F.2d 1205, 1245 (7th Cir. 1984), (holding that parents have a constitutionally-protected liberty interest in their relationship with their children for purposes of a § 1983 claim for damages for wrongful death).
374. 602 F. Supp. 210 (D. Colo. 1985); \textit{see also} Kelson v. City of Springfield, 767 F.2d 651 (9th Cir. 1985), which quotes the \textit{Myres} language. In \textit{Kelson}, the court also recognized that parents possess a constitutionally-protected liberty interest in the companionship and society of their children.
based on the death of their son. The court disagreed, holding that:

It would be ironic indeed to recognize, on the one hand, the constitutional rights to marry [Loving v. Virginia], to procreate [Skinner v. Oklahoma], to supervise the upbringing of children [Pierce v. Society of Sisters, Prince v. Mass], to retain custody of one's illegitimate children [Stanley v. Illinois], and to live in the same residence with one's "family" [Moore v. City of East Cleveland], but on the other hand, to deny parents constitutional protection for the continued life of their child. State action that wrongfully kills one's child certainly interferes with fruition and fulfillment of the fundamental right to procreate. A parent cannot benefit from his constitutionally protected rights to supervise the upbringing, retain custody, or live in the same residence with a child if state action unlawfully takes the child's life. To constitutionally protect families from lesser intrusions into family life, yet allow the state to destroy the family relationship altogether, would drastically distort the concept of ordered liberty protected by the Due Process Clause.

A few cases have gone further, holding that actionable state action resulted from the mere separation of relatives. In Morrison v. Jones, for example, the Ninth Circuit recognized that constitutional protection of "substantive familial rights" in the parent-child relationship gives rise to a section 1983 action for damages by a parent against county officials who transported her mentally-ill alien son to Germany after determining that she was incapable of providing the care that he required.

B. Defining "Family" for Purposes of Constitutional Protection of Family Unification

The decisions in East Cleveland and the recent section 1983 cases indicate that a constitutional right to integrity of the family unit or to association of family members may extend beyond the bounds of the nuclear family. Although the Supreme Court has never defined those family relationships to which the Constitution affords protection, an analysis of the Court's decisions does allow one to map some of the parameters.

The Supreme Court's decisions extending substantive due process protection to family relationships emphasize traditional concepts of the "family", defined essentially as persons bound together by marriage and kinship ties. Besides the nuclear family, this concept has included an

376. Id. at 213.
377. 607 F.2d 1269 (9th Cir. 1979), cert. denied, 445 U.S. 962 (1980).
378. Id. at 1273-74; see also Drollinger v. Milligan, 552 F.2d 1220, 1226-27 (7th Cir. 1977) (deprivation of grandfather's relationship with his grandchild actionable under § 1983); Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) (recognizing "the right of the family to remain together without the coercive interference of the awesome power of the state").
379. See supra notes 364-71 and accompanying text.
380. See supra notes 372-78 and accompanying text.
381. See, e.g., Trujillo v. Board of County Comm'rs, 768 F.2d 1186 (10th Cir. 1985), recognizing a constitutionally-protected liberty interest in sibling relationship for purposes of § 1983 actions.
extended family member who is a de facto parent or a dependent in the household. 382

The decisions indicate, however, that some “family” relationships are outside the zone of protection. These include homosexual partners, polygamous marriages, and households of individuals unrelated by blood or marriage. 383 The treatment of ascendants or collaterals, 384 as well as unmarried couples and their children, present more difficult problems.

1. Traditional Concepts of Family—The Necessity of Formal Marriage or Kinship Ties

In Moore v. City of East Cleveland, 385 the Court provided its most expansive discussion of the family concept. There, the Court examined the reasons why the fourteenth amendment’s due process clause protects certain rights associated with the family. 386

Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful “respect for the teachings of history [and] solid recognition of the basic values that underlie our society.” [citations omitted]. Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.

Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. 387

This discussion defined the family in formalistic terms, i.e., through kinship ties. A more recent case, Lehr v. Robertson, 388 adopted instead a functional approach. 389 Lehr involved a natural father’s procedural due process rights to notification of adoption proceedings for his child. The Court held that, where the putative father had never established a substantial relationship with his child, the state’s failure to notify him of adoption proceedings did not deny the putative father due process or

382. See supra notes 364-71 and accompanying text.
383. See infra notes 405-17 and accompanying text.
384. Ascendants are “[p]ersons with whom one is related in the ascending line; one’s parents, grandparents, great-grandparents, etc.” BLACK’S LAW DICTIONARY 104 (5th ed. 1979). Collaterals are “[t]hose who descend from one and the same common ancestor, but not from one another.” Id. at 237. It is sometimes used to designate uncles and aunts. Id.
386. Id. at 499.
387. Id. at 503-04.
389. The Court quoted approvingly Justice Stewart’s observation that “‘Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.’” Id. at 260 (emphasis added by Court) (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979)).
equal protection.390

[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children . . . as well as from the fact of blood relationship.391

A functional approach to defining constitutionally-protected family relationships, therefore, may include de facto parent-child ties.

The functional approach is expansive in some ways and restrictive in others. On the one hand, it encompasses some ties that a formalistic kinship approach would exclude. On the other hand, it may exclude some biological parent-child relationships which lack emotional bonds.

Lehr suggests that, at least when contrasting competing rights, the Court prefers the functional approach to the formalistic.392 This does not necessarily mean that it has adopted a functional approach, however. Factoring East Cleveland into the equation suggests that, in many situations, the Court will not find it necessary to look beyond formal blood ties.

Constitutional protection of family ties other than the parent-child relationship is more problematic. The Seventh Circuit rejected a section 1983 claim by several siblings for damages for loss of society and companionship resulting from their brother's fatal shooting by the police.393 The court distinguished the parent-child from sibling relationships as follows:

[W]here the right to raise, educate and associate with one's own child may rise to constitutional dimensions, the right of siblings to have their brother or sister continue living does not. The relationship between a parent and its offspring and the relationship between brother and sibling is not a difference in degree; it is a difference in kind. Though one has a constitutional right to have or not to have a child, one does not have a constitutional right to have or not have a brother.394

390. Id. at 264-67.
391. Id. at 261 (quoting from Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 844 (1977)).
392. The functional approach, however, raises one unanswered policy question. Lehr, for example, held that the extent of constitutional protection of the parent-child relationship depends upon the degree to which the parent "accepts some measure of responsibility for the child's future." Id. at 261. Arguably, only parents who actually assume the responsibilities of parenthood should benefit from the constitutional protection of family unification. The problem remains as to whether the parent-child relationship thus loses constitutional significance as the child matures, and, if so, where to draw the line. If the child-rearing function is what distinguishes the parent-child relationship from all others, the dependent status of the child should establish constitutional protection. Thus, the line would be drawn at the age of majority.
393. Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984). But see Trujillo v. Board of County Comm'rs, 768 F.2d 1186 (10th Cir. 1985) (recognizing constitutionally protected interest of sister in her brother who died while incarcerated in county jail).
394. Bell, 746 F.2d at 1247-48 (quoting Sanchez v. Marquez, 457 F. Supp. 359, 362 (D. Colo. 1978)).
The court noted that constitutional protection of family ties other than the parent-child relationship would preclude any "principled way of limiting" the range of family relationships protected by the Constitution. 395

2. Functionally Defining the Family: Impact on Exclusion and Deportation

The functional test, though perhaps most consistent with the reasons for affording constitutional protection to family relationships, presents several difficulties in the immigration context. Judging the quality of the parent-child relationship is necessarily so subjective that even-handed administration of the immigration laws would be a problem. 396 As a result, such a test could add significant administrative burdens to the INS workload.

In exclusion cases, the immigration laws themselves may bar development of the functional parent-child bond. In exclusion situations, therefore, if a parent has not lost custody of his or her child, the biological relationship should be preferred over a functional analysis in establishing constitutional protection. This approach will promote the development of the emotional attachment that derives only from the intimacy of living together as a family unit. 397

When the issue concerns deportation of a family member, however, the constitutional significance of the relationship may depend upon whether or not close family ties exist. The current immigration law takes such an approach by requiring a showing of "extreme hardship" to family members who would be left behind before granting relief from a deportation order. 398 In determining whether "extreme hardship" exists for purposes of suspending deportation, some recent decisions have used a functional approach. 399 These decisions suggest that kinship is not necessary so long as a functional family relationship exists.

395. Id. at 1247.
396. Such a problem has been recognized in regard to the marital relationship. See Bark v. INS, 511 F.2d 1200, 1201 (9th Cir. 1975), cautioning that any attempt to regulate . . . [married persons'] life styles, such as prescribing the amount of time they must spend together, or designating the manner in which either partner elects to spend his or her time, in the guise of specifying the requirements of a bona fide marriage would raise serious constitutional questions.

Id. at 1201.
397. Under current law, once a petition for immediate relative status is filed, it must be approved provided the Attorney General determines "that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is an immediate relative specified in section 201(b)." 8 U.S.C. § 1154(b)(1982).
398. Id. § 1254(a). The exclusion context lacks the same opportunities for developing the parent-child relationship. In Fiallo v. Bell, 430 U.S. 787, 799 (1977), however, the Court suggested that the natural father's failure to legitimize his child could indicate an absence of close family ties. The Immigration Reform and Control Act of 1986 grants immigration benefits to father-natural child relationships when there has been "a bona fide parent-child relationship." See supra text accompanying notes 110-12.
399. See supra notes 388-92 and accompanying text.
The First Circuit, for example, recently concluded that a servant who had lived with a family and who "had been treated as and considered herself to be a member of the family for the past thirty years" clearly established a family relationship.400 A recent Supreme Court ruling, however, refused to substitute a functional approach for legislative intent.401

*East Cleveland,* and the functional decisions, indicate that the family relationships meriting constitutional protection include, in addition to the nuclear family, those in which grandparents or others fulfill an essential role in caring for and raising children. Sibling relationships, however, do not merit constitutional protection. Siblings are protected only by the parent-child bond. Future rulings will no doubt depend on specific fact situations. Certainly, the traditional family has served as a haven for close relatives who, because of old age, are unable to live independently. Ideally, persons who function as *de facto* parents in these situations should be afforded the same constitutional protections as natural parents.

The above profile of family relationships to which at least some U.S. decisions grant constitutional protection matches closely the definitions of family formulated in France and the European Economic Community. In France, the original *decret* governing family unification, enacted in 1976, allowed entry of spouses and children as a matter of right.402 Though collaterals and ascendants were excluded in principle, a 1976 circular allowed entry of (1) ascendants who were elderly and who had no other children to care for them in their country of origin, (2) a third person to care for the children in the absence or sickness of the mother, and (3) orphaned collateral relatives who would be cared for in the household.403 Similarly, European Economic Community regulations protect not only the spouse and dependent children, but also ascendants and collaterals who are under the care of the family.404

3. Relationships Excluded from the Definition of Family

The Court's functional approach to defining "family" is limited. Although it protects family relationships which "by their nature involve deep attachments and commitments to the necessarily few other individuals with whom one shares . . . a community of thoughts, experiences,

---

400. Antoine-Dorcelli v. INS, 703 F.2d 19, 20 (1st Cir. 1983); see also Zamora Garcia v. INS, 737 F.2d 488, 494 (5th Cir. 1984) (holding that the Board of Immigration Appeals must consider an alien's hardship resulting from separation from unrelated family with whom the alien had lived as housekeeper for 14 years); Contreras Buenfil v. INS, 712 F.2d 401, 403-04 (9th Cir. 1983) (advocating consideration of hardship to alien on separation from his stepson); Vergel v. INS, 536 F.2d 755, 757 (8th Cir. 1976) (noting possible hardship if nurse, upon whom a mentally retarded child was totally dependent, was deported).


402. See *supra* notes 263-67 and accompanying text.

403. Circular No. 7-76 of July 9, 1976; see GISTI, *supra* note 199, at 105.

and beliefs [and] distinctively personal aspects of one's life," the protected relationships must also be "deeply rooted in this Nation's history and tradition." Thus, neither same-sex relationships, nor polygamous marriages (even if child-rearing is involved) lie within constitutional protections. Neither do unmarried heterosexual couples forming one household, even though, in functional terms, some unmarried couples meet the "deep attachment and commitment" standard as well as or better than married couples.

The Supreme Court's recent decision in *Bowers v. Hardwick*, upholding Georgia's criminal sodomy statute, confirms that the immigration law's exclusion of homosexuals from entry does not violate their rights to family unification. In reviewing its "family" cases, the *Hardwick* Court could see "no connection between family, marriage, and procreation on the one hand and homosexual activity on the other." Thus, *Hardwick* explicitly places homosexual relationships outside the zone of constitutional protection afforded to families.

405. Roberts v. United States Jaycees, 468 U.S. 609 (1984). The Court identified protection of the family as the common thread in the line of decisions from *Meyer* and *Pierce* through *Griswold* and *Moore*. Id. at 619.
406. See supra note 387 and accompanying text.
408. See 8 U.S.C. § 1182(a)(4) (1982) (excluding aliens with a "psychopathic personality, or sexual deviation, or a mental defect" from admission into the United States). The predecessor of this section, which excluded aliens afflicted with psychopathic personality, epilepsy, or a mental defect, was interpreted to include homosexuals in *Boutilier v. INS*, 387 U.S. 118 (1967).
410. *Id.* This statement, however, does not resolve the problem of a person excluded because of homosexuality who is entering to reunify a protected family relationship, such as a minor homosexual entering to join his or her parents.
411. These relationships were also explicitly excluded by *Adams v. Howerton*, 673 F.2d 1036 (9th Cir.), cert. denied, 458 U.S. 1111 (1982). In *Howerton*, a male U.S. citizen and a male alien were married by a minister and brought suit after they were denied their petition to reclassify the alien as a U.S. citizen. The court held that a statute denying spouses of homosexual marriages the benefits provided other spouses under the immigration law was constitutional:

*Congress has determined that preferential status is not warranted for the spouses of homosexual marriages. Perhaps that is because homosexual marriages never produce offspring, because they are not recognized in most, if any, of the states, or because they violate traditional and often prevailing societal mores. In any event, having found that Congress rationally intended to deny preferential status to the spouses of such marriages, we need not further "probe and test the justifications for the legislative decision."* 


In *Lesbian/Gay Freedom Day Committee*, the district court ruled that the Immigration and Naturalization Service must obtain a Public Health Service medical certificate before excluding self-declared homosexuals from the United States on the ground of affliction with a psychopathic personality, sexual deviation, or mental defect. The district court also granted a preliminary injunction forbidding the INS from interfering with the entry of aliens solely on the ground that the aliens were, or were believed to be, homosexual. In granting the preliminary injunction, the district court held that the INS' policy of *per se* exclusion of homosexual aliens violated the first
Courts have also refused to extend the protection afforded family relationships to polygamous marriages even though they meet the associational requirements and fulfill child-rearing functions.\(^{412}\) More recently, the Tenth Circuit rejected the challenges of a police officer terminated for polygamy.\(^{413}\) In doing so, the court identified monogamous marriage as a fundamental value “inextricably woven into the fabric of our society . . . the bedrock upon which our culture is built”\(^{414}\) giving the state a compelling interest in enforcing the ban on plural marriages.\(^{415}\) The Supreme Court has not decided a case involving unmarried couples. If it adopted the Tenth Circuit's reasoning on polygamy, however, this would almost certainly preclude protecting unmarried couples separated by immigration law,\(^{416}\) despite the Court's recognition that such individuals have constitutional privacy rights.\(^{417}\)

The reasons for excluding homosexual relationships and polygamous marriage from constitutional protection reflect a culture-bound approach. In contrast, the French courts do not automatically apply the French understanding of “family.” French courts have considered the

amendment rights of American homosexuals to communicate and associate with homosexual aliens.

