

Petitioning on Behalf of an Alien Spouse: Due Process Under the Immigration Laws

On its face, the due process clause of the fourteenth amendment does not limit its application to United States citizens. The amendment provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States; nor shall any State deprive *any person* of life, liberty, or property, without due process of law."¹ The contrasting use of "citizens" in the privileges and immunities clause and "any person" in the due process clause suggests that the protections of the latter apply to any person over whom a state exercises its power, regardless of his citizenship. The text of the fifth amendment, analogously restricting the federal government's power,² is also consistent with such an interpretation.

The Supreme Court, however, has not approved such an expansive reading of the due process clause. Aliens seeking to immigrate to this country have regularly been denied any claim to due process with respect to their applications. Though the Court at one time seemed on the verge of recognizing that even excludable aliens possess due process rights in the context of immigration proceedings,³ the opposite view has prevailed. In the 1950 case *United States ex rel. Knauff v. Shaughnessy*⁴ the Court stated bluntly that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."⁵

Despite abundant criticism,⁶ the Court has, since *Knauff*, consistently refused even to weigh the interests of nonresident aliens against

1. U.S. CONST. amend. XIV, § 1 (emphasis added).

2. "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law." *Id.* amend. V.

3. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1389-91 & n.85 (1953); Note, *Constitutional Limits on the Power to Exclude Aliens*, 82 COLUM. L. REV. 957, 962 n.33 (1982); see *Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329, 335-36 (1932); *The Japanese Immigrant Case (Yamataya v. Fisher)*, 189 U.S. 86, 100 (1903).

4. 338 U.S. 537 (1950).

5. *Id.* at 544; see also *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (quoting this language).

6. See, e.g., Hart, *supra* note 3, at 1392 (criticizing the *Knauff* due process language as "patently preposterous"); Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 20-21 (1984) (rule encourages and legitimates "deplorable governmental conduct toward both aliens and American citizens"); Note, *supra* note 3, at 962-63, 997 ("harsh and frequently criticized" rule which has never been repudiated); *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1322-24 (1983) (characterizing *Knauff* and *Mezei* decisions as

those of the government.⁷ Immigration procedure is considered within the plenary power of Congress, subject only to the most limited judicial review and shielded from many of the constitutional restraints now taken for granted in other areas of the law.⁸ With the Court's acquiescence, Congress has frequently imposed conditions upon aliens seeking entry to the United States that would not withstand constitutional scrutiny if applied to citizens.⁹

An unusual challenge to this extraordinary judicial deference is posed when a United States citizen marries an alien and wishes to help her acquire residence in this country. Similar considerations apply when a resident alien petitions on behalf of a nonresident alien spouse, as a resident alien has acknowledged due process rights.¹⁰ When the immigration authorities decide on such a petition, due process considerations arise that are foreclosed when an alien alone seeks a benefit. The situation no longer involves only an "outsider's" claims upon the national community, but also those of a citizen or resident member of the community.

This Comment addresses some of the considerations that arise when a married couple in which one partner is an alien and the other is a citizen or resident encounters the Immigration and Naturalization Service's¹¹ procedures for processing petitions for adjustment of the alien's status to permanent residence. These procedures involve practices that potentially violate the couple's due process rights, but which are difficult to attack both because of the courts' reluctance to recognize the rights of nonresident aliens and because of their extreme deference to government authority in immigration matters. Part I examines the INS's procedures for adjudicating such petitions and its techniques for detecting "sham marriages." Part II elaborates on the rights potentially infringed by such practices, particularly the right of marital privacy. Part III addresses the ability of the couple to assert such rights in the face of the courts' deference to government authority in this area, asserting that the rationales advanced for the general denial of due process rights to aliens seeking permanent residence do not justify a similar approach to the rights of a married couple seeking residence for an alien spouse. Finally, in Part IV, the ostensibly analogous situation in which American citizens assert a

"anomalous" and, insofar as they suggest the Constitution imposes no constraints on the government's exercise of its exclusion power, "no longer tenable").

7. See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 762, 765-67 (1972); *Galvan v. Press*, 347 U.S. 522, 530-32 (1954); *Mezei*, 345 U.S. at 212.

8. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-16, at 281 (1978); Schuck, *supra* note 6, at 1.

9. *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976); L. TRIBE, *supra* note 8, § 5-16, at 281.

10. See *Graham v. Richardson*, 403 U.S. 365, 371 (1971).

11. Hereinafter "INS" or "Service."

first amendment right to hear and associate with an excluded alien is discussed and distinguished on the basis that in such a case, the citizens' constitutional claims depend on a not-yet-existing relationship with the excluded alien. An existing, particularized relationship such as marriage supports greater judicial solicitude.

I

IMMIGRATION PROCEDURES

For the first hundred years of its existence, the United States freely encouraged foreign immigration as it sought to populate and exploit the resources of a vast continent. Eventually, however, pressure from nativist groups and labor organizations convinced Congress first to bar certain classes of immigrants (such as Chinese laborers) entirely, and later to implement an immigration quota system.¹²

The early system, devised in the 1920's, based its quotas upon the "national origins" of the existing U.S. population, using a formula that strongly favored British and Northern European immigrants over those from other parts of the world.¹³ The modern system places a ceiling on the number of immigrants who may obtain permanent residence each year and establishes uniform per country numerical limitations for immigrant visas. The system also creates "preferences" for certain classes of would-be immigrants.¹⁴

A. *INS Procedures*

Among those entitled to an immigration preference are spouses of United States citizens or of permanent residents. Congress and the INS have developed procedures for evaluating petitions on behalf of such persons which are intended to detect fraudulent marriages. There is evidence, however, that some of these methods invite abuses of discretion and infringements of the couple's privacy rights.

Marriage may assist an alien seeking to immigrate in one of two ways. If she marries a U.S. citizen, she is classified an "immediate relative" and can be admitted for permanent residence free of any quotas.¹⁵ If she marries an alien who is himself a permanent resident, she acquires "second preference" status.¹⁶ While still subject to quotas, the second

12. V. BRIGGS, *IMMIGRATION POLICY AND THE AMERICAN LABOR FORCE* 24-27 (1984); 1 C. GORDON & H. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* § 1.2(a)-2(c) (rev. ed. 1985); see Act of May 6, 1882 (The Chinese Exclusion Act), ch. 126, 22 Stat. 58 (repealed 1945); Immigration Act of 1921, ch. 8, § 2, 42 Stat. 5 (repealed 1952); Immigration Act of 1924, ch. 190, § 11, 43 Stat. 153 (repealed 1952).

13. Schuck, *supra* note 6, at 13.

14. See 8 U.S.C. §§ 1151(a), 1152, 1153 (1982).

15. *Id.* § 1151; 1 C. GORDON & H. ROSENFELD, *supra* note 12, § 2.18(a), at 2-139.

16. See 8 U.S.C. § 1153(a)(2).

preference category is less likely to be oversubscribed than the others;¹⁷ among categories it is entitled to the largest percentage of the available slots.¹⁸

These categories attract particular attention because of concern that they may be abused by aliens entering into marriages with citizens or permanent residents for the sole purpose of circumventing immigration quotas.¹⁹ Prior to 1986, the formulation of techniques for detecting such "sham marriages" was left to the INS, which accorded the petition for adjustment of the alien's status based upon marriage²⁰ its highest level of scrutiny.²¹ An INS official would review the petition and interview the petitioner and his alien spouse. The petition would be granted or denied solely on the basis of that official's determination of the bona fides of the marriage.²²

Continued concern about marriage fraud, however, prompted Congress to revise the petition procedure. Shortly before the adjournment of the 99th Congress, both houses approved H.R. 3737, the "Immigration Marriage Fraud Amendments of 1986."²³ The new legislation preserves the system of preferences, but imposes a new two-year waiting period on the petitioners if the marriage was entered into less than two years prior to the application. During this waiting period, the alien spouse is considered to have acquired permanent residence only on a conditional basis.²⁴ If at any time during this period the Attorney General²⁵ determines that the marriage was entered into for a fee or solely to obtain immigration benefits for the alien, or that the marriage has been judicially annulled or terminated, the alien's admission for permanent residence may be

17. Danilov & Nerheim, *Marriage, Divorce, Legal Separation and the Alien*, 18 INT'L LAW. 675, 676 (1984).

18. Second preference slots account for 26% of all visas per year, plus any not allotted under the first preference category. 8 U.S.C. § 1153(a)(2).

19. Danilov & Nerheim, *supra* note 17, at 679; see also *Lutwak v. United States*, 344 U.S. 604, 611 (1953) ("Congress did not intend to provide aliens with an easy means of circumventing the quota system by fake marriages in which neither of the parties ever intended to enter into the marital relationship.").

20. Under 8 U.S.C. § 1154, the citizen or resident must petition on behalf of the alien spouse. The Attorney General may approve the adjustment of status "if he determines that the facts stated in the petition are true." 8 U.S.C. § 1154(b) (1982).

21. *Immigration Marriage Fraud: Hearing Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 79 (1985) [hereinafter *Hearing*] (Statement of Jules E. Coven, President, Am. Immigration Lawyers Ass'n).

22. See *infra* text accompanying notes 40-42.

23. Pub. L. No. 99-639, [Statutes & Regulations] Immigr. L. & Proc. Rep. (MB) S-57 (to be codified in scattered sections of 8 U.S.C.) (Oct. 18, 1986).

24. *Id.* § 2(a), [Statutes & Regulations] Immigr. L. & Proc. Rep. (MB) at S-57 (to be codified at 8 U.S.C. § 1186(a)).

25. In practice, this discretion will most likely be exercised by an INS officer. See *infra* text accompanying note 43.

revoked.²⁶

To make the alien's residence status truly "permanent," at the end of the two-year period the couple must file a petition declaring under penalty of perjury that the marriage was lawfully entered into, that it has not since been annulled or terminated, and that it was not entered into for a fee or for the purpose of procuring the alien's entry.²⁷ The couple must then appear for a personal interview before an INS official.²⁸ If the latter finds the petition's allegations true, the alien's conditional residence becomes permanent; otherwise the alien is subject to deportation.²⁹

While the new legislation codifies the requirement of a personal interview with an INS officer, such an interview actually has been a feature of the petitioning process for some time. In this "marriage fraud interview," the spouses are separated and questioned at length concerning intimate details of their married life.³⁰ The questions often focus upon trivial details, such as who takes out the garbage and which side of the bed the alarm clock is on.³¹ The Service believes only a couple actually living together intimately can give consistent answers to such questions, and discrepancies are taken as signs that the marriage may be fraudulent. A refusal to answer, moreover, may be as damaging as an inconsistent response.³² If the interview fails to dispel the examiner's doubts, the Service may place the couple's dwelling under observation and question neighbors, landlords, and employers about the couple's habits.³³

Prior to the 1986 amendments, this interview took place at the time the citizen or resident alien spouse filed the petition for adjustment of the alien spouse's status. The new legislation directs that an interview be conducted at the end of the two-year "conditional permanent residence"

26. Pub. L. No. 99-639, § 2(a), [Statutes & Regulations] Immigr. L. & Proc. Rep. (MB) at S-57 (to be codified at 8 U.S.C. § 1186(b)).