The Ninth Circuit affirmed that part of the district court's decision requiring the INS to obtain medical certification of psychopathic personality, sexual deviation, or mental defect before excluding a self-declared homosexual. The Ninth Circuit, however, vacated that part of the judgment declaring the \textit{per se} exclusion of homosexual aliens as contrary to congressional intent. Because the Public Health Service will not issue a medical certificate on the basis of homosexuality \textit{per se}, and because the INS cannot exclude a homosexual alien without such a certificate, “it is completely speculative that any aliens will be excluded in the future on the basis of their homosexuality \textit{per se}.” Hill, 714 F.2d at 1481.

Despite the Ninth Circuit's refusal to reach the issue, the above language suggests that any future exclusion of homosexuals \textit{per se} will not be upheld.

\(^{412}\) See Reynolds v. United States, 98 U.S. 145 (1878), upholding a Mormon's criminal conviction for polygamy, despite the defendant's religious beliefs. The Court found it “impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life [monogamy].” \textit{Id.} at 165.


\(^{414}\) \textit{Id.} at 1070.

\(^{415}\) \textit{Id.}

\(^{416}\) See Hafen, \textit{The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interest}, 81 Mich. L. Rev. 463 (1983), arguing that the Constitution's protection of family relationships does not extend to unmarried couples because the traditional importance of family to society depends upon long term commitment and a “justifiable expectation . . . that the relationship will continue indefinitely.” \textit{Id.} at 486 (quoting Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 860 (1977) (Stewart, J., concurring)). Because it is the willingness to marry which permits “important legal and personal assumptions about one's intentions” and expresses a meaningful commitment toward permanence, Hafen argues that the extension of special constitutional protections to informal families would undermine the family's ability to perform the very functions for which it is afforded special constitutional protections in the first place. \textit{Id.}

\(^{417}\) See, e.g., Eisenstadt v. Baird, 405 U.S. 438, 453 (1972), (extending the marital right to privacy to individuals, married or not); see also Developments, \textit{The Constitution and the Family}, 93 Harv. L. Rev. 1156, 1289 et. seq. (1980).
resident alien's situation, the customs and law of his home country, and his religious beliefs in protecting the right to family unification. In two recent decisions, for example, the Conseil d'Etat determined that where polygamous marriage is legally valid in the resident citizen's country of origin, the second spouse was entitled to remain in France for purposes of family unification. In regard to unmarried couples, French law protects them in some instances. The government will allow family unification for unmarried couples who meet two conditions, one of them being that legal obstacles prevent formal marriage. It would be difficult to argue, however, that French or U.S. law is responsible for separating a "family" when the only barrier is the formality of the marriage ceremony.

4. The Problem of Sham Marriages

Because marriage produces significant immigration benefits for individuals, a strong incentive exists to commit fraud. Recognizing a right to family unification, therefore, requires effective controls against marriage fraud.

When a spousal visa petition is filed, the Attorney General, through the INS, examines the marriage certificate's validity and the legitimacy of the marriage relationship, i.e., that it was not entered into solely for the purpose of obtaining immigration benefits. Investigations involving personal interviews of the resident petitioner and the alien spouse are conducted on a case-by-case basis to detect sham relationships. These interviews sometimes involve questioning partners separately to assess the consistency of their answers concerning the relationship. If the Service determines that a couple married for fraudulent purposes, it may deny the alien spouse admission as an

---

418. Ministre de l'Interieur c. Montcho, Conseil d'Etat, 1980 Lebon 315; Ministre de l'Interieur c. Bennacer, Conseil d'Etat, 1980 Lebon 226. In the Montcho decision, a woman who had lived for several years with her husband in France, along with their children and the husband's other wife, sought to regularize her status. After the local prefet denied her request and ordered her to leave the territory on ordre public grounds, she obtained a stay order from the Tribunal Administratif. The Ministre de l'Interieur appealed to the Conseil d'Etat, which found both sufficient prejudice to the interested resident family and a sufficiently strong argument that the polygamous relationship did not harm ordre public to justify staying execution of the prefet's order. The Conseil d'Etat recognized that the right to a normal family life requires consideration of the resident foreigner's personal situation, customs, law, and religious beliefs rather than an automatic application of the French understanding of 'family'.

419. Under the Circular No. 7-76 of July 9, 1976, France allowed family unification of unmarried couples under two conditions: (1) a stable household which could be indicated by the sharing of responsibility in raising their common children; and (2) legal obstacles which prevent the formal marriage of the couple. See G.I.S.T.I., supra note 199, at 105.

420. See supra note 115 and accompanying text.


424. See Note, supra note 423, at 1242.
immediate relative.\textsuperscript{425} Disincentives to immigration fraud include criminal penalties\textsuperscript{426} as well as deportation.\textsuperscript{427} Additionally, the law presumes fraud if a marriage occurring within two years before the immigrant spouse's entry is judicially terminated within two years after entry.\textsuperscript{428}

Despite these safeguards against sham marriages, the INS recently estimated that nearly 30\% of spousal petitions may involve fraud.\textsuperscript{429} When marriage fraud began to attract media attention in 1985,\textsuperscript{430} Congress reacted by proposing tighter controls.\textsuperscript{431} On November 10, 1986, the President signed into law the Immigration Marriage Fraud Amendments.\textsuperscript{432} The Amendments are patterned after the approach used by France and other European nations.\textsuperscript{433} Instead of being granted immediate permanent resident alien status, entering spouses will now obtain a two-year conditional resident status dependent upon the continuation of the marital relationship.\textsuperscript{434} This provides the immigration authorities the opportunity to better detect and control sham marriages.\textsuperscript{435}

\begin{itemize}
\item \textsuperscript{425} See 8 U.S.C. § 1361 (1982).
\item \textsuperscript{426} 18 U.S.C. §§ 1001, 1546 (1982).
\item \textsuperscript{427} 8 U.S.C.A. § 182(a)(19) (West Supp. 1987).
\item \textsuperscript{428} 8 U.S.C. § 1251(c) (1982).
\item \textsuperscript{429} Fraudulent Marriage and Fiance Arrangements to Obtain Permanent Resident and Immigration Status, Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. (July 26, 1985).
\item \textsuperscript{430} Nightline: Marriage Fraud (ABC television broadcast, Aug. 26, 1985); 60 Minutes: Do You Take This Alien? (CBS television broadcast, Sept. 22, 1985); N.Y. Times, June 14, 1985, at A15, col. 1 (breakup of sham marriage ring in Miami).
\item \textsuperscript{432} Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 3537.
\item \textsuperscript{433} See IMMIGRATION MARRIAGE FRAUD: CONTROLS IN MOST COUNTRIES SURVEYED STRONGER THAN IN U.S., S. REP. No. 491, 99th Cong., 2d Sess. 2 (1986).
\item \textsuperscript{434} 8 U.S.C.A. § 1186(a) (West Supp. 1987), provides that "an alien spouse . . . and an alien son or daughter . . . shall be considered, at the time of obtaining the status of an alien lawfully admitted for permanent residence, to have obtained such status on a conditional basis . . . ." 8 U.S.C.A. § 1186(a) (West Supp. 1987), provides that "an alien spouse . . . and which, within two years subsequent to . . . entry . . . shall be judicially annulled or terminated, unless such alien shall establish to the satisfaction of the Attorney General that such marriage was not contracted for the purposes of evading any provisions of the immigration laws.
\item \textsuperscript{435} Under the current law, 8 U.S.C. § 1251(c) (1982), the Attorney General is authorized to deport an alien who obtains an immigrant visa on the basis of a marriage entered into less than two years prior to . . . entry . . . and which, within two years subsequent to . . . entry . . . shall be judicially annulled or terminated, unless such alien shall establish to the satisfaction of the Attorney General that such marriage was not contracted for the purposes of evading any provisions of the immigration laws.
\item \textsuperscript{436} Id. The addition of § 1186a places the burden upon each alien to demonstrate that the marriage continues for two years. 8 U.S.C.A. § 1186a(c)(2)(B) (West Supp. 1987). Under the prior law the INS would have had to discover that the marriage had terminated and then initiate deportation proceedings.
\end{itemize}
In order for an alien to then obtain permanent resident status, the couple must file a petition during the ninety days prior to the end of the alien's conditional resident period and prove: (1) that the marriage was entered into in accordance with the laws of the place where the marriage took place, (2) that it has not been judicially annulled or terminated, (3) that no fee was given for filing a visa, and (4) that the couple has maintained a bona fide marital relationship. If the couple demonstrates compliance with these requirements, the conditional resident alien's status is changed to permanent resident status, and the alien is credited with two years toward the time necessary for naturalization.

The immigration laws recognize that innocent parties may suffer extreme hardship in situations where the marriage ends prior to two years and deportation results. The Attorney General, therefore, may waive the two-year requirement and grant permanent-resident status when necessary.

C. Court Deference to the Political Branches in the Immigration Area

The Supreme Court has recognized the authority of the federal government's political branches over immigration, finding it implicit in the sovereign powers of government, as well as implicit in the commerce and naturalization clauses of the Constitution. In its first decisions recognizing governmental authority to exclude aliens, the Court equated control of immigration with the necessity of national security and independence from foreign encroachment. The Court's recognition of governmental authority, however, did not preclude judicial review of

437. Id. § 1186a(c)(3)(B).
438. Id. § 1186a(c)(4) (West Supp. 1987). "The Attorney General... may remove the conditional basis of the permanent resident status for an alien who fails to meet the requirements of [this section] if the alien demonstrates that... extreme hardship would result if such alien is deported." Id.
439. U.S. Const. art. I, § 8, cl. 4, authorizes the Congress to establish a uniform rule of naturalization. Another constitutional source of the federal government's power to regulate aliens is Congress' power to "regulate Commerce with foreign nations." U.S. Const. art. I, § 8, cl. 3; see also Chae Chan Ping v. United States, 130 U.S. 581 (1889), stating:

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.

Id. at 609.

The source and nature of the power have been confirmed in recent decisions. See Fiallo v. Bell, 430 U.S. 787, 799 (1977) ("Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control'") (quoting Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953); see also INS v. Chadha, 462 U.S. 919 (1983), where the Court referred to the "plenary authority of Congress over aliens under Art. I, § 8, cl. 4." Id. at 940.
440. See Chae Chan Ping, 130 U.S. at 606.
immigration legislation. The Court specifically noted that all sovereign authority, including that over immigration, is restricted in its exercise "by the Constitution itself and [by] considerations of public policy and justice which control, more or less, the conduct of all civilized nations." The Court has also recognized that maxims of international law limit governmental control of immigration.

In decisions reviewing immigration laws, the Court's analysis typically begins with the observation that "over no conceivable subject is the legislative power of Congress more complete." The Court has relied on two separate grounds for refusing to review certain immigration legislation. It has refused to extend constitutional protections to those aliens who have not "entered" the United States, and has applied a right/privilege distinction.

If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.

Id.

Four years later, the Court used similar reasoning in recognizing governmental authority to deport foreigners based on race. In Fong Yue Ting v. United States, 149 U.S. 698 (1893), the Court stated: "The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps toward becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country." Id. at 707.

Chae Chan Ping, 130 U.S. at 604. Though at one point in the opinion the Court referred to legislative determinations in the immigration area as "conclusive on the judiciary," it was likely speaking of the "necessity" of the law, while reserving for judicial scrutiny its constitutionality. Id. at 606.

See generally Nafziger, The General Admission of Aliens under International Law, 77 AM. J. INT'R'L. L. 804, 828 (1983) (noting that the Court in Chae Chan Ping and in Fong Yue Ting "qualified the excludability of aliens by citing international legal authority to the effect that a state can exclude aliens only when they present a danger to the peace and security of the country.") (emphasis in original). The Fong Yue Ting Court stated, quoting Vattel's Law of Nations:

Every nation has the right to refuse to admit a foreigner into the country, when he cannot enter without putting the nation in evident danger, or doing it a manifest injury. What it owes to itself, the care of its own safety, gives it this right; and in virtue of its natural liberty, it belongs to the nation to judge whether its circumstances will or will not justify the admission of the foreigner.

149 U.S. at 707.


These rationale were first identified in Note, Constitutional Limits on the Power to Exclude Aliens, 82 COLUM. L. REV. 957, 975-83 (1982). They are further discussed in Developments, Immigration Policy and the Rights of Aliens, 96 HARV. L. REV. 1286, 1314-22 (1983). An extreme example of this refusal to review occurred in Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953). In that case, an alien who had resided in the United States for 25 years was, after a trip abroad, imprisoned by immigration authorities for two years on Ellis Island, without a hearing and for undisclosed reasons. The Court rejected Mezei's claims that his detention was unlawful, holding that excluded aliens have no constitutional rights to invoke. The Court stated:
The Court has employed the right/privilege analysis since Justice Holmes, while still sitting on the Supreme Judicial Court of Massachusetts, "drew a sharp distinction between constitutionally protected rights on the one hand, and privileges supplied by the government without obligation on the other." In its first and most enduring application of the right/privilege analysis to immigration matters, the Court in *United States ex rel. Knauff v. Shaughnessy* stated:

[A]n alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe.

Indeed, since *Knauff*, the Court has primarily applied the right/privilege distinction to the immigration area. The Court has relied on the doctrine of unconstitutional conditions to soften the right/privilege distinction's narrowness. The doctrine of unconstitutional conditions does not reject Holmes' right/privilege distinction; rather, "[i]t mute[d] its force . . . by holding that the government may not do indirectly that which it is constitutionally prohibited from doing directly. If a condition placed on the receipt of government largess prohibits or inhibits the exercise of a constitutional right, it may be invalidated." Through the unconstitutional conditions doctrine and other limiting doctrines, the Court has virtually ceased to apply the right/privilege distinction in non-immigration cases; the Court should not cling to this doctrine in the immigration area alone.

The Court's deference extends even to immigration laws affecting constitutional rights. The political nature of immigration legislation provides the most convincing explanation for judicial deference in this area. The Court has stated:

[A]ny policy toward aliens is vitally and intricately interwoven with the contemporaneous policies in regard to the conduct of foreign relations,

---

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

*Id.* at 212 (citations omitted).


449. *Id.*

450. *Id.* at 976-77 (footnotes omitted).

451. *Id.* at 977. For a discussion of the other limiting doctrines, see Note, *supra* note 445, at 977.
the war power, and the maintenance of a republican form of government.
Such matters are so exclusively entrusted to the political branches of gov-
ernment as to be largely immune from judicial inquiry or interference. Even this justification for extreme deference, however, is flawed. The
Court has invalidated the very kinds of legislation it asserts are exclu-
sively entrusted to the political branches, including legislation regarding
denial of passports, the war power, and other matters involving foreign
relations or national security. For example, in United States v. Robel, the Court invalidated a statute making it a criminal offense for
employees in defense facilities to be members of the Communist Party.
The Court stated: "When Congress' exercise of one of its enumerated
powers clashes with those individual liberties protected by the Bill of
Rights, it is our 'delicate and difficult task' to determine whether the
resulting restriction on freedom can be tolerated." Thus, the Court
has refused to defer blindly to the executive and legislative branches,
especially when "individual freedoms of Americans are at stake."

When a law's focus shifts to immigration, however, the Court's level
of scrutiny becomes minimal. A good example of this minimal scrutiny
is Fiallo v. Bell, where the Court considered a challenge to an immi-
gration law provision exempting illegitimate alien children from the
numerical limitations if they were coming to join their citizen-mothers,
but not if they were joining their citizen-fathers. The plaintiffs claimed,
among other things, that the statute violated equal protection by imper-
missibly discriminating on the grounds of legitimacy and gender, and
that it interfered with the right to raise one's natural children. The

deporation of a resident alien for membership in the Communist Party, even though
he had terminated his membership before the statute making such membership
deportable had been enacted. The alien unsuccessfully claimed such deportation was
deprivation of liberty without due process of law under the fifth amendment and
violated the prohibition of ex post facto laws in art. I, § 9 of the U.S. Constitution.
453. For a summary of several of these cases, see Kleindienst v. Mandel, 408 U.S.
758, 782-83 n.5 (1972) (Marshall, J., dissenting).
455. Id. at 264.
458. Id. at 791. Specifically, the plaintiffs alleged that the statutory provisions:
(i) denied them equal protection by discrimination against natural fathers
and their illegitimate children "on the basis of the father's marital status, the
illegitimacy of the child and the sex of the parent without either compelling
or rational justification";
(ii) denied them due process of law to the extent that there was established
"an unwarranted conclusive presumption of the absence of strong psycholog-
ical and economic ties between natural fathers and their children born out of
wedlock and not legitimated"; and
(iii) "seriously burden[ed] and infringe[d] upon the rights of natural fathers
and their children, born out of wedlock and not legitimated, to mutual associ-
ation, to privacy, to establish a home, to raise natural children and to be
raised by the natural father:"
Id. Responding to the dissent's argument that fundamental rights of citizens were at
stake, the Court noted:
Court rejected both these claims. After acknowledging "limited judicial responsibility . . . even with respect to the power of Congress to regulate the admission and exclusion of aliens," the Court stated that decisions regarding preferential status were "solely for the responsibility of the Congress and wholly outside the power of this Court to control."

Recent lower federal court decisions, however, may indicate a tendency toward more active review of immigration law. One decision invalidated an exclusion provision barring homosexual aliens. Relying on first amendment grounds of right to association, the court noted that the government had been unable to assert a "facially legitimate and bona fide reason" for the exclusion. Another recent federal court decision relied on principles of international law in a case involving the rights of an alien seeking freedom from arbitrary detention.

The assumption is facially plausible in that the families of putative immigrants certainly have an interest in their admission. But the fallacy of the assumption is rooted deeply in fundamental principles of sovereignty. We are dealing here with an exercise of the Nation's sovereign power to admit or exclude foreigners in accordance with perceived national interests. Although few, if any, countries have been as generous as the United States in extending the privilege to immigrate, or in providing sanctuary to the oppressed, limits and classifications as to who shall be admitted are traditional and necessary elements of legislation in this area. . . . In the inevitable process of 'line drawing,' Congress has determined that certain classes of aliens are more likely than others to satisfy national objectives without undue cost, and it has granted preferential status only to those classes.

In his dissent, Justice Marshall noted that this case "directly involves the rights of citizens, . . . [that] . . . the essential fact here is that Congress did choose to extend such privileges to American citizens but then denied them to a small class of citizens." The statute therefore, classified not only on the basis of gender and legitimacy, but also impinged upon the "fundamental freedom of personal choice in matters of marriage and family life" recognized in a long line of Supreme Court decisions.

In upholding the plenary power of Congress over exclusion and deportation of aliens, the Supreme Court has sought support in international law principles . . . . (citation omitted) It seems proper then to consider international law principles for notions of fairness as to propriety of holding aliens in detention. No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment. See Universal Declaration of Human Rights, Arts. 3 and 9, U.N. Doc. A/801.
The recent Supreme Court decision in *Plyler v. Doe*\(^4\) may also have implications for future review of immigration legislation affecting family integrity. In *Plyler*, the Court invalidated state legislation denying a free public education to undocumented alien schoolchildren. The Court reasoned that many of the children would remain in the United States indefinitely; some would eventually become citizens.\(^4\) In light of the problems of "unemployment, welfare, and crime" created by an illiterate subclass, the Court found that the savings achieved by denying the children an education were insubstantial when weighed against the costs to the children, the state, and the nation.\(^4\) The Court's attention to the legislation's impact on society may prove to be a significant factor in future review of immigration law affecting the family.

D. Family Unification Claims in the Context of Immigration Law:
   The Tilt Towards Judicial Deference

As noted at the beginning of this Part, two judicial doctrines conflict when family unification claims are made in the immigration context. One is the substantive due process consideration given the family, focusing on the nature of the family interest, and the extent to which a law affects that liberty interest. The other doctrine is that of extreme deference to the other branches in the immigration area. So far, the Court has refused to balance these considerations; judicial deference, therefore, trumps the constitutional interests at stake.

Constitutional claims to family unity in the immigration context were not squarely presented to the federal courts until the 1950s. In *United States ex rel. Knauff v. Shaughnessy*,\(^4\) the Court held that immigration authorities could exclude, without a hearing, the spouse of a U.S. citizen. The Court stated, "whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."\(^4\) This reasoning, ignoring the rights of the alien's U.S.-citizen spouse, has been described as "patently preposterous" by one commentator.\(^4\)

---


\(^{4}\) Wilkinson, 654 F.2d at 1388. *But see* Jean v. Nelson, 727 F.2d 957, 964 n.5 (11th Cir. 1984), aff'd, 472 U.S. 846 (1985) (rejecting the notion that current international practice regards the detention of uninvited aliens seeking admission as a violation of customary international law).


\(^{4}\) Id. at 230.

\(^{4}\) Id.

\(^{4}\) 338 U.S. 537, 544 (1950).

\(^{4}\) Id. at 543.

Two years later, in 1952, the Court considered the case of a permanent resident alien whose wife and two children were U.S. citizens and who, after living in the country for over thirty years, was ordered deported on grounds that he had been a member of the Communist Party twenty-five years previously. The Court rejected first and fifth amendment challenges to the constitutionality of the Alien Registration Act of 1940. It reasoned instead that Congress has essentially unlimited discretion in deportation questions involving national security.

The due process clause does not shield the citizen from conscription and the consequent calamity of being separated from family, friends, home and business while he is transported to foreign lands to stem the tide of Communism. If Communist aggression creates such hardships for loyal citizens, it is hard to find justification for holding that the Constitution requires that its hardships must be spared the Communist alien.

Notably, the Court in this case again focused on the alien's lack of rights rather than on the rights of the citizen family members affected by the separation.

In 1958, the D.C. Circuit in *Swartz v. Rogers* addressed for the first time a claim that the fifth amendment due process clause provides protection from deportation that would destroy a marriage relationship. Rejecting that argument, the court reasoned that, while deportation might burden a marriage, it "would not in any way destroy the legal union which the marriage created." For the court, it was sufficient that the wife could accompany her deported husband.

In *Noel v. Chapman*, the Second Circuit rejected an equal protection challenge to a distinction in the preference system's treatment of aliens married to citizens and aliens married to permanent resident aliens. The court rejected a family-integrity theory and held that resident aliens have no constitutional right for their alien spouses to enter the United States while awaiting visas. The Court distinguished actions by the INS in an area in which the federal government has broad powers from other family protection cases involving state action. Additionally, the court found that the greater liberality accorded the spouses of citizens was a matter of the INS's plenary discretion.

---

471. *Id.* at 584-92.
472. *Id.* at 591.
473. 254 F.2d 338 (D.C. Cir. 1958).
474. *Id.* at 339; see also *Silverman v. Rogers*, 437 F.2d 102, 107 (1st Cir. 1970), *cert. denied*, 402 U.S. 983 (1971). In the context of the requirement that J-1 foreign exchange visitors return to their country of origin, the *Silverman* Court followed the reasoning in *Swartz v. Rogers* and rejected constitutional claims regarding the deportation of the alien wife of a U.S. citizen.
476. *Id.* at 1029.
477. *Id.* at 1027.
478. *Id.*
479. *Id.* at 1029.
pose of protecting the U.S. economy by discouraging the arrival of aliens who were coming "in large numbers and remaining illegally in the expectation of a marriage which would assure their continuing residence here."  

These decisions, along with the Supreme Court's 1977 decision in \textit{Fiallo v. Bell},\textsuperscript{480} are the major cases analyzing the family unity issue. The Court has rejected these family unification claims with little analysis of the two substantive due process factors at issue: the nature of the liberty interest, and the extent to which a regulation affects the family's interest in unity. Although a long line of non-immigration cases has established the importance of the liberty interest, the Court has not weighed this interest, or examined whether the offending regulation is narrowly tailored to promote a significant government interest without impinging more than necessary on the right to family unity. The second factor, the extent to which a regulation affects the family's interest in unity, has also received glib attention. It is true that the affected family members can relocate to another country to avoid disruption. It appears inconsistent, however, for the Supreme Court to say in \textit{East Cleveland} that the city is asking too much if the family must move to another suburb to preserve its unity, but to imply that if the family is an immigrant family, it can move to another country.

\section*{VI. The Right to Family Unification Under the French Constitution of 1958}

Understanding French constitutional review, and comparing it to the U.S. system, requires understanding the separation of the French civil and administrative court systems, and the traditionally more restrained role of the French judiciary. The reader must also keep in mind that the reasoning underlying French court decisions is less accessible because the concise nature of their decisions avoids the more elaborate analysis present in opinions by U.S. courts.

France has had sixteen constitutions; of the four since 1940, the current Constitution has been in effect only since 1958.\textsuperscript{482} Judicial review of the constitutionality of legislation implicating individual rights has occurred only within the last fifteen years.\textsuperscript{483} The contours of judicial review, therefore, are only beginning to take shape. Nevertheless, judicial review has, in the last decade, produced three major immigration decisions.\textsuperscript{484} The Conseil Constitutionnel has invalidated legislative provisions authorizing extended detention of aliens awaiting expulsion,\textsuperscript{485} and has acknowledged a right to family unification in the

\textsuperscript{480} \textit{Id.}
\textsuperscript{481} 430 U.S. 787 (1977); see \textit{supra} text accompanying notes 457-60.
\textsuperscript{482} M. Prelot, \textit{Institutions Politiques Et Droit Constitutionnel}, 295-96 (9th ed. 1984).
\textsuperscript{483} See \textit{infra} note 492 and accompanying text.
\textsuperscript{484} See \textit{infra} notes 553-73 and accompanying text.
\textsuperscript{485} See \textit{infra} notes 566-69 and accompanying text.
Constitution. The Conseil d'Etat, the highest administrative court, has also recognized a constitutional right to family unification in an opinion invalidating an administrative decree. These decisions, and others involving constitutionally protected rights, suggest that, despite its more hesitant approach to judicial review in general, the French judiciary is more willing than the U.S. judiciary to recognize and protect a right to family unification in the context of immigration.

This part first examines the evolution and treatment of the right to family unification under French case law. The following sections discuss the powers of the Conseil Constitutionnel and the Conseil d'Etat, the provisions used by the courts to establish a right to family unification, the influence of international law on the development of the right, and the major decisions recognizing the right to family unity.

A. The Scope of Judicial Power to Annul Legislation and Administrative Acts

1. The Conseil Constitutionnel

The Conseil Constitutionnel is a specialized court, with power to review legislation to determine: 1) whether the legislature has

---

486. See infra note 570 and accompanying text.
488. See infra notes 574-83 and accompanying text.
489. The establishment of the Conseil Constitutionnel under the 1958 Constitution broke a long tradition of non-review of parliamentary acts. See generally F. LUCHAIRE, LE CONSEIL CONSTITUTIONNEL 1-32 (1980). Prior to 1958, the French Parliament had exclusive power to determine the constitutionality of legislation. Under the 1946 Constitution, the "Comite Constitutionnel," a predecessor of the Conseil Constitutionnel, could review proposed legislation only to ensure the Parliament did not usurp the powers of other state organs. It could not review legislation implicating individual rights and liberties. Id. at 12-14. Whether the Conseil Constitutionnel is a "true court" or a political institution has been a source of great controversy. See generally Davis, The Law/Politics Distinction, the French Conseil Constitutionnel, and the U.S. Supreme Court, 34 AM. J. COMP. L. 45 (1986). Davis discusses several reasons why the Conseil may be considered other than a "true court":

(1) its membership is political and unprotected by life tenure;
(2) its subject matter is . . . limited to proposed rather than existing legislation;
(3) the matters decided are not presented in an adversary setting and no parties or concrete factual situations are involved;
(4) its procedures are secret and non-public;
(5) its jurisdiction is ambiguous; and
(6) its textual constitutional source (or authority) arises from a part of the constitution different from the part dealing with the judiciary.

Id. at 45-46, 57-65.

Davis notes, however, that the controversy may be essentially academic: "The concept of a court and a legal constraint as opposed to, and fundamentally distinct from, power in the form of executive discretion or legislative politics is philosophically and epistemologically suspect." Id. at 89. But see F. LUCHAIRE, supra, at 33, 34, 41-56 (concluding that the Conseil performs a judicial function).
encroached upon the domain of the administration; and 2) whether the legislature has impermissibly infringed upon an individual's constitutional rights. The Conseil Constitutionnel, however, did not take an active role in reviewing legislation for conformity with individual rights until 1971.

The Conseil Constitutionnel is the only forum for constitutional review of legislation. Its jurisdiction to render decisions does not depend upon the existence of an actual controversy. In fact, only certain governmental officials and legislative groups may request review. These are—the President of the Republic, the Prime Minister, the President of the Senate, and the President of the National Assembly—and, in addition, either a group of 60 senators or 60 deputies of the National Assembly. The parliamentary opposition's power to challenge the constitutionality of legislation sponsored by the majority was created in 1974 by constitutional amendment. Since that amendment, the number of requests to review legislation impinging on fundamental rights has greatly increased.