27. *Id.* (to be codified at 8 U.S.C. § 1186(c)).

28. *Id.*

29. *Id.*

30. *Hearing, supra* note 21, at 80; Danilov & Nerheim, *supra* note 17, at 680; Roberts, *Sex and the Immigration Laws*, 14 SAN DIEGO L. REV. 9, 40 (1976); Comment, *Defense of Sham Marriage Deportations*, 8 U.C.D. L. REV. 309, 315-16 (1975); Miller, *Marriage is the Worst Way to Immigrate*, L.A. Daily J., Oct. 1, 1982, at 4, col. 4.

Accounts differ as to whether the INS's policy has been to conduct a marriage fraud interview in every case. Compare *Hearing, supra* note 21, at 80 and Comment, *supra* at 315 (interview conducted in each case) with Miller, *supra* (interview conducted only when couple fits INS's sham marriage "profile"). Practices probably vary from one INS field office to another, but the technique has clearly been widely used.

31. Miller, *supra* note 30, at 4, col. 4.

32. See *Manarolakis v. Coomey*, 416 F. Supp. 532, 534 (D. Mass. 1976) (petition denied because petitioner refused to answer questions and thus failed to establish marriage not fraudulent).

33. Danilov & Nerheim, *supra* note 17, at 680; Note, *The Constitutionality of the INS Sham Marriage Investigation Policy*, 99 HARV. L. REV. 1238, 1241-42 (1986); Comment, *supra* note 30, at 316.

period.³⁴ It is not clear, however, what will be required of the couple at the beginning of this period, when the alien initially seeks to be admitted for permanent residence. Since this initial admission will result in the alien's being allowed to reside in the United States for at least two years, the Service is likely to continue to scrutinize petitions for initial entry carefully and will probably continue to use the marriage fraud interview as a part of that process. The 1986 amendments, then, may only alter the procedure by directing the INS to conduct a second marriage fraud interview twenty-four months after the first.

It is common in such interviews for the interviewer to demand details of the couple's meeting, courtship, and wedding.³⁵ However, interviewees claim that the questioning often becomes more intrusive and sometimes coercive. Interviewees have been asked to divulge details of their sexual behavior, including how and when the marriage was consummated,³⁶ what method of birth control the couple uses,³⁷ and whether either spouse has had extramarital sexual relations.³⁸ Citizens and aliens claim they have been accused of lying and threatened with imprisonment unless their petitions were withdrawn.³⁹

That INS examiners operate with a relatively free hand could explain such excesses. Congress gave the Attorney General discretion whether or not to grant a petition for adjustment of status,⁴⁰ but that discretion may be delegated to any Service employee.⁴¹ In practice, the interviewing officer exercises almost total discretion, even though the decision will be issued over the signature of the INS District Director.⁴² Similarly, the 1986 amendments direct the Attorney General to determine whether the facts stated in the petition filed at the end of the two-

34. See Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, § 2(a), [Statutes & Regulations] Immigr. L. & Proc. Rep. (MB) S-57 (to be codified at 8 U.S.C. §§ 1186(c), 1186(d)).

35. Danilov & Nerheim, *supra* note 17, at 680.

36. Comment, *The Marriage Viability Requirement: Is It Viable?*, 18 SAN DIEGO L. REV. 89, 100 (1980); see also *Whetstone v. INS*, 561 F.2d 1303, 1305 (9th Cir. 1977) (indicating alien had been required to describe consummation of marriage); *In re Kitsalis*, 11 I. & N. Dec. 613 (1966) (petition denied after both spouses admitted marriage had not been consummated).

37. Note, *supra* note 33, at 1242-43 (questions about couple's sexual conduct and method of birth control "are not uncommon").

38. Roberts, *supra* note 30, at 40 & n.192 (alien admitted extramarital sexual relations under questioning).

39. See, e.g., *Elbez v. INS*, 767 F.2d 1313, 1314 (9th Cir. 1985); *Stokes v. INS*, 393 F. Supp. 24, 27 (S.D.N.Y. 1975).

40. 8 U.S.C. §§ 1154(b), 1256 (1982).

41. *Id.* § 1103.

42. Roberts, *The Exercise of Administrative Discretion Under the Immigration Laws*, 13 SAN DIEGO L. REV. 144, 147 (1975). The District Director, who has the power to grant or deny any application or petition, exercises the INS's authority at the local level. 1 C. GORDON & H. ROSENFIELD, *supra* note 12, § 1.9(c), at 1-49.

year waiting period are true,⁴³ but this determination will apparently actually be made by the INS official who conducts the interview.

Petitioners and immigration attorneys often complain of inadequate supervision of Service personnel. In addition to alleging improper questioning during marriage fraud interviews, these parties claim that decisions are often arbitrary or based on racial prejudice and personal bias.⁴⁴ Moreover, while the INS has published guidelines and designated some decisions for publication as precedents, these appear to be largely ignored by the Service employees who actually pass upon petitions.⁴⁵

B. *Judicial Review*

The danger of arbitrary adjudication is exacerbated by the limited availability of judicial review of INS decisions. The 1986 legislation allows the alien to "request a review" at her deportation hearing of the INS's determination that the facts stated in the petition are untrue, and provides that "[i]n such proceeding, the burden of proof shall be on the Attorney General to prove, by a preponderance of the evidence, that the facts and information . . . alleged in the petition are not true with respect to the qualifying marriage."⁴⁶ A deportation proceeding, however, is an administrative hearing, conducted not by a judge but by an INS employee called a "Special Inquiry Officer."⁴⁷ These employees are accountable to the same bureaucracy as are investigative officers, and their impartiality when reviewing the decisions of such officers is therefore questionable.⁴⁸

Nor is the alien likely to obtain review in the courts. Statutes severely limit the scope of review, essentially confining the inquiry to whether the administrative agency has abused its discretion.⁴⁹ A court

43. Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, § 2(a), [Statutes & Regulations] Immigr. L. & Proc. Rep. (MB) S-57 (to be codified at 8 U.S.C. § 1186(c)(3)(A)).

44. U.S. COMM'N ON CIVIL RIGHTS, *THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION* 39 (1980); see also Roberts, *supra* note 42, at 154, 155 n.43 (quoting INS official as saying in an unreported decision, "By now, everyone dealing with such matters is aware that aliens from the Philippines will engage in any fraud to get here and will do anything to stay.").

45. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 44, at 40; Roberts, *supra* note 42, at 158.

46. Pub. L. No. 99-639, § 2(a), [Statutes & Regulations] Immigr. L. & Proc. Rep. (MB) S-57 (to be codified at 8 U.S.C. § 1186(c)(3)(D)).

47. 8 U.S.C. § 1101(b)(4) (1982). Special Inquiry Officers are also sometimes called "Immigration Judges." Schuck, *supra* note 6, at 30-31 & n.170.

48. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 44, at 108-11; Schuck, *supra* note 6, at 30-31 & n.170.

49. The court is authorized to set aside administrative decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "contrary to constitutional right, power, privilege or immunity," "in excess of statutory jurisdiction," "without observance of procedure required by law," "unsupported by substantial evidence," or "unwarranted by the facts." 5 U.S.C. § 706(2) (1982).

Challenging an administrative decision under this standard essentially means persuading the

might even deny judicial review altogether if it found the decision entirely "committed to agency discretion" under the Administrative Procedure Act.⁵⁰ The courts frequently state their unwillingness to substitute their judgment for that of the officials to whom Congress has delegated discretion in immigration matters.⁵¹ Some federal courts have shown greater willingness to review INS exercises of discretion,⁵² but have been rebuked by the Supreme Court for doing so.⁵³

II CONSTITUTIONAL RIGHTS

The INS procedures outlined above, particularly the "marriage fraud interview," potentially violate the due process rights of citizen and permanent resident petitioners, as well as those of their nonresident alien spouses.⁵⁴ First, the techniques may infringe the couple's right to privacy. While the contours of the right to privacy are still being developed, a protected interest in "marital privacy" was established in the first Supreme Court decision recognizing constitutional privacy rights.⁵⁵ In

court that "the agency's decision has no rational basis whatsoever." S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 336-37 (2d ed. 1985).

50. 5 U.S.C. § 701(a)(2) (1982).

The "committed to agency discretion" language of the APA has engendered some confusion. Despite its implication of absolute freedom of decision, virtually no administrative decision (even one falling within the "committed to agency discretion" clause) is completely immune from review, at least for illegal or arbitrary use of discretion. L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 374-75 (1965). In any event, the Supreme Court has emphasized that the clause provides at best a "very narrow exception" to the general presumption in favor of judicial review. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971).

51. See, e.g., *INS v. Jong Ha Wang*, 450 U.S. 139, 144-46 (1981) (per curiam); *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972); *Fleurbaey v. INS*, 585 F.2d 129, 133-34 (5th Cir. 1978).

52. See, e.g., *Dabaghian v. Civiletti*, 607 F.2d 868, 871 (9th Cir. 1979) (finding abuse of discretion in INS decision to rescind alien's permanent residence status because of his divorce); *Bark v. INS*, 511 F.2d 1200, 1202 (9th Cir. 1975) ("arbitrary" to base denial of petition upon couple's separation); *Chan v. Bell*, 464 F. Supp. 125, 132-33 (D.D.C. 1978) (same).

53. See *Jong Ha Wang*, 450 U.S. at 144-45 (per curiam) (criticizing Ninth Circuit Court of Appeals for encroaching upon Attorney General's discretion), *rev'd* 622 F.2d 1341 (9th Cir. 1980).