The Conseil Constitutionnel may hear a challenge only if brought in the period after a law is voted and before its promulgation. Once promulgated, therefore, French legislation cannot be constitutionally challenged.

2. The Conseil d'Etat

A separate court system determines the constitutionality of decrets or

---


492. See Decision of July 16, 1971, Con. const., 1972 D.S. Jur. 685 (1971), invalidating proposed legislation which would have subjected certain associations to the a priori control of judicial authorities. The decision was a landmark in several respects. First, it declared the Preamble of the 1958 Constitution to be positive law. It then relied upon a reference in the 1958 Preamble to the Preamble of the 1946 Constitution, which in turn referred to "fundamental principles recognized by the laws of the Republic." Finally, it identified a law of 1901, under the Third Republic, as the source of the constitutionally protected right to liberty of association. See infra note 507.

493. Davis, supra note 489, at 52.

494. Id.


497. F. Luchaire, supra note 489, at 29-30.

498. Id.

other administrative actions. The tribunaux administratifs, or trial courts, render the initial decisions, which are then reviewed by the Conseil d'Etat, the highest administrative court. The administrative courts decide cases arising from actual controversies. As do U.S. courts when reviewing administrative action, the Conseil d'Etat considers only such issues as competency, abuse of discretion, improper motivation, or violation of a higher law such as the Constitution. In no event may the administrative courts determine the constitutionality of a legislative provision.

B. Constitutional Authority for the Right to Family Unification

1. The Constitution of 1958

Although the 1958 Constitution primarily delimits the areas of competence of the branches of government, it does contain provisions protecting individual liberty comparable to those in the U.S. Bill of Rights. The Preamble has been the most fruitful constitutional source of the right to family unification. The Preamble does not refer to any specific rights, but rather affirms the rights contained in prior sources of law, namely the Declaration of 1789 and the Preamble of the 1946 Constitution. In 1971, the Conseil Constitutionnel held that the 1958 Preamble limited the power of the legislature. Perhaps the French...
equivalent of *Marbury v. Madison*, the decision signalled a significant shift in the balance of powers, with the Conseil Constitutionnel taking a major role in assuring the protection of individual rights and liberties.\(^5\) Since 1971, the Conseil Constitutionnel has relied on provisions of the 1789 Declaration of Rights and the 1946 Preamble, as incorporated by the 1958 Preamble, to invalidate several legislative provisions.\(^5\)

2. *The Declaration of the Rights of Man and of the Citizen of 1789*

The Declaration of the Rights of Man and of the Citizen of 1789,\(^5\) like the Bill of Rights, reflects an individualistic conception of rights derived from the ideas of Locke, Montesquieu, and Rousseau.\(^5\) Emphasizing the protection of the individual from governmental interference, its 17 articles identify four rights—liberty, property, security, and resistance to oppression—as natural and inalienable.\(^5\) The right of liberty is defined broadly as consisting "in being able to do anything which does not injure another."\(^5\) French commentators have written that the right of liberty has a scope at least as broad as the corresponding liberty protections of the U.S. Constitution's Fifth and Fourteenth Amendments.\(^5\) The French right to liberty protects individual privacy, free-

---


508. L. Favoreau, supra note 507, at 237.

509. The Conseil invalidated proposed legislation which would have violated the right to equal treatment under the law guaranteed by articles 1 and 6 of the Declaration of the Rights of Man of 1789. Decision of Dec. 27, 1973, Con. const., reprinted in L. Favoreau, supra note 507, at 276. The Conseil has also invalidated proposed legislation on the basis that it interfered with the right to strike guaranteed by the Preamble of 1946. Decision of July 25, 1979, Con. const., 1980 D.S. Jur. 201 (1979). The Conseil Constitutionnel has also recognized that the Preamble of the 1958 Constitution is positive law. Decision of June 19, 1970, Con. const. (LEXIS, French Public library, Conset file); see also L. Favoreau, supra, at 237.


512. Id. art IV. "[T]he exercise of the natural rights of each man has no limits other than those which assure to the other members of society the enjoyment of these same rights." Id.

dom of movement, and the freedom to make personal choices in matters of family life. 515

Numerous provisions of the Declaration of 1789 refer to equal rights. 516 These provisions, however, often distinguish between aliens and citizens. For example, article 6 of the Declaration establishes equality for "citizens" in regard to admissibility to public places or public employment. The decisions of the Conseil Constitutionnel frequently state that only persons similarly situated must be treated the same under the law. 517

3. The Preamble to the 1946 Constitution

While the Declaration of 1789 defines rights in terms of freedom from governmental tyranny, the Preamble to the 1946 Constitution reflects a more socialistic concern for ensuring social welfare. 518 It begins by reaffirming the Declaration of 1789:

On the morrow of the victory of the free peoples over the regimes that attempted to enslave and degrade the human person, the French people proclaim once more that every human being, without distinction of race, religion or belief, possesses inalienable and sacred rights. They solemnly reaffirm the rights and freedoms of man and of the citizen consecrated by the Declaration of Rights of 1789 and the fundamental principles recognized by the laws of the Republic.

They further proclaim as most vital in our time the following political, economic and social principles[

The principles the Preamble proclaims as vital include the maintenance of health and well-being, the provision of time for repose and leisure, assurance of equal access to education and to opportunities for professional and cultural development, and protection of the right to work and to strike. 520 Paragraph 10 of the Preamble provides specifically for the

515. See C. Colliard, supra note 514, at 311, 330, 385; J. Imbert, supra note 511, at 99, 42-43, 92. It has been suggested, for example, that a law limiting the capacity of foreigners to marry (Ordonnance of Nov. 2, 1945, No. 45-2658, art. 13, 1945 J.O. 7225), later repealed in 1981 (Law of Oct. 29, 1981, 1981 J.O. 2970), was an unconstitutional deprivation of liberty. F. Luchaire, supra note 489, at 195. The French concept of personal liberty is probably broad enough to encompass the results reached in the line of U.S. cases concerning integrity of the family from Meyer and Pierce through Moore v. City of East Cleveland. See supra notes 331-71.

516. See, e.g., 1789 Declaration, art. I, reprinted in French Law, supra note 490, at 2-3 (“Men are born and remain free and equal in respect of their rights. Social distinctions, therefore, may be founded only on common utility.”) see also id. art. VI (“All the citizens being equal in [the law’s] sight are equally eligible to all honors, offices, and public employments, according to their ability; and without distinction other than those of their virtues and talents.”).

517. See generally F. Luchaire, supra note 489, at 202, 204.


520. Paragraph 5 of the 1946 Preamble provides that everyone has the duty to work and the right to obtain employment and that no one may be dismissed from work because of his origins, opinions or beliefs. Paragraph 7 protects the right to strike. Paragraph 11 states that the nation guarantees to all, particularly to the child
benefit and dignity of the family: "The nation assures to the individual and to the family the conditions necessary to their development." Significantly, this provision, like many other provisions of the 1946 Preamble, protects "individuals" rather than "citizens."

Whether all of the social guarantees of the Preamble have constitutional value is unclear. Thus far, the Conseil Constitutionnel has referred to only a few of the Preamble's provisions. These are the right of health, the right to strike, and the right of workers to participate in the management of the enterprises for which they work. The Conseil Constitutionnel has also implicitly recognized the constitutional value of the Preamble's right to development of the family in the context of immigration. However, the Conseil Constitutionnel has invalidated legislative provisions because they conflicted with a provision in the 1946 Preamble only in the case of the right to strike. Nevertheless, the 1958 Constitution clearly invests the 1946 Preamble with authority it generally lacked under the Fourth Republic (1946-1958).

4. A Comparison of the Mandates of the 1946 Preamble and the Declaration of 1789

Although the 1958 Constitution affirms the provisions of both the 1946 Preamble and the Declaration of 1789, the two documents are not totally reconcilable. The Declaration emphasizes individual freedom from governmental interference while the Preamble emphasizes the governmental provision of social benefits. One commentator summarized the difference in this way:

On the one hand there is the goal of individual liberty, the intention to exclude the state from the areas in which the individual exercises his initiative; on the other hand there is the concern for the satisfaction of social and the mother, and aged workers, the protection of health, economic security, repose and leisure. Paragraph 13 guarantees the equal access of the child and the adult to education, professional training and cultural formation, and states that the organization of free and secular public instruction is a duty of the state. Id. 521. Id. 522. See F. Luchaire, supra note 489, at 177-78. 523. See Flauss, Les Droits Sociaux dans la Jurisprudence du Conseil Constitutionnel, No. 9-10 Droit Social 645 (1982). But see F. Luchaire, supra note 489, at 177, stating that each paragraph of the 1946 Preamble, except for the last three concerning the French Union, have constitutional value. 524. See Flauss, supra note 523, at 646. 525. Decision of January 15, 1975, Con. const., 1975 D.S. Jur. 529 (regarding the constitutionality of the French law liberalizing abortion). 526. Decision of July 25, 1979, Con. const., reprinted in L. Favorreau, supra note 507, at 435 (regarding the continuity of radio and television broadcasting during a strike); see also Decision of July 22, 1980, Con. const., 1981 D.S. Jur. 356 (1980) (regarding the protection of nuclear facilities). 527. Decision of July 5, 1977, Con. const., 1979 D.S. Jur. 41 (1977) (regarding worker participation in management decision-making). 528. See infra note 570. 529. See Decision of July 25, 1979, Con. const., reprinted in L. Favorreau, supra note 507, at 435. 530. F. Luchaire, supra note 489, at 177-78; Flauss, supra note 523, at 649.
needs, which translates necessarily into the active intervention of the state in the lives of the citizens.\textsuperscript{531}

The Conseil Constitutionnel must balance the tensions between the provisions protecting individual rights and those requiring the government to provide economic and social benefits.

Some commentators argue against applying the social welfare provisions of the 1946 Preamble to require the Parliament or the administration to affirmatively ameliorate social conditions.\textsuperscript{532} Protecting family unification is consistent with this view. Although the family's source of constitutional protection lies in what is labelled a social provision of the 1946 Preamble, protecting the family in the immigration area does not require the government to affirmatively grant benefits. The concern, rather, is with freedom from governmental interference.

C. Protection of the Family in European and International Law

International law can play an important role in French judicial decisions.\textsuperscript{533} Consequently, this section analyzes those regional and international declarations of law recognizing family rights.

Several human rights declarations recognize the right to family life. For example, article 16 of the Universal Declaration of Human Rights of 1948 recognizes a right to "found a family" and states that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the state."\textsuperscript{534} Similarly, article 10 of the International Covenant on Economic, Social and Cultural Rights of 1966 provides that "[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children."\textsuperscript{535} Like the declarations, numerous international conventions recognize the family as the basic unit of society, entitled to protection and freedom from interference by the state.\textsuperscript{536}

\begin{itemize}
  \item \textsuperscript{531} J. Rivero, Les Libertes Publiques, t. 1, Les droits de l'homme, at 85 (1st ed. 1975).
  \item \textsuperscript{532} See Flauss, supra note 523, at 646.
  \item \textsuperscript{533} See F. Luchaire, supra note 489, at 135-37, 259 et seq.
    \begin{enumerate}
      \item Everyone has the right to respect for his private and family life, his home and his correspondence.
      \item There shall be no interference by a public authority with the exercise of this right except as is in accordance with the law and is necessary in a demo-
The Treaty of Rome is the international convention most significant for French family and immigration policy. It established the principle of free movement of workers among member states of the Common Market. The Treaty has a profound impact on the rules for entry and stay of foreigners, essentially removing border barriers to nationals of EEC nations seeking to settle in another EEC nation. The Treaty harmonized immigration provisions of the various member states by limiting the grounds for exclusion and expulsion of workers, and by establishing certain procedural guarantees.

EEC member states also adopted regulations governing the right of family members to join relocated workers. Among the family members entitled to join a worker employed in another state are: 1) the spouse and descendants less than 21 years of age who are dependent; and 2) ascendants of the worker or of his spouse who are under their care or who are dependent. Family members not within the above definition...
who, in the country of origin, were dependent upon or lived in the same household may also be admitted. 541

Relatives of workers entering under the treaty must meet the requirements of "ordre public, security, and public health." 542 Unlike the French law, the EEC regulations do not impose a waiting period for family members wishing to join the worker. 543 The worker must, however, provide his family with accommodations "considered as normal for the national workers in the region where he is employed." 544

Various bilateral agreements also provide for family unification. For example, the convention between France and Portugal of January 11, 1977, provides that "the French authorities favor family unification of Portuguese workers employed in France." 545

The first multilateral convention to explicitly recognize a right to family unification, however, is the European Convention on the Legal Status of Migrant Workers, enacted in 1977 by the member states of the Council of Europe. 546 Article 12 of the Convention provides a right to "family reunion" for the spouse and minor children:

The spouse of a migrant worker who is lawfully employed in the territory of a Contracting Party and the unmarried children thereof, as long as they are considered minors by the relevant law of the receiving State who are dependent on the migrant worker are authorized on conditions analogous to those which this convention applies to the admission of migrant workers and according to the admission procedures prescribed by such law or by international agreements to join the migrant worker in the territory of the Contracting Party provided that the latter has available for the family housing considered as normal for national workers in the region where the migrant worker is employed. Such Contracting Party may make the giving of authorization conditional upon a waiting period which shall not exceed 12 months. 547

Article 12 also allows a state to require the worker to show sufficient resources to support the additional family members. 548 Thus, the Con-
vention, ratified by France in 1983, establishes nearly the same parameters regarding family unification as those erected by the 1976 French decret.

The EEC provisions may serve as a catalyst for extending family unification rights to non-EEC nationals. For instance, a circular of July 10, 1981 specified that French citizens must be accorded the same rights to family unification as are set up by EEC regulations, whatever the nationality of the relatives seeking admission. Conversely, the EEC free entry provisions might be used as a justification for closing the doors to immigrant workers from non-EEC nations.

D. French Judicial Decisions Protecting Family Unification

1. The Conseil d'Etat

In the GISTI decision of 1978 the Conseil d'Etat held that the Preamble of the 1946 Constitution protected the right of legitimate foreign residents to lead a normal family life. The government, therefore, could restrict the entry of a resident's spouse or minor child only to maintain order public or to protect the family members.

GISTI involved a challenge to an administrative decret preventing family members from working while in France. The Conseil d'Etat invalidated the decret because the potential barrier established by the “no work” provision was insufficiently related to the preservation of order public or the protection of the entering family members' welfare. Thus, the Conseil d'Etat erected a “means” test for any restrictions on unification of immediate family members.