A federal court may exercise jurisdiction in habeas corpus on behalf of aliens who are detained pending deportation, but it is supposed to treat the INS's determination as final and unreviewable unless the proceedings were "manifestly unfair" or showed a "manifest abuse" of discretion. *Kwock Jan Fat v. White*, 253 U.S. 454, 457-58 (1920) (quoting *Low Wah Suey v. Backus*, 225 U.S. 460, 468 (1912)). Even this avenue of review, however, may have been closed off by the Court's declaration in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950), that whatever procedure is afforded, "it is due process as far as an alien denied entry is concerned." See Hart, *supra* note 3, at 1389-94; *supra* notes 4-9 and accompanying text. But see *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981) (affirming issuance of writ to compel release of alien from indefinite detention pending deportation).

54. There are signs that the courts are beginning to view the due process claims of nonresident aliens with greater sympathy. See *infra* notes 89-98 and accompanying text.

55. *Griswold v. Connecticut*, 381 U.S. 479 (1965); see *infra* text accompanying notes 56-73.

addition, the procedures appear to invite arbitrary and discriminatory enforcement of the immigration laws.

A. Marital Privacy

In *Griswold v. Connecticut*,⁵⁶ the Supreme Court held a state law prohibiting the use and sale of contraceptives unconstitutional because it unjustifiably interfered with marital privacy. The Court recognized privacy as an independent constitutional right for the first time.⁵⁷

The majority opinion characterized the marital relationship as "intimate to the degree of being sacred."⁵⁸ The government must therefore meet a heavy burden of justification before intruding into the protected zone which surrounds this relationship.⁵⁹ The Connecticut statute failed to sustain that burden.⁶⁰

The right of marital privacy now seems an established aspect of the "liberty" protected by the due process clauses of the fourteenth and fifth amendments, but the *Griswold* Court seemed reluctant to say so. Justice Douglas, in his opinion for the majority, located the privacy right in a "pennumbra" emanating from the express guarantees of the Bill of Rights, including the first amendment right of association, the fourth amendment prohibition of unreasonable searches and seizures, and the fifth amendment protection against self-incrimination.⁶¹ Douglas carefully avoided resting his argument on fourteenth amendment due process grounds, possibly to avoid the "substantive due process" criticisms which led to the repudiation of the *Lochner v. New York*⁶² line of cases.⁶³

Three Justices who concurred⁶⁴ were less cautious. For them, privacy's status as a "fundamental" right, albeit an unenumerated one, was

56. 381 U.S. 479 (1965).

57. D. O'BRIEN, *PRIVACY, LAW, AND PUBLIC POLICY* 177 (1979).

58. *Griswold*, 381 U.S. at 486.

59. The Court cited the "familiar principle" that government purposes "may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *Id.* at 485 (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964)); see *Zablocki v. Redhail*, 434 U.S. 374, 397 n.1 (1978) (Powell, J., concurring); Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 271 (1977); *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1257 (1980).

60. *Griswold*, 381 U.S. at 485-86.

61. *Id.* at 483-84.

62. 198 U.S. 45 (1905).

63. See *Griswold*, 381 U.S. at 481-82. The "*Lochner* era" came to an end when, in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the Supreme Court repudiated its practice of construing unenumerated due process rights (such as the "right to contract") to invalidate social and economic legislation. L. TRIBE, *supra* note 8, § 8-2: *Griswold* and subsequent cases have revived the debate over substantive due process and the Court's "legislative" role, though only in the context of individual rather than economic rights. D. O'BRIEN, *supra* note 57, at 178-79 & n.8; Craven, *Personhood: The Right to be Let Alone*, 1976 DUKE L.J. 699, 712-13.

64. *Griswold*, 381 U.S. at 486-99 (Goldberg, J., concurring). Justice Goldberg was joined by Chief Justice Warren and Justice Brennan.

determinative. Rejecting the notion that due process protects only those rights explicitly guaranteed in the Bill of Rights, these concurrences pointed to the ninth amendment as evidence that the Bill's enumeration of rights was not intended to be exhaustive.⁶⁵ Only Justice Harlan, also concurring separately, went so far as to declare that the right of privacy (at least in family matters) is an aspect of fourteenth amendment due process independent of the Bill of Rights.⁶⁶

Though the *Griswold* majority avoided Harlan's position, commentators⁶⁷ and the Court itself soon adopted the view that privacy is indeed an aspect of due process. The Court eventually acknowledged that the "guarantee of certain areas or zones of privacy" is "one aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."⁶⁸

Griswold opened the door to a still-developing constitutional right to privacy. Some commentators saw *Griswold* as a step toward recognizing a broad constitutional right, transcending the context of marital or family relationships.⁶⁹ Debate continues over the extent of the right to privacy in the law. Some commentators define it quite broadly as the right of "individuals, groups, or institutions to determine for themselves when, how and to what extent information about them is communicated to others."⁷⁰ Others suggest that such a broad concept lacks practical legal value.⁷¹ The Supreme Court so far has not fulfilled the expectations of the early commentators, finding the right to privacy relevant only where government seeks to intrude in family, marital, or sexual matters.⁷²

65. *Id.* at 486-93. The ninth amendment provides, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

66. *Griswold*, 381 U.S. at 500 (Harlan, J., concurring in the judgment).

67. See, e.g., L. TRIBE, *supra* note 8, § 15-10, at 925 n.25 (The *Griswold* Court "seemed to deny that its judgment rested on fourteenth amendment due process, although of course no other constitutional provision was applicable").

68. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684 (1977); see also *Roe v. Wade*, 410 U.S. 113, 168 (1973) (Stewart, J., concurring) (accepting *Griswold* as "one in a long line of . . . cases decided under the doctrine of substantive due process").

If marital privacy is an aspect of the "liberty" the fourteenth amendment protects against infringement by the states, a similar restriction logically applies to the federal government under the due process clause of the fifth amendment. Beane, *The Griswold Case and the Expanding Right to Privacy*, 1966 WIS. L. REV. 979, 992.

69. See, e.g., Beane, *supra* note 68, at 988-93; McKay, *The Right of Privacy: Emanations and Intimations*, 64 MICH. L. REV. 259, 278-79 (1965); Note, *Privacy after Griswold: Constitutional or Natural Law Right?*, 60 NW. U.L. REV. 813, 828-29 (1966).

70. A. WESTIN, *PRIVACY AND FREEDOM* 7 (1967); see also A. MILLER, *THE ASSAULT ON PRIVACY* 25 (1971) ("[T]he basic attribute of an effective right of privacy is the individual's ability to control the circulation of information relating to him . . .").

71. See, e.g., Gerety, *supra* note 59, at 261-63; Lusky, *Invasion of Privacy: A Clarification of Concepts*, 72 COLUM. L. REV. 693, 695-700 (1972).

72. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2844 (1986) (right of privacy has been recognized only in matters of "family, marriage, or procreation," does not extend to claimed right of

Regardless of the outcome of this debate, however, *Griswold* and subsequent decisions affirm that at least in the context of the marital relationship, the interests of individuals in keeping their private affairs from the eyes of the government are at a maximum.⁷³ This more finely tailored right of "marital privacy" is thus well established, and it is this right that is implicated by the INS's sham marriage investigation procedures.

B. Arbitrariness

The INS examiner exercises extremely broad discretion in the context of the petition for adjustment of status and is governed by few if any standards.⁷⁴ This dearth of standards invites arbitrary and discriminatory decisions, as well as tending to render ineffective what judicial review is available. The due process clause embodies, to some extent, the right to be free from arbitrary enforcement of the laws, although current doctrine recognizes this freedom only insofar as an independently protected interest is affected.

The Supreme Court has recognized that fundamental rights are in danger of abridgement when the laws define official discretion too broadly. Thus, in *Papachristou v. City of Jacksonville*,⁷⁵ the Court found that a vaguely worded vagrancy ordinance violated the arrestees' due process rights both because it failed to give fair notice of what conduct was prohibited and "because it encourage[d] arbitrary and erratic arrests and convictions."⁷⁶

homosexuals to practice sodomy); see *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977) (privacy right protects use of contraception); *Planned Parenthood v. Danforth*, 428 U.S. 52, 60 (1976) (includes right to abortion); *Roe v. Wade*, 410 U.S. 113, 155 (1973) (abortion); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (contraception); cf. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (possession of obscene materials in one's own home).

73. See *Gerety*, *supra* note 59, at 270 n.133 ("This concept of 'familial' or 'marital' privacy was at least arguably all there was (or should have been) to the *Griswold* opinion.").

74. A 1975 challenge to the INS's procedures, see *Stokes v. INS*, 393 F. Supp. 24 (S.D.N.Y. 1975), resulted in a consent judgment which attempted to define standards for conducting marriage fraud investigations, though only in the INS's New York District. These standards prohibit denial of the petition solely on the basis of the petitioner's exercise of the fifth amendment privilege against self-incrimination and direct the examiner not to inquire about intimate matters. See *Immigration Service Consents to Judgment Reforming Procedures on Spouse Visa Petitions*, 54 INTERPRETER RELEASES 77 (1977) (discussing entry of judgment in *Stokes v. INS*, No. 74 Civ. 1022 (S.D.N.Y. Nov. 12, 1976)).

There is evidence, however, that those standards that have been established are frequently ignored by the officials who actually pass upon the petitions. See *supra* note 44 and accompanying text; see also *INS Agrees to Train N.Y. Investigators on "Stokes" Requirements*, 61 INTERPRETER RELEASES 632 (1984) (discussing *Tanvir v. Nelson*, No. 84 Civ. 2212 (E.D.N.Y. June 19, 1984), a class action seeking to compel INS to implement *Stokes* standards; in a consent judgment, INS agreed to conduct "training seminar" for its New York District investigators.).

75. 405 U.S. 156 (1972).

76. *Id.* at 162.

In administrative law, the Court has been less rigorous in requiring procedural protection from arbitrariness. Under the view adopted by the Court in *Board of Regents v. Roth*,⁷⁷ there is no independent right to freedom from governmental arbitrariness.⁷⁸ The question of what procedural protection should be afforded arises only after the identification of a constitutionally protected interest.⁷⁹ Thus, for example, the Court has acted to curtail overbroad administrative discretion affecting the exercise of first amendment rights because of the potential for arbitrary infringement of such rights.⁸⁰

Yet the recognized interest in marital privacy appears to be no less fundamental than first amendment freedoms and therefore should be equally deserving of judicial solicitude. The *Griswold* majority characterized marital privacy as a right "older than the Bill of Rights," affecting as it does "an association for as noble a purpose as any involved in our prior decisions."⁸¹ Like the first amendment interests threatened when a censor acts according to no explicated standard, marital privacy rights may suffer arbitrary infringement where the official charged with determining the bona fides of a marriage for immigration purposes has too much discretion.⁸²

Besides inviting arbitrary and discriminatory⁸³ decisions, the lack of explicit standards makes it difficult for a court to apply even the relatively deferential "abuse of discretion" standard of review. Thus the Supreme Court has recognized a particularly great potential for infringement of fundamental rights when, as in an administrative proceeding, the opportunity for judicial review is limited and the standards for the exercise of the administrator's discretion are vague. In *Interstate Circuit, Inc. v. City of Dallas*,⁸⁴ a case involving censorship by an administrative board, the Court warned that whatever judicial review is available may

77. 408 U.S. 564 (1972).