The Conseil d'Etat also identified this right as a general principle of


550. For the discussion of the 1976 decret, see supra notes 263-67 and accompanying text.


553. Id. The Commissaire du Gouvernement submitted an advisory brief arguing that "the 1946 Preamble treats the family as an institution to be protected and fostered and recognizes in each individual the right to lead a normal existence and a normal family life by creating a family and living with it." See Dondoux, supra note 272, at 57, 60. The Commissaire du Gouvernement is a member of the Conseil d'Etat, but, contrary to what the title might suggest, does not represent the government. Rather, he conducts an independent study of the affair and presents his conclusions to his colleagues actually deciding the case. See G. Vedel, supra note 171, at 44, 633. In addition to the 1946 Preamble, the Commissaire cited two other major sources of protection for the family, international law and the provisions of the Family Code and Civil Code. Dondoux, supra note 272, at 58.


555. Id.

556. Id.; see supra text accompanying notes 274-82.

557. M. Long, supra note 4, at 588.
law. Derived by the court from existing written law, general principles most often function to fill gaps in existing legislation or regulations. They can also be substantive principles derived from constitutional provisions. General principles include such broad formulations as the right to present a defense, the principle of separation of powers, and the principle of equality of citizens before the law.

Only rarely does the Conseil d'Etat recognize a general principle of law in the area of social and economic rights. Its reluctance is due to the difficulty of putting into concrete terms the expression of abstract ideas of social justice. Moreover, the law in that area is constantly evolving, and judicially setting standards for governmental conduct may have serious financial consequences for the government.

2. The Conseil Constitutionnel

The Conseil Constitutionnel has rendered two major decisions concerning the constitutionality of the immigration law. These decisions suggest that the Conseil Constitutionnel will aggressively review the constitutionality of legislation restricting the right to family unification.

---

558. See G. VEDEL, supra note 171, at 387-401.
559. General principles of law (principes generaux de droit) are non-textual laws derived by the judge as a means of filling gaps in the existing textual law. Thus, if a rule were so pervasive in the positive law that it indicated an intent by the legislature to apply the principle generally, it would be extended even to situations not explicitly covered by the text of these laws or regulations. It is not a means of discovering natural rights, but a method of discovering rights pervasive in the existing positive law. Exactly where general principles of law fit into the hierarchy of French law is problematic. Some general principles have near constitutional value and are both supra-legislative and supra-decretal. An example is the right to continuity of public services recognized by the Conseil Constitutionnel in its decisions of Sept. 25, 1979. See infra notes 574-78 and accompanying text. Other principles have supra-decretal value but may be derogated by legislative provisions. Still others are only effective in the absence of overriding administrative text. See Dondoux, supra note 272, at 62.
560. The Conseil Constitutionnel has also derived general principles of constitutional law not explicit in the Constitution or other documents to which the Preamble refers, a technique comparable to the derivation of rights from the penumbra of the U.S. Bill of Rights. See discussion of Griswold v. Connecticut, supra notes 346-54 and accompanying text. For instance, the Conseil Constitutionnel has identified the continuity of public services as a general principle of law of constitutional value. See infra notes 574-78 and accompanying text.
561. General principles of law identified by the courts have become so numerous that a complete list would be difficult to compile. See G. VEDEL, supra note 171, at 389.
563. See M. LONG, supra note 4, at 394-95.
The Conseil will not overturn large amounts of legislation by asserting primacy of family unification rights over other governmental interests; it will, however, attempt to strike a balance between individual and state interests by examining the justification and necessity for legislation infringing upon certain important rights. These decisions also establish that the Constitution protects not only French citizens, but also aliens, at least in those provisions where protections are framed in the terms "everyone" or "no one." These protections extend even to aliens who have been ordered expelled or who have never been officially admitted.\textsuperscript{565}

The Conseil Constitutionnel's first immigration decision\textsuperscript{566} annulled 1980 legislation authorizing the administration to detain aliens awaiting expulsion for up to seven days prior to judicial approval.\textsuperscript{567} In annulling the detention provision, the Conseil Constitutionnel relied on article 66 of the 1958 Constitution which provides: "No one may be arbitrarily detained. The judicial authority, guardian of individual liberty, shall assure the respect for this principle under conditions determined by law."\textsuperscript{568} Although the Conseil Constitutionnel refused to deny the government all power of detention, it overturned the seven-day detention provision. Its compromise position held that the administration could detain persons ordered expelled for 48 hours without judicial approval.\textsuperscript{569}

In a more recent decision,\textsuperscript{570} the Conseil considered the constitutionality of the 1986 amendments, which narrowed the right to family unification. While recognizing the constitutional value of the family

\begin{footnotes}
\item[565] See F. Luchaïre, supra note 489, at 188. In the course of its Decision of Sept. 3, 1986, Con. const., No. 86-216 (LEXIS, French Public library, Consit file) the Conseil, while rejecting other claims on the merits, recognized that provisions providing the right to asylum, rights to individual liberty, non retroactivity, and the right of defense also apply to foreigners in France.
\item[567] Id. The administration's detention of aliens had become a sensitive issue after the discovery of a secret center in Marseille in 1975 used by police to confine aliens without hearings or charges. At first, the government cited the Penal Code as impliedly authorizing detention of aliens awaiting expulsion. It later acted by decree to authorize detention of aliens awaiting expulsion. Vincent, supra note 223, at 369.
\item[569] Id.; see also L. Favoreau, supra note 507, at 371-75. U.S. courts have had to review similar detention policies. Since the influx of Cuban and Haitian refugees in 1981, the United States has begun routinely incarcerating aliens for indefinite periods of time without bond while they await processing. Recent decisions have considered the issue of the constitutionality of such administrative detention of aliens. Though some lower federal court decisions have granted procedural protection limiting the period of detention, others have given minimal review, deferring to the traditional legislative role in protecting national sovereignty. Compare Fernandez v. Wilkensen, 505 F. Supp. 787 (D. Kan. 1980), aff'd, 645 F.2d 1382 (10th Cir. 1981), with Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983), aff'd, 472 U.S. 846 (1985).
\end{footnotes}
protection provision in the Preamble of the 1946 Constitution, the Conseil upheld the challenged legislative provisions.

The 1981 Amendments to the immigration law had specifically exempted certain family members from expulsion, including family members who violated *ordre public* when those violations presented a case of less than absolute urgency. The 1986 legislation qualified this family exemption by requiring that an alien married to a French citizen demonstrate a continuing relationship of more than one year with the French citizen, that alien parents demonstrate that they have exercised parental responsibility for their citizen-child, and that a child whose parents faced expulsion have a relative in France willing to accept responsibility for her custody in order for her to remain in France.

In rejecting claims that these conditions to exemption from expulsion unconstitutionally infringed upon the right to family unification, the Conseil concluded:

> Considering that it is for the legislature to determine the conditions under which the rights of the family are to be reconciled with the requirements of the general welfare; if the legislature may permit the authority which is responsible for determining the expulsion of a foreigner to consider all relevant factors, including when appropriate, the family situation, the legislature violates no constitutional provision in giving precedence to the necessities of *ordre public*.

Thus, the Conseil Constitutionnel, like the Conseil d'Etat in its *GISTI* decision, recognized that maintenance of *ordre public* or protection of family members may justify limitations on family unification.

The 1986 decision leaves unresolved the scope of the legislature's power to limit family unification. Though the decision can be read as permitting the Parliament unfettered discretion to limit the right to family unification contained in the 1946 Preamble, such a reading is unwarranted in light of other cases outside the immigration context. The pattern erected by these other decisions is the balancing approach familiar to Americans.

Perhaps most instructive is the Conseil Constitutionnel's decision involving the right of radio and television employees to strike. The right to strike, like the right to a normal family life, is grounded in the

---

572. Law No. 86-1025 of Sept. 9, 1986, 1986 J.O. 11035. Two of the challenged provisions of the 1986 law merely afforded the factfinder the authority to look beyond the paper relationship to test the existence of a functional family relationship. In the case of a child whose parents are deported, the *ordre public* concern justified the relocation of the child rather than an exemption of the parent from expulsion. *See supra* notes 299-301 and accompanying text for discussion of the 1986 amendments.
1946 Preamble, but is circumscribed by national interests. Whereas the legislative power to limit family unification was read by the Conseil into the family rights provision of the 1946 Preamble, the Constitution expressly authorizes the legislature to limit the right to strike.

In its 1979 decision the Conseil Constitutionnel held that the constitutionally protected right to strike is limited by the constitutionally protected principle of "continuity of the public services." In determining the scope of the right to strike, the Conseil adopted a sliding scale approach. The more important the public service affected, the more power the legislature possesses to regulate strikes. For certain employees involved in services indispensable to essential needs of the nation, the right to strike may be totally prohibited. Though the legislature may regulate the right to strike in seeking a balance with other constitutional protections, the decision makes clear that the Conseil Constitutionnel has the final word on the appropriate conciliation of two principles of constitutional value.

The Court's approach in reconciling competing claims resembles substantive due process analysis under the United States Constitution. When an important individual interest, such as the right to strike, conflicts with an equally important governmental interest, such as the continuity of crucial public services, the Conseil has sought a solution preserving the government's interest while minimizing the intrusion upon individual constitutional rights.

---

575. "The right to strike may be exercised within the framework of the laws that govern it." Preamble of the Constitution of Oct. 27, 1946, reprinted in FRENCH LAW, supra note 490, at 2-6.
577. See supra note 575 and accompanying text.
578. Considering that under the terms of the Preamble . . . the right to strike may be exercised within the framework of the laws which regulate it that in enacting this provision the constituents intended to emphasize that the right to strike is a principle of constitutional value, but that it has limits and authorized the legislature to set those limits effecting the conciliation necessary between the protection of the interests of employees, of which the strike is a means, and the safeguarding of the general interest which the strike may harm that, insofar as the public services are concerned, the recognition of the right to strike does not prevent the legislature from applying to this right the limits necessary to assure the continuity of the public service which, just as the right to strike, has the character of a principle of constitutional value; that these limitations may go to the extent of prohibition of the right to strike by agents whose presence is indispensable to assuring the functioning of elements of the service of which interruption would cause injury to essential needs of the nation.
579. Id.
580. Id.
581. Id. at 447.
582. See Hafen, The Constitutional Status of Marriage, Kinship & Sexual Privacy—Balancing the Individual and Social Interests, 81 Mich. L. Rev. 468, 553 (1983). The difference, however, is that the Conseil Constitutionnel lacks the Supreme Court's extreme def-
Constitutionnel has used this least intrusive means test in approaching other decisions as well.\textsuperscript{583}

3. Possible Effects of the Balancing Approach

If this balancing approach were applied to immigration legislation, the court would reconcile the right to family unification with the necessity of preserving ordre public and the welfare of the family members seeking unification. Such a balancing approach by the Conseil Constitutionnel would not necessarily require deference to the judgment of Parliament in the same way the U.S. Supreme Court defers to Congress.

Francois Luchaire, a former member of the Conseil Constitutionnel, concludes that legislation interfering with the social guarantees of the 1946 Preamble, including the right to family unification, would be unconstitutional, even though holding the state affirmatively responsible for providing specific benefits under the provisions of the 1946 Preamble would be practically difficult.\textsuperscript{584} Another former member of the Conseil Constitutionnel, F. Goguel, argues instead that paragraph 10 of the 1946 Preamble does not limit legislative action.\textsuperscript{585} A third point of view was expressed by the Commissaire du Gouvernement in the GISTI decision, who speculated that paragraph 10 may limit legislative interference to a greater extent for the families of citizens than for those of foreigners.\textsuperscript{586}

VII. Constitutional Protection of Family Unification

A. Quantitative Limits on Entry of Immediate Family Members

1. The Need for a Less Deferential Supreme Court

The current U.S. restrictions upon the entry of second preference cate-
immigrants (spouses and minor children of resident aliens) implicate several constitutional issues: 1) whether treating resident aliens less favorably than citizens constitutes an equal protection violation; 2) whether varying treatment depending upon the national origin of the relatives seeking entry violates equal protection; and 3) whether the delayed entry of relatives violates the substantive constitutional rights of permanent resident aliens.

The first issue is a weak one upon which to challenge present policy. Certainly, the Constitution protects resident aliens, and state legislation that treats aliens and citizens differently is suspect for most purposes. Federal legislation, however, has greater leeway. As the Supreme Court has noted, "a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributions and benefits for one class not accorded to the other." 

587. For a description of the second preference category and how it fits into the preference system, see supra notes 115-31 and accompanying text.

588. Aliens are "persons" within the meaning of that term in the fourteenth amendment, Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886), and in the fifth amendment, Wong Wing v. United States, 163 U.S. 228, 238 (1896). "The Fifth Amendment, as well as the Fourteenth Amendment, protects [aliens within the jurisdiction of the United States] from deprivation of life, liberty, or property without due process of law." Matthews v. Diaz, 426 U.S. 67, 77 (1976). Even one whose presence is unlawful is entitled to that constitutional protection. Id.

589. In reviewing state classifications based on citizenship, the Court treats alien-age as a suspect class and employs strict scrutiny. Sugarman v. Dougall, 413 U.S. 634 (1973) (New York statute limiting civil service jobs to citizens violates equal protection and supremacy clauses); Graham v. Richardson, 403 U.S. 365, 372 (1971) (Arizona and Pennsylvania statutes denying welfare benefits to resident aliens struck down as violative of the Equal Protection Clause). However, the Court has used the rational basis test when the classification relates to state governmental functions. Ambach v. Norwich, 441 U.S. 68, 75 (1979).

590. Matthews, 426 U.S. at 78 n.12. Recently, the Court has also rejected the contention that close relatives are a suspect or quasi-suspect class, noting that "they have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority or politically powerless." Lyng v. Castillo, 106 S. Ct. 2727, 2729 (1986). In upholding a five year residency requirement for participation by aliens in the federal medicare program, the Court in Matthews v. Diaz noted that Congress could decide that the strength of a claim to benefits increases over time as an alien's ties to the country grow stronger. Matthews, 426 U.S. at 80 ("The decision to share [the nation's] bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that as the alien's ties grow stronger, so does the strength of his claim to an equal share of that munificence."); see also Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("Once an alien gains admission to our country and begins to develop the ties that go with permanent residence, [her] constitutional status changes accordingly."). Congress might also presume that the generally weaker ties of alien residents to this country, when compared to those of citizens, justify a distinction in treatment for purposes of family unification. In general, aliens as a class may experience less hardship in relocating to the country in which the relatives reside than would most citizens. Additionally, Congress could decide that the easier access to family unification for citizens might serve as an inducement to aliens to become citizens.
Claims (2) and (3) raise more serious constitutional issues. If one assumes, as this essay has argued, that the line of privacy and family cases implicitly protects family unification, the substantive claim in (3) carries great weight. Similarly, the varying treatment depending upon national origin smacks of invidious classification. If resident aliens cannot be discriminated against in the job market because of national origin, direct state action with that result seems less defensible. Permanent resident aliens in like circumstances, but for irrelevant and fortuitous factors, should be treated in a like manner when important rights are at stake.

591. See supra notes 315-78.

592. As a practical matter, the immigration law affords aliens entering under the preference categories an opportunity to be accompanied by their existing spouses and children. 8 U.S.C. § 1153(a)(9) provides that:

A spouse or child as defined in section 1101(b)(1)(A), (B), (C), (D), or (E) of this title shall, if not otherwise entitled to immigrant status and the immediate issuance of a visa under paragraphs (1) through (7) of this subsection, be entitled to the same status, and the same order of consideration provided in subsection (b), if accompanying or following to join his spouse or parent. 8 U.S.C. § 1153(a)(9) (1982) (emphasis added).

The spouse or child who enters under this provision may do so without the necessity of separate visa petitions and is given the same order of consideration as the principal immigrant. 8 C.F.R. § 204.1(a)(4) (1987); 22 C.F.R. § 42.1 (1987). The family members may also remain behind temporarily and join the preference immigrant at any time after he acquires lawful residence status. See 22 C.F.R. § 42.1 (1987). The unification problem confronts spouses or children acquired after the grant of permanent residence to the principal alien. These relatives cannot be regarded as accompanying or following him and thus must await the availability of second preference visas. See 9 FOREIGN AFFAIRS MANUAL OF THE DEP’T OF STATE § 42.1 n.5, reprinted in 6 GARDEN & ROSENFIELD, supra note 153, at 32-355. Relatives who precede the preference immigrant to the United States also cannot be regarded as "accompanying or following to join" the principal immigrant. See Santiago v. INS, 526 F.2d 488, 490 (9th Cir. 1975), cert. denied, 425 U.S. 971 (1976).

593. An extreme example of this would be a law allowing family unification only for citizens of the white race. This would violate the fifth amendment both because of the invidiousness of the classification and because of the interference with the substantive due process liberty interest of non-white citizens and resident aliens in living a normal life. Rosberg, The Protection of Aliens from Discriminatory Treatment by the National Government, 1977 SUP. CT. REV. 275, 326.

Provisions favoring immigrants from particular nations present a more difficult problem. Since 1977, France essentially has limited entry of foreign workers to nationals of the member states of the European Economic Community. This arrangement's impact is felt most strongly by the Arab states, and indeed is not unconnected to sentiment against the growing Arab population in France. B. STASI, supra note 229, at 80. The U.S. system has also traditionally favored immigration from European nations. This special treatment is reflected in the Immigration Reform and Control Act of 1986, which reserves 5,000 special visas for each of the next two years for Western European nations because of Congress's impression that Europeans were being "squeezed out of the immigration mix." 132 CONG. REC. H10,598 (daily ed. Oct. 15, 1986) (statement of Rep. Donnelly in reference to Section 314 of the Immigration Reform and Control Act of 1986).

594. Francis v. INS, 532 F.2d 268 (2d Cir. 1976). The court in Francis invalidated on equal protection grounds a distinction which limited those who could petition for discretionary relief from deportation under 8 U.S.C. § 1182(c). While recognizing "the power of Congress to create different standards of admission and deportation for different groups of aliens," the court noted that "once these choices are made,
The Court’s longstanding justification for deference in this context is unpersuasive. It simply is not true that because “any policy toward aliens is [so] . . . intricately interwoven with . . . the conduct of foreign relations, the war power, and the maintenance of a republican form of government” that “[s]uch matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.” United States v. Robel provides a counterpoint to such reasoning. In Robel, the Court held that the government could not blanketly exclude members of the Communist Party from work in defense plants despite the national security interests involved. Clearly, the government has a much greater interest in controlling whom it allows to work in defense plants than in whom it allows to live in the United States. Contrasting the nature of the Congressional motives underlying the two forms of regulation highlights this conclusion.

In Robel, the government asserted a real and substantial interest. Congress prefaced the Subversive Activities Control Act of 1950 with findings that there existed an international Communist movement which by treachery, deceit, espionage, and sabotage sought to overthrow existing governments; that the movement operated in this country through Communist-action organizations under foreign domination and control and which sought to overthrow the Government by any necessary means, including force and violence; that the Communist movement in the United States was made up of thousands of adherents, rigidly disciplined, operating in secrecy, and employing espionage and sabotage tactics. In addition, Congress had found that many Party members were subject to or recognized the discipline of a controlling foreign government or organization. Despite these findings, the government did not try to prohibit or severely penalize membership in such organizations. Instead, the government narrowly tailored its prohibition, excluding Party members only from employment in “defense plants which Congress and the Secretary of Defense consider of critical importance to the security of the country.”

individuals within a particular group may not be subjected to disparate treatment or criteria wholly unrelated to any legitimate government interest.” Id. at 273.


597. Id. at 262.
599. Id.
600. Id. at 988.
601. Robel, 389 U.S. at 287.
602. Id. Outside the immigration context, the Court has found that individuals’ interest in freedom sometimes outweighs the Government’s security interests. See Aptheker v. Secretary of State, 378 U.S. 500, 508-09 (1964) (statute revoking American Communists’ passports struck down); see also NAACP v. Alabama, 377 U.S. 288, 307 (1964); Shelton v. Tucker, 364 U.S. 479, 488 (1960).
In contrast, the reasons behind the structuring of the current immigration law, while important, do not rise to the level asserted in Robel. The legislative history of the 1965 Act\(^{603}\) indicates that while Congress believed the "reunification of families . . . to be the foremost consideration," it also wanted an annual quota to limit immigration "within what is believed to be the present absorptive capacity of this country. . . ."\(^{604}\) The 1965 Act also reveals that Congress designed the annual ceilings for preference category immigrants from each nation "to prevent an unreasonable allocation of visa numbers to any one foreign state."\(^{605}\) The Act limits immigration from high demand countries to avoid an imbalance in the numbers of immigrants from a few nations. The major objectives of the numerical limitations, therefore, are the establishment of an overall annual limit to preference category immigration, the prevention of monopolization of immigration visas by a few countries, and promotion of the corresponding national interest in achieving cultural diversity.

Analysis similar to that in Robel should be used to determine the degree to which these interests justify interference with family unification rights. One entering such constitutional terrain confronts a myriad of tests, levels of scrutiny, requirements for tailoring, and standards for balancing of interests. What approach the Court takes to a particular question may depend on the right implicated, the nature of the government's interest, and the specific factual pattern. To systematically explore these factors, or to argue how the Court should employ them, is beyond the scope of this Article. A couple of observations, however, seem relevant. The Court should be willing either to balance interests or to look for some kind of tailoring.\(^ {606}\) Furthermore, the Court should not fear fine-tuning the immigration law. Judicial recognition of a constitutional right to family unification need not involve a drastic re-evaluation of immigration policy. The United States can achieve its immigration goals without infringing on the rights to family unification.

2. Issues Suggesting Congressional Action

a. Fundamental Unfairness of Present System

Regardless of its current or future constitutional status, the current immigration system is fundamentally unfair and inconsistent with the declared policy of Congress. Congress has recognized that family unification should be the primary goal of immigration policy.\(^ {607}\) Indeed,

---

\(^{603}\) See supra note 113.


\(^{605}\) Id.

\(^{606}\) Here again, Robel provides possible guidance: "We have ruled only that the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict." Robel, 389 U.S. at 268 n.20.

\(^{607}\) Id.; see supra note 604 and accompanying text.
much of current immigration law seems crafted to promote family unification.\textsuperscript{608} As shown in part III, however, the overall effect of current law is discriminatory.\textsuperscript{609} National origin has assumed critical importance for many immigrants, especially those from Mexico and the Philippines. Immediate family of resident aliens from countries of high demand must wait many years, while other parts of the preference system allow immediate entry for adult brothers and sisters of citizens.

b. Further Concerns: Impact of the 1986 Immigration Reform and Control Act

The 1986 Act potentially legalizes the status of millions of illegal aliens in the United States.\textsuperscript{610} The legalization provisions limit neither the number nor the national origin of potential applicants for amnesty. Some experts estimate that several million aliens may eventually obtain permanent resident status under the 1986 Act. These estimates increase to as many as seventy million when those who become legalized in turn petition for the entry of their alien relatives.\textsuperscript{611} It is unlikely, however, that all aliens eligible for legalization will come forward. One Congressman argued:

How many people who live in the world of the undocumented will be able to produce the documents? And what will these be? It is a cruel joke. It will produce a boom for those who prey on people who need help to prove their cases; it will produce anguish to those who know they qualify but can't prove it; and it will not end the twilight existence of those who do not want to take the risks that are implicit with applying at all.\textsuperscript{612}

The 1986 Act also creates injustice for those who have waited in their countries of origin for visa availability. As another Congressman expressed it:

\textsuperscript{608} For example, 80% of the preference quotas are set aside for various kinds of family entry, and immediate relatives of citizens are totally exempt from quotas or ceilings. \textit{See generally supra} notes 115-20 and accompanying text.
\textsuperscript{609} \textit{See supra} notes 128-34.
\textsuperscript{610} Under the Immigration Reform and Control Act of 1986, three distinct groups of aliens may obtain permanent resident status after a period of temporary resident status:

(1) Aliens who resided illegally in this country since before January 1, 1982 (after eighteen months temporary resident status);
(2) Aliens who worked at least 90 days in agriculture between May 1, 1985, and May 1, 1986 (after two years temporary resident status);
(3) Aliens who can prove they worked 90 days a year in U.S. agriculture for the last three years (after one year temporary resident status).

Husbands, wives, and unmarried children or immigrants from Mexico have been waiting for over 9 years to come to America... and with one fell swoop we are about to legalize all those who illegally crossed our borders, who have been illegally residing here and who have preempted the legal immigration of those who are trying to obey our laws.613

Conversely, the 1986 Act will allow many waiting for second preference category visas (immediate family of resident aliens) to finally obtain legal entry. As noted during the hearings on the 1986 Act, many alien relatives from Mexico already reside in the United States while awaiting the availability of a preference category visa:

[T]here is a large number in the backlog from Mexico—7 years, 6 years.... But you have to go to the consul in Mexico to see what happens when their number comes up... they come down from the United States to pick up their number because almost 85 percent of the people who come up under the legal immigration number system are in the United States. They come down to pick up their green card, their legal documents. That is the most fascinating statistic—85 percent are already here. When their number is called, they go back to get it and come back up into the United States.614

Although the percentage of such relatives who will have resided in the United States long enough to qualify for legalization would be much smaller than the eighty-five percent quoted as already present, the prospect remains that the 1986 Act will significantly reduce the numbers waiting for second preference category visas.

The 1986 Act, then, could affect family unification problems in several ways. By legalizing many clandestines in the United States, it may increase the pressure on our preference system as these regularized aliens begin petitioning to bring in their own families. To the degree, however, that many “waiting for entry” are already here as clandestines, the 1986 Act may significantly reduce the backlog. The Act ignores, however, the rights of permanent resident aliens to be joined by spouses and children, especially those who have obeyed U.S. law by waiting outside until a visa becomes available. These law-abiding family members will see others reaping the rewards denied to them.

3. Proposed Reforms of Quantitative Limits on Entry

This section outlines a proposal for simplifying the visa preference system and protecting the constitutional right of permanent resident aliens to family unification. The full text of these proposed amendments is attached as Appendix A.

A brief recap of the present system's mechanics will clarify my proposed amendments. Currently, the United States has a six-tiered preference system; four of these categories refer to relatives of either citizens

or resident aliens, while two refer to needed workers. The ceiling for preference visas is 270,000.

The preference system exempts certain "immediate relatives" of citizens. The children, spouses, and parents of U.S. citizens are admitted without regard to any ceiling and without impinging on the general preference system. The exemption means that in many years a number substantially greater than 270,000 enter. In 1984, for instance, nearly 400,000 relatives entered.

My proposal consists of several parts. First, and most crucially, I suggest expanding the definition of "immediate relatives" in 8 U.S.C. § 1151(b) to include the spouses and minor children under the age of 18 of permanent resident aliens. The amended text would read as follows (additions to be capitalized):

(b) The "immediate relatives" referred to in subsection (a) of this section shall mean [(1)] the children, spouses, and parents of a citizen of the United States: Provided, that in the case of parents, such citizen must be at least twenty-one years of age, AND (2) THE CHILDREN UNDER 18 YEARS OF AGE AND SPOUSES OF AN ALIEN LAWFULLY ADMITTED FOR PERMANENT RESIDENCE. The immediate relatives specified in this subsection who are otherwise qualified for admission as immigrants shall be admitted as such, without regard to the numerical limitations in this Chapter.

Some distinction, therefore, would remain between citizens and resident aliens. Whereas the spouses, children, and parents of citizens would be exempt from numerical restrictions, only the spouse and children under the age of 18 of resident aliens would be exempt.

My second major proposal is to include the expanded definition of immediate relatives in the overall quota ceiling. Instead of 270,000 preference visas, the new system would set a ceiling of 400,000, or some other figure more representative of the number of relatives actually entering the United States. The number of preference visas allocated in one year would be 400,000, minus the number of immediate relative visas issued the preceding year. For example, if more than 400,000 immediate relatives entered in one year, no preference visas would be available the following year. This system gives priority to the imme-

615. See supra note 120 and accompanying text.
616. See text accompanying note 117.
617. See supra note 29
618. See supra note 115
619. See id. Of the 544,000 immigrants who obtained permanent resident status in 1984, 399,000, or 73% entered through family ties, 17% (92,000) were refugees and 9% (50,000) entered as skilled or unskilled laborers. 1984 Statistical Yearbook of the INS 11-14; see supra note 29 and the accompanying table for a comparison of recent immigration by categories in France and in the United States.
621. See S. Rep. No. 62, 98th Cong., 1st Sess. 16 (1983), which similarly suggested reducing the number of visas available for the preference categories by the number of visas issued to "immediate relatives" during the prior year. The reason for using a carry-over method from one year to the next is simply for reasons of accounting.
diate family of resident aliens over the more distant relatives of citizens now accorded preference. At the same time, it would maintain the total number of family immigrants entering in any one year at approximately current levels, thus allowing firmer administrative control over the total number of immigrants.

A similar “deduction” system would govern the annual 20,000 ceiling for preference visas allocated to each country. The annual ceiling for preference visas would remain at 20,000 for each country but would also be offset by the number of visas issued to “immediate relatives” admitted from that country in the prior year. Thus, if more than 20,000 immediate relatives entered from a particular country, no preference visas would be allocated the following year; that year the only entrants would be immediate family. This system would maintain cultural diversity among new entrants and would refrain from placing artificial limits on the number of immediate family members who can enter in any one year from any one country. It would, therefore, eliminate the injustice done to immediate family members of resident aliens from Mexico and the Philippines.