78. See, e.g., *id.* at 569-78 (finding no independent substantive right to freedom from procedural arbitrariness); *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1037 (5th Cir. 1982) (Procedural due process with respect to application for political asylum "is not itself an independent right, but merely the condition precedent to the deprivation of a life, liberty, or property interest.").

79. Some have argued, however, that freedom from arbitrary exercises of official discretion is itself a "liberty" interest protected by the due process clause. See, e.g., L. TRIBE, *supra* note 8, § 10-13, at 538-39; Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 487-90 (1977).

80. See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 & nn.3-8 (1972); L. TRIBE, *supra* note 8, § 12-28, at 719.

81. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

82. At least one lower court has noted the potential for abuse inherent in overbroad INS discretion in passing upon such petitions. See *Chan v. Bell*, 464 F. Supp. 125, 129 (D.D.C. 1978) (It would be "inherently incompatible with due process" to allow INS "unreasonably wide, and essentially unreviewable, discretion to determine which marriages are or are not viable.").

83. See *supra* note 44 and accompanying text.

84. 390 U.S. 676 (1968).

be rendered "inoperative" under these circumstances.⁸⁵ A court will hardly be able to say that an administrator has abused his discretion when it can identify no standard against which to judge his exercise of that discretion.

III

RAISING THE CHALLENGE

A. *Aliens' Rights*

Unfettered discretion and the attendant infringements upon the marital privacy right announced in *Griswold* together suggest challenges to the constitutionality of the INS's procedures for adjudicating petitions for adjustment of immigration status based upon marriage. Both the nonresident alien and his citizen or resident alien spouse may be compelled to reveal intimate information about their relationship. Refusal to do so will almost surely result in denial of the benefit sought, and, if the Service makes a finding that the marriage is fraudulent, may ultimately result in deportation and a bar against the alien's obtaining permanent residence status at any time in the future.⁸⁶ Under normal due process analysis, the government would face a heavy burden of justification for such intrusions into the zone of marital privacy.

Nonetheless, a constitutional challenge to these practices based on alleged infringement of the *alien's* due process rights would probably fail. As noted above, the Court has denied that aliens seeking entry into this country have any due process rights.⁸⁷ The alien has no constitutionally protected interest with respect to his application, and thus, under the *Roth* approach, no substantive right to which procedural protection must be afforded.⁸⁸ While more recent decisions of lower courts and even of the Supreme Court seem to indicate greater solicitude for the due process claims of aliens, such rights have not yet been recognized generally.

Several commentators have noted a recent trend in lower courts toward recognizing the rights of nonresident aliens.⁸⁹ Most of these cases

85. *Id.* at 684-85 (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 532 (1952) (Frankfurter, J., concurring)).

86. See 8 U.S.C. § 1154(c) (1982); *Hearing, supra* note 21, at 80-81. Also, the alien as well as the citizen or resident spouse could face criminal prosecution. The 1986 legislation imposes a maximum penalty of five years of imprisonment and a \$250,000 fine on "[a]ny individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws." Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, § 2(d)(2), [Statutes & Regulations] *Immigr. L. & Proc. Rep. (MB)* S-57, S-58 (to be codified at 8 U.S.C. § 1325(b)).

87. See *supra* text accompanying notes 3-9.

88. See *supra* text accompanying notes 77-79.

89. E.g., Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 168-71 (1983); Schuck, *supra* note 6, at 68-71 & n.391; Note,

have arisen from the mass detentions without bond of refugees from Haiti, Cuba, and other Caribbean Basin countries in the 1980's.⁹⁰ These courts have displayed an increasing willingness to intervene on the refugees' behalf on due process grounds.⁹¹ It would be anomalous to recognize the due process rights of these undocumented aliens but deny similar protection to nonresident aliens pursuing permanent residence through prescribed legal channels. If these cases are correctly decided, then the courts should also consider the due process claims of the alien on whose behalf a citizen or resident alien spouse petitions for adjustment of immigration status.

Even some recent decisions of the Supreme Court can be read to indicate a greater solicitude for the due process rights of aliens. On balance, however, the Court does not yet seem prepared to repudiate the rule of *United States ex rel. Knauff v. Shaughnessy*.⁹²

The Court's 1982 decision in *Plyler v. Doe*,⁹³ striking down a Texas statute that would have denied free public education to the children of illegal aliens, has impressed some commentators as a watershed in American immigration law.⁹⁴ Though dealing with a state regulation rather than federal immigration law, the decision is noteworthy for the Court's willingness to recognize the constitutional claims of illegal immigrants. The very entry of such persons into the country is a federal crime,⁹⁵ so

supra note 3, at 960, 963-65; *Developments, supra* note 6, at 1313-14 & n.8. Not everyone has applauded this development. See Martin, *supra*, at 171.