This change would require amending 8 U.S.C. § 1152(a) as follows (additions capitalized, deletions denoted by brackets):

(a) No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence, except as specifically provided in sections 1101(a)(27), 1151(b), and 1153 of this title, AND SECTION XXX (NEW CATEGORIES FOR WORKERS): Provided, that the total number of immigrant visas made available to natives of any single foreign state under paragraphs (1) through [(7) of section 1153(a) of this title shall not exceed 20,000 in any fiscal year.](4) OF SECTION 1153(a) SHALL BE DETERMINED BY SUBTRACTING FROM 20,000 THE NUMBER OF “IMMEDIATE RELATIVE” VISAS ISSUED TO NATIVES OF THE SAME FOREIGN STATE DURING THE PREVIOUS FISCAL YEAR.

Finally, I suggest revising the preference system. Because workers should have a separate preference system, I would first remove the worker categories from the current six-tier system.

In the new, four-tier preference system, the first preference category, adult unmarried sons or daughters of citizens, would remain unchanged. The second category would include only those unmarried

---

Until one year is over, the government will not know how many visas of different categories and from different countries have been used.

622. Id.
623. Id.
625. For a description of the preference system, see supra notes 115-31 and accompanying text.
sons and daughters of permanent resident aliens who do not qualify for exempt status under the proposed amendments, i.e., those 18 years of age or older. My proposal eliminates the current third preference category for workers, while leaving unchanged the fourth preference category for married sons and daughters of citizens. The fifth preference category would be reformed. This category, for brothers and sisters of citizens, has the greatest demand for visas. I would narrow this category to include only the unmarried brothers and sisters of adult U.S. citizens. The backlog of active petitions for this category exceeded 700,000 visas in 1983. Over half of these petitions involved the family members of married brothers and sisters of citizens who had already established families of their own. Narrowing this category to unmarried brothers and sisters, therefore, would considerably reduce the backlog problem.

Under my proposal, Congress could adjust the percentage of visas available to each preference category. For the sake of simplicity, the amendments propose that 25% of visas be reserved for each category. The amended system for the allocation of preference visas would be as follows:

<table>
<thead>
<tr>
<th>Preference Category</th>
<th>Visa Allocations</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Unmarried sons and daughters (over 21) of United States citizens.</td>
<td>25% of available visas plus any unused visas from the 4th preference category.</td>
</tr>
<tr>
<td>2. Unmarried sons (over 18) and unmarried daughters (over 18) of permanent resident aliens.</td>
<td>25% of available visas plus any unused visas from the 1st preference category.</td>
</tr>
<tr>
<td>3. Married sons and daughters of United States citizens.</td>
<td>25% of available visas plus any unused visas from the 1st and 2nd preference categories.</td>
</tr>
<tr>
<td>4. Unmarried brothers and sisters of adult United States citizens and married brothers and sisters of United States citizens whose visa petitions were filed before the date of enactment.</td>
<td>25% of available visas plus any unused visas from the 1st, 2nd or 3rd preference categories.</td>
</tr>
</tbody>
</table>

As indicated, the system recycles unused visas in each preference category until all are consumed.

B. Qualitative Limitations on Family Unification

This section focuses upon the manner in which the recognition of a constitutional right to family unification would modify the qualitative grounds for exclusion or expulsion. The facial validity of the provisions

---

627. Id. at 43.
for exclusion and expulsion is assumed. In the application of these provisions to individual cases, however, this section proposes a balance between the national interest in excluding or expelling an immediate family member and the interests of individuals in remaining together as a family unit in this country. The balancing process would be affected by whether the interested parties in this country are resident aliens or citizens and by whether the case involves exclusion or expulsion. Whether hardship or duration of residency should be a factor in the balancing process is also discussed. As a model for comparison, this section examines the French approach to protection of family unification.

1. French Protection of Immediate Family Members from Exclusion and Expulsion

a. Exclusion

The 1976 decret frames the basic conditions governing entry of immediate family members. The decret's two most significant conditions are (1) that entering aliens present no danger to ordre public, and (2) that their relative(s) in France provide adequate housing and sufficient resources for their support.

The ordre public standard encompasses all activity possibly contrary to the welfare, safety, or security of the nation. The standard, however, differs from the U.S. approach; for example, the ordre public standard applies to few forms of social deviation. Neither homosexuality nor polygamy are considered sufficiently disruptive to justify exclusion.

The adequate lodging or sufficient resources standard attempts to provide “guarantees sufficient for the orderly insertion of foreign families into the social environment.” These “guarantees” include various detailed restrictions, such as the minimum floor area per person in

---

628. But see Note, Constitutional Limits on the Power to Exclude Aliens, 82 COLUM. L. REV. 957, 990 (1982), suggesting that the provision of section 212(28) excluding aliens who advocate or teach the views of, or are affiliated with, either the Communist Party or an organization opposed to organized government lacks the necessary correlation between classification and purpose and is unconstitutionally overbroad under the First Amendment. See also Silvers, The Exclusion and Expulsion of Homosexual Aliens, 15 COLUM. HUM. RTS. L. REV. 295, 322 (1984).


630. See supra text accompanying notes 171-73.

631. G.I.S.T.I., supra note 199, at 30; see also supra note 418 and accompanying text.

632. Decret No. 84-1080 of Dec. 4, 1984, 1984 J.O. 3733, amending Decret No. 76-38 of Apr. 29, 1976, 1976 J.O. 2628, requires that both the housing and resources conditions be approved prior to entry of family members. This implies prosecution and expulsion of those family members who enter without authorization or who attempt to adjust their status after entry as a tourist or otherwise. In addition to the lodging and resources requirements, entering relatives must not present a danger to ordre public and the relative in France must have resided there at least one year.
the family’s dwelling unit.\textsuperscript{633} The resource requirements establish a double standard for resident aliens and citizens. These requirements are not necessary for relatives of citizens who otherwise present no danger to \textit{ordre public}.\textsuperscript{634}

The actual impact of the French exclusion provisions on family unification is difficult to assess. Although the adequate housing and resource standard may protect the country from the adverse economic impact of family entrants who might require state assistance, housing market conditions may delay entry of family members. The right to family unification becomes hollow for those not able to meet the housing and resource standards; the French right to family unification can be enjoyed only by those who can afford it.

b. Expulsion

As discussed in part IV, general grounds for expulsion in France have shifted with changes in the political makeup of the government.\textsuperscript{635} The 1945 Ordonnance predicated expulsion upon a finding that the alien’s presence in France presented a danger to \textit{ordre public}.\textsuperscript{636} From 1981 to 1986, the socialist government narrowed this ground, requiring that the danger to \textit{ordre public} be “grave” and that the alien facing expulsion have been convicted of a serious criminal offense.\textsuperscript{637}

The 1986 amendments returned in part to the less stringent pre-1981 \textit{ordre public} standard. For relatives of resident aliens, it abolished the requirement of a criminal conviction, and restricted the exemption

\textsuperscript{633} Circular No. 7-76 of July 9, 1976. If a French family lives in housing which is judged “inadequate,” it may lose the benefits of allocations for housing costs; for foreign families, however, the sanction is the loss of the possibility to live together as a family. See G.I.S.T.I., \textit{L’IMMIGRATION FAMILIALE DANS L’IMPASSE} 10 (March 1985).

\textsuperscript{634} Some French cities have applied the “adequate lodging” provision to limit the proportion of foreign families who might live in any one apartment complex or area of the city. The limitation introduces the notion of a threshold of tolerance for the number of immigrants in any one locality. The administrative tribunal for Paris, however, determined in a 1981 decision that “the proportion of foreigners in a housing complex . . . is not one of the considerations which may be legally applied to foreign workers who wish to move in with their families.” Judgment of Dec. 16, 1981, Tribunal Adm. of Paris, No. 10471/P, Mme Dames c. Ministre de l’Interieur, \textit{reprinted in} G.I.S.T.I., \textit{LA NOUVEAU DOSSIER DE L’IMMIGRATION FAMILIALE}, at Annexe VII (1984). The tribunal held instead that the character of the housing must be evaluated in regard to the needs of the family and not as a function of the necessities of \textit{ordre public}. Lower administrative courts have held that the family should determine adequacy so long as minimal conditions of comfort are met. See Decision of Tribunal Admin. de Marseille, Rezqui c. Ministre de l’Interieur, No. 81/3159Y, \textit{reprinted in} G.I.S.T.I., \textit{LA NOUVEAU DOSSIER DE L’IMMIGRATION FAMILIALE}, at Annexe X (1984). Beyond that, however, the Conseil d’Etat has upheld the validity of these provisions for exclusion of immediate family members. In \textit{GISTI}, for example, the Conseil stated that the government must reconcile the right to lead a normal family life “with the necessities of \textit{ordre public} and the social protection of foreigners and their families.” Groupe d’Information et de Soutien des Travailleurs Immigres et Antres, Conseil d’Etat, 1978 Lebon 493; see also M. LONG, supra note 4, at 587.

\textsuperscript{635} See supra notes 226-45, 284-302.

\textsuperscript{636} See supra note 164.

\textsuperscript{637} See supra note 236.
to spouses who have an ongoing relationship and to parents who meet parental responsibilities. Minors are exempt from expulsion unless their parents are expelled and no other guardian is available in France to provide for them.

The Conseil d'Etat has held on numerous occasions that when *ordre public* is violated, family ties do not exempt an immediate relative of either a citizen or a resident alien from exclusion. For close relatives of citizens, however, French law establishes heightened protection from expulsion. Alien spouses of French citizens may, after one year of communal life, be expelled only in cases of extreme emergency where continued presence in France would present a "particularly grave threat to *ordre public."" Alien parents of French children are afforded the same protection from expulsion.

Two situations elude the citizen/resident alien distinction. Spouses of French citizens who have been married for less than one year receive the same level of protection as spouses of resident aliens, namely, the general *ordre public* standard. Conversely, if an alien is the father or mother of a French child in France, the parent becomes entitled to the heightened protection from expulsion afforded immediate relatives of French citizens.

The French *ordre public* standard strikes a sensible balance between the governmental concern for protection of national interests and the need to protect the right of family unification. An immediate family member who poses no threat to national welfare, safety or security should not be excluded. If, after entry, the conduct of a family member does in fact present a danger to the nation, the government may then resort to its expulsion powers.

Family members justifiably receive greater protection from expulsion than from exclusion. The resident alien facing expulsion is already established in the country. In terms of family unification, exclusion maintains the status quo by prolonging a situation of separation. Expul-

---

638. See supra note 301.
642. Id. art. 25. "The foreign father or mother of a French child residing in France" is exempt from expulsion "on condition that he or she exercises at least partial parental responsibility for the child or provides adequately for the support of the child." Id.
643. Id.
644. A child born in France to alien parents becomes a citizen automatically at age 18 if he has lived for the previous five years in France. See article 44 of the French Code of Nationality. Technically, then, he is not "French," at least not a French citizen, until he reaches age 18 and meets the five-year condition. If one of the parents is French, then the child is French at birth if born in France. Article 17 of the French Code of Nationality; see also supra notes 285, 301 and accompanying text.
sion, in contrast, disrupts an existing family unit. As the U.S. Supreme Court has noted, deportation can be "the equivalent of banishment or exile." Since expulsion affects normal family life more directly than does exclusion, the government's burden to justify expelling an alien family member should be greater than when excluding a family member.

The French distinction between the protections afforded citizens and those afforded resident aliens is also justifiable. Citizens have stronger ties to the country than do resident aliens. More importantly, citizens may never be expelled, but expelling a citizen's family member may indirectly act to expel the citizen. The citizen's only available avenue for maintaining the integrity of the family unit would be to accompany the expelled member.

2. American Protections of Immediate Family Members From Exclusion and Expulsion

a. Exclusion

Although U.S. law provides numerous grounds for exclusion, it also provides for waiver of many of these grounds for close relatives. One of the waiver provisions resorts to an equivalent of the ordre public standard. Under this provision, aliens who are convicted criminals or prostitutes are exempt from exclusion when their admission to join immediate family members would not be "contrary to the national welfare, safety, or security of the United States." This waiver provision indicates that the exclusion provisions bar a much broader category of aliens than those whose presence would endanger the national welfare, safety, or security. In contrast, the French "danger to ordre public" standard is tailored to afford reasonable protection from expulsion. In France, therefore, no special waiver provisions for family unification are necessary.

In order to obtain waiver from exclusion, the alien must also demonstrate that his exclusion would "result in extreme hardship" to a relative in the United States. Although the hardship consideration in U.S. law appears to be a humanitarian provision, a comparison to the

647. See supra notes 136-39 and accompanying text.
648. See supra note 142 and accompanying text.
649. 8 U.S.C. § 1182(h) (1982) provides a waiver from exclusion for aliens entering to join certain close relatives in the United States when:
   (A) the alien's exclusion would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, or son or daughters of such alien, and
   (B) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States. . . .

Id.
650. Id.
651. Id.
French practice shows otherwise. French law presumes hardship; the critical factor is the extent of danger to the national welfare or security. Essentially, no amount of hardship to family members could outweigh the necessity for expulsion based on "grave danger to ordre public." In contrast, hardship is not presumed in the United States; rather, the alien has the burden of demonstrating it.

The French policy is demonstrably superior. The government should not assess the quality of the family's ongoing emotional ties or the value of the economic benefits family members provide. To determine the degree of hardship that would be caused by separation, however, U.S. law currently requires such evaluation of private relationships. If no actual danger to the national health, safety or welfare exists, such evaluations should not be made. Individual and cultural differences make such determinations arbitrary. These determinations also raise serious questions concerning the right to marital and familial privacy. So long as the family relationship remains intact, presuming hardship is the preferable approach.

b. Expulsion

As with exclusion, immediate family members receive considerably less protection in the United States from expulsion than they do in France.

---

The Committee was required to strike a delicate balance between the government's need to effectively enforce our laws and protect an individual's right to privacy. This bill provides a balanced approach by requiring an objective and unobtrusive test. In most cases the couples should be able to satisfy the Attorney General through documentary evidence. When an interview with an officer of the Immigration and Naturalization Service is necessary, questions should not probe into the intimate personal habits of the applicants. Id. (commenting on the proposed Marriage Fraud Amendments of S.2270, 99th Cong., 2d Sess.). Nevertheless, the exemption from expulsion would depend upon the existence of an actual family unit. Id.

653. See, e.g., Chan v. Bell, 464 F. Supp. 125, 130 (D.D.C. 1978) ("INS has no expertise in the field of predicting the stability and growth potential of marriages—if indeed anyone has—and it surely has no business operating in that field.").

654. As originally written, article 25 of the French immigration law seemed to protect relatives from expulsion even in situations in which the actual family ties were very weak or nonexistent. Article 25, for example, exempted from expulsion "an alien who is the father or the mother of one or more French children who are residing in France, so long as he or she has not been definitively deprived of parental authority . . . ." Ordonnance No. 45-2658 of Nov. 2, 1945, art. 25, 1945 J.O. 7225, 7226.

In a 1986 decision, however, the Conseil d'Etat interpreted this provision as requiring the parent to have fulfilled some parental responsibilities. Although the decision left unsettled the extent to which the administration may probe the relationship's quality, it made clear that a father who had "not made an effort to obtain joint custody and who had lived apart from the mother who had exercised responsibility for the child" could not rely upon the statutory exemption of parents from expulsion. Ministre de l'Interieur c. Azzouzi, Jan. 24, 1986, Conseil d'Etat (LEXIS, French Public library, Consel file). In 1986 the Parliament amended the immigration law to limit exemption from expulsion to parents who demonstrate that they "exercise at least partial responsibility for the child or provide adequately for the support of the child." See supra note 302 and accompanying text.
As is also the case with exclusion, the United States treats expulsion of immigrant family members of citizens and resident aliens in the same manner. Exemption from expulsion requires both a showing of continuous residence of seven to ten years and "hardship" to the immediate relative in the United States. The latter condition requires a case-by-case analysis of the hardship that would result from a family member’s expulsion.

The French standard, in contrast, avoids a determination of hardship to family members. In France, the sole factor determining the need for excluding or expelling family members is the gravity of the threat to the nation’s interests. The U.S. approach, by focusing upon the hardship to the family members, ignores the seriousness of the threat to national interests posed by such an alien.

For both nations, an alien who enters illegally and subsequently establishes family ties poses a unique problem. In France, when an illegal alien establishes family ties to a French citizen, either through marriage or through birth of a French child in France, the law favors protecting the alien from expulsion except when the danger to ordre public amounts to an emergency. In the United States, the law provides relief from expulsion for illegal entry only if the alien has been present for seven years and can prove "hardship" to his resident, immediate family members. Moreover, U.S. courts have uniformly rejected arguments that expelling an alien spouse or an alien parent is unconstitutional as a de facto deportation of the citizen spouse or the citizen child. Again, the United States ignores the question of whether the deportee presents any threat as an individual to the national security,

---

655. See 8 U.S.C. § 1251(a) (1982); see also supra note 140 and accompanying text.
656. See 8 U.S.C. § 1254 (1982); see also supra note 146 and accompanying text.
657. See supra notes 172, 557.
660. See, e.g., Keh Tong Chen v. Attorney General, 546 F. Supp. 1060 (D.D.C. 1982), stating:

Courts have upheld the constitutionality of INS decisions which result in “de facto deportation” of citizens on the grounds that “de facto deportation” is not a necessary result of government action, but rather an indirect consequence of the citizen’s choice between alternatives. It follows that where the citizen does not have available two alternatives recognized by the law, the citizen’s selection of the only available course of action is directly attributed to government action.

Id. at 1067.

As one court has argued: “In view of the relative ease with which aliens can enter this country and then delay their departure long enough to produce citizen children, [allowing them to remain] would do away with the limitations imposed by Congress on immigration.” Lee v. INS, 550 F.2d 554, 556 (9th Cir. 1977); see also Hintopoulos v. Shaughnessy, 353 U.S. 72 (1957); Banks v. INS, 594 F.2d 760 (9th Cir. 1979); Aalund v. Marshall, 461 F.2d 710 (5th Cir. 1972); Perdido v. INS, 420 F.2d 1179 (5th Cir. 1969).
safety, or general welfare, instead basing its policy solely on effective enforcement of the immigration law. Even this rationale, however, has lost much of its force with the 1986 Reform and Control Act's legalization of the status of many illegal aliens.\(^6\)

The French policy shows more respect for family unification rights than the current U.S. approach. The Attorney General's authority to suspend deportation after a showing of seven years' residency in the United States and extreme hardship is far too little protection. The cutoff of consideration of those with less than seven years residency precludes an individualized determination of the necessity for expulsion in these cases. When fundamental rights are at stake, however, administrative efficiency does not justify denying deportees and their families constitutional protections.

3. Exclusion and Expulsion: A Proposal for Reform

Barring recognition of the constitutional dimension of family unification rights by the Supreme Court, Congress should step in to remedy the current deficiencies. It should limit exclusion or expulsion to situations in which the entry or continued presence of the alien presents an actual danger to the national welfare, safety, or security. This standard, already contained in the immigration law,\(^6\) should constitute the minimum requirement for exclusion or expulsion of family members.

For deportation of alien relatives, a stricter standard should be required. In such instances, the state interest in deportation must be carefully weighed against both the citizen's and the resident alien's right to a normal family life. In France, such expulsion is permitted only in situations of "absolute emergency... constituting an imperative necessity for the security of the state or for the public safety."\(^6\) United States law should be amended to exempt immediate relatives of both citizens and resident aliens from deportation in all but the most extreme

---

Numerous decisions have upheld the deportation of alien parents whose children were born in and resided in the United States. *See, e.g.*, Lee, *supra*; Rubio de Cachu *v.* INS, 568 F.2d 625 (9th Cir. 1977) (noting that "an alien illegally present in the United States cannot gain a favored status merely by the birth of his citizen child").

The Immigration and Naturalization Service recently advised a Salvadoran woman living in New York City that deportation proceedings would be initiated against her if she did not leave the country by the next day. Departure would mean separating from her husband and her two-year-old son (both U.S. citizens), breaking ties established during five years of residence in New York City, and returning to an uncertain fate in El Salvador. The INS sought her departure because she entered illegally in the 1970s. *N.Y. Times*, Jan. 27, 1985, at A18, col. 4.

661. *See supra* note 610.
662. *See supra* note 650 and accompanying text.
663. Ordonnance No. 45-2658 of Nov. 2, 1945, art. 26, 1945 J.O. 7225, 7226, as amended by Law No. 81-975 of Oct. 29, 1981, art. 5, 1981 J.O. 2970, 2971. In 1986, the article 26 standard for emergency expulsion of the relatives normally exempted by article 25 was relaxed somewhat to provide for expulsion when "the presence of the foreigner in France constitutes a danger to ordre public of an extremely serious nature." Minors under 18 years of age, however, remain totally exempt from expulsion. Law No. 86-1025 of Sept. 9, 1986, art. 10, 1986 J.O. 11035.
situations. At least in expulsion, the United States should follow the French policy, exempting from expulsion close relatives unless they present a grave and immediate danger to the national welfare, safety, or security. A stricter standard is necessary to protect citizens from de facto deportation and resident aliens from unwarranted deportation.

VIII. Conclusion

This Article proposes that U.S. immigration law recognize a constitutional right to family unification for members of the nuclear family.

Although the right of a country to decide which and how many people to admit is indisputable, in terms of family reunion, immigration policy must not be determined only by economic and political considerations. The decisive factor in all policy involving family reunion ought to be a humanitarian one, that is, the protection of the . . . right to a normal family life.664

A state choosing to admit aliens into its territory must afford them full constitutional protection, including protection of their right to live with their nuclear family. Implementing this right to family unification requires removal of the numerical limitations which impede the entry of spouses and minor children of permanent resident aliens. It also requires a case-by-case analysis of the need for excluding or expelling an alien who has ties to legally resident family members.

Although Congress gradually has eliminated discriminatory provisions based on race, sex, social class, and legitimacy from U.S. immigration law, national origin has become a critical factor in determining the entry of immediate family members. In the absence of compelling circumstances, however, national origin is an illegitimate basis for denying or excessively delaying family unification. While the United States Supreme Court has allowed the legislative and executive branches nearly unfettered discretion in controlling immigration, its decisions protecting the family from governmental intrusions provide the basis for recognizing a constitutional right to family unification. That right, if explicitly recognized, would require a more exacting standard of judicial review than is currently applied to immigration law. Such a right would also protect the rights of resident aliens as well as citizens.

French immigration law recognizes that both citizens and resident aliens possess a constitutional right to family unification. Any limitation of that right must be justified by important state interests such as the preservation of national security. French recognition of a constitutional right to family unification, however, has been largely symbolic. France did not explicitly recognize the constitutional nature of family unification until 1978,665 four years after foreclosing the entry of worker immi-


665. See supra notes 553-54 and accompanying text.
grants from non-EEC nations. As a result, the number of family entrants has actually declined over the last several years. Moreover, except for the short period in 1975 when France totally barred family unification, the current immigration regulations have not significantly interfered with the entry of family members. Constitutional recognition of the right has not significantly affected existing regulations except for invalidating the "no-work" condition in the GISTI decision. Thus, although constitutionalizing the right to family unification in France secured the right by removing family unification from arbitrary decision-making by administrative officials, the practical impact has been limited.

Recognizing a constitutional right to family unification would have a far broader impact in the United States. The numbers of entrants would considerably increase for several reasons. First, 280,000 aliens in the second preference category now await visas to join a spouse, parent, or minor child in the United States. Not only would their entry be accelerated, but spouses and minor children whose names are not currently on the waiting list would probably request entry. Secondly, aliens who become permanent residents through the amnesty process of the Immigration Reform and Control Act of 1986 would also be entitled to be joined by their spouses and unmarried minor children after the eighteen-month period of temporary residence. Finally, since the U.S. preference system allows citizens to petition for the entry of a wide range of relatives, each entry of a resident alien for family unification purposes could, when these resident aliens later obtain citizenship, lead to multiple petitions for entry of parents, adult brothers and sisters, and their family members. For these reasons, the recognition of a constitutional right to family unification in the United States, especially following the 1986 amnesty provision, would significantly increase the demand for family unification.

The amnesty provisions themselves may result in such an increased demand for preference visas that the system will function even less effectively and equitably than it does today. If so, Congress finally may be compelled to reexamine the current system of allocating visas. In that event, Congress should give priority to elevating protection of permanent resident aliens' family unification rights. To accommodate this goal, and to avoid the increase in family members' demands for entry of other family members, Congress should narrow the range of relatives of citizens who are now entitled to preference. Limiting the entry of citizens' brothers and sisters to those who are unmarried would significantly reduce demand under that preference category. Here, as in France, the scope of relatives who qualify for entry might eventually be reduced to those within the constitutionally-protected family—spouses, minor children, and those who are functionally members of the nuclear family unit.

667. See generally supra note 133 and accompanying text.
IX. Appendix

Proposed Family Unification Amendments (With additions to the legislation shown by CAPITALS and deletions shown by brackets). Chapter 1—SELECTION SYSTEM NUMERICAL LIMITATIONS

8 U.S.C. 1151(a) Exclusive of special immigrants defined in section 101(a)(27), immediate relatives specified in subsection (b) of this section, [and] aliens who are admitted or granted asylum under section 1157 or 1158, ALIENS WHOSE STATUS IS ADJUSTED TO THAT OF LAWFUL PERMANENT RESIDENT UNDER THE LEGALIZATION PROVISIONS OF SECTION 245, [1986 amendments], AND INDEPENDENT IMMIGRANTS SPECIFIED IN SECTION XXX [NEW CATEGORIES FOR WORKERS], the number of aliens born in any foreign state or dependent area who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence, shall [not in any of the first three quarters of any fiscal year exceed a total of seventy-two-thousand and shall not in any fiscal year exceed a total of two-hundred-and-seventy-thousand] BE LIMITED TO FAMILY UNIFICATION IMMIGRANTS AS DEFINED IN SECTION 1153(a) IN A NUMBER NOT TO EXCEED IN ANY FISCAL YEAR THE NUMBER EQUAL TO 400,000 REDUCED BY THE NUMBER OF IMMEDIATE RELATIVES AS DEFINED IN SUBSECTION (b) OF THIS SECTION WHO IN THE PREVIOUS FISCAL YEAR WERE ISSUED AN IMMIGRANT VISA OR WHO OTHERWISE ACQUIRED THE STATUS OF LAWFUL PERMANENT RESIDENT.

(b) The "immediate relatives" referred to in subsection (a) of this section shall mean (1) the children, spouses, and parents of a citizen of the United States: Provided, that in the case of parents, such citizen must be at least twenty-one years of age, AND (2) THE CHILDREN UNDER 18 YEARS OF AGE AND SPOUSES OF AN ALIEN LAWFULLY ADMITTED FOR PERMANENT RESIDENCE. The immediate relatives specified in this subsection who are otherwise qualified for admission as immigrants shall be admitted as such, without regard to the numerical limitations in this Chapter.

8 U.S.C. 1152(a) No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence, except as specifically provided in sections 1101(a)(27), 1151(b), and 1153 of this title, AND SECTION XXX [NEW CATEGORIES FOR WORKERS]: Provided, That the total number of immigrant visas made available to natives of any single foreign state under paragraphs (1) through (7 of section 1153(a) shall not exceed 20,000 in any fiscal year.] (4) OF SECTION 203(a) SHALL BE DETERMINED BY SUBTRACTING FROM 20,000 THE NUMBER OF "IMMEDIATE RELATIVE" VISAS ISSUED TO NATIVES OF THE SAME FOREIGN STATE DURING THE PREVIOUS FISCAL YEAR.

(b)-(d) same.
1988  Family Unification

(e) delete.

8 U.S.C. 1153(a) Aliens who are subject to the numerical limitations in section 1151(a) of this title shall be allotted visas as follows:

(1) Visas shall be first made available, in a number not to exceed [20] 25 per centum of the number specified in section 1151(a) of this title, PLUS ANY VISAS NOT REQUIRED FOR THE CLASS SPECIFIED IN PARAGRAPH (4) OF THIS SUBSECTION, to qualified immigrants who are the unmarried sons or daughters of citizens of the United States.

(2) Visas shall next be made available, in a number not to exceed [26] 25 per centum of the number specified in section 1151(a) of this title, plus any visas not required for the classes specified in paragraph (1) of this subsection, to qualified immigrants who are [the spouses,] the unmarried sons 18 YEARS OF AGE OR OVER or the unmarried daughters 18 YEARS OF AGE OR OVER of an alien lawfully admitted for permanent residence.

((3)) delete (provision for members of the professions transferred)

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

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

(i) AS OF THE DATE OF ENACTMENT OF THIS ACT HAD RECEIVED APPROVAL OF A PETITION MADE ON THEIR BEHALF FOR PREFERENCE STATUS BY REASON OF THE RELATIONSHIP DESCRIBED IN PARAGRAPH (5) OF THIS SECTION AS IN EFFECT ON THE DAY BEFORE SUCH DATE, AND

(ii) CONTINUE TO QUALIFY UNDER THE TERMS OF THIS ACT AS IN EFFECT ON THE DAY BEFORE SUCH DATE.

((6)) delete. (provisions for skilled and unskilled laborers)

((7)) delete. (provisions for issuance of unused visas to nonpreference immigrants)

((8)) (5) A spouse or child as defined in section 101(b)(1) (A), (B), (C), (D), or (E) of this title, shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under paragraphs (1) through ((7)) (4) of this subsection, be entitled to the same status, and the same order of consideration provided in subsection (b) of this section, if accompanying, or following to join, his spouse or parent.
(b) In considering applications for immigrant visas under subsection (a) of this section consideration shall be given to applicants in the order in which the classes of which they are members are listed in subsection (a) of this section.

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

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

(e) No change.