90. See, e.g., *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981); *Fernandez-Roque v. Smith*, 567 F. Supp. 1115 (N.D. Ga. 1983), *rev'd*, 734 F.2d 576 (11th Cir. 1984).

91. See, e.g., *Haitian Refugee Center*, 676 F.2d at 1037 ("[T]he executive is subject to the constraints of due process in implementing and enforcing congressional immigration policy."); *Rodriguez-Fernandez*, 654 F.2d at 1387 ("Certainly imprisonment in a federal prison of one who has been neither charged nor convicted of a criminal offense is a deprivation of liberty in violation of the Fifth Amendment . . ."); *Fernandez-Roque*, 567 F. Supp. at 1142 ("[A]n alien whose parole is revoked in order to return him to indefinite detention . . . has a liberty interest that is entitled to due process protection."). But see *Fernandez-Roque v. Smith*, 734 F.2d 576, 582 (11th Cir. 1984), *rev'g* 567 F. Supp. 1115 (N.D. Ga. 1983) (denying that aliens have a constitutional liberty interest in remaining free on parole pending deportation); *Jean v. Nelson*, 727 F.2d 957, 972 (11th Cir. 1984) (en banc), *rev'g* 544 F. Supp. 973 (S.D. Fla. 1982), *aff'd*, 105 S. Ct. 2992 (1985) ("[E]xcludable aliens cannot challenge either admission or parole decisions under a claim of constitutional right.").

92. 338 U.S. 537 (1950); see *supra* text accompanying notes 4-9.

93. 457 U.S. 202 (1982).

94. See, e.g., Schuck, *supra* note 6, at 54-58. For criticism of the holding, see generally Livingston, *Plyler v. Doe: Illegal Aliens and the Misguided Search for Equal Protection*, 11 HASTINGS CONST. L.Q. 599 (1984).

95. 8 U.S.C. § 1325 (1982) provides,

Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offenses, be guilty of a misdemeanor . . . and for a subsequent commission of any such offenses shall be guilty of a felony . . .

their constitutional claims are arguably more tenuous than those of non-resident aliens who seek legitimate immigrant status by presenting themselves to the immigration authorities. Yet the *Plyler* Court upheld the childrens' right to a free public education, acknowledging that despite their undocumented status, illegal aliens (or at least their children) are entitled to constitutional protections.⁹⁶

In *Landon v. Plasencia*,⁹⁷ the Court exhibited unusual concern for the rights of an alien in the exclusion context, recognizing that a former resident alien who had departed the country had due process rights when she sought to reenter.⁹⁸ However, the Court reaffirmed its earlier holdings to the effect that nonresident aliens seeking initial entry have no due process rights.⁹⁹ *Plasencia* had due process rights because, having been out of the country only briefly, she was "assimilate[d]" to the status of a continuously present resident alien.¹⁰⁰ Thus, *Plyler* and *Plasencia* notwithstanding, and despite hints of reform among lower courts, the Supreme Court does not appear ready to reconsider the cases denying the due process claims of a nonresident alien seeking entry.¹⁰¹

B. Citizens' Rights: Extraordinary Deference

The petition for adjustment of status based upon marriage does not involve merely the due process claims of an alien seeking entry. It implicates the rights of another: the nonresident alien's citizen or resident spouse. United States citizens unquestionably have due process rights, including the right to marital privacy. Resident aliens, too, have due process rights.¹⁰² Yet even a constitutional challenge based upon the rights of a U.S. citizen faces an uphill battle because the Court has virtually abdicated its role of judicial review in immigration cases. The 1972 case *Kleindienst v. Mandel*¹⁰³ demonstrates that even when an immigration decision is asserted to have infringed a citizen's fundamental rights, the Court will refuse even to balance his interest against the government's plenary exclusion power.

96. For a fuller discussion of *Plyler*, see *infra* text accompanying notes 161-71.

97. 459 U.S. 21 (1982).

98. *Id.* at 32; see also *infra* text accompanying notes 157-60.

99. *Landon*, 459 U.S. at 32 ("[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application . . .").

100. *Id.* at 33-34.

101. In *Jean v. Nelson*, 105 S. Ct. 2992 (1985), *aff'g* 727 F.2d 957 (11th Cir. 1984), the Court held that the Eleventh Circuit Court of Appeals should not have decided on constitutional grounds a claim that INS detention policies violated the Equal Protection clause. *Id.* at 2997-98. Justice Marshall, however, would have reached the constitutional issue, and would have held that aliens seeking admission "have a Fifth Amendment right to parole decisions free from invidious discrimination based on race or national origin." *Id.* at 3000 (Marshall, J., dissenting).

102. See *supra* note 10 and accompanying text.

103. 408 U.S. 753 (1972).

1. *The Mandel Case*

In *Mandel*, the Court considered a novel first amendment claim. Ernest Mandel, a noted Marxist scholar from Belgium, had been denied a temporary visa under a section of the immigration law that prohibits issuing visas to aliens who "advocate" or "write or publish . . . the economic, international, and governmental doctrines of world communism."¹⁰⁴ The Attorney General, exercising his discretion, declined to waive the ban.¹⁰⁵

The claim was not, however, that Mandel's due process or first amendment rights had been violated, but that the first amendment rights of United States citizens (a number of university professors) to hear and associate with Mandel had been.¹⁰⁶ Two members of a three-judge district court panel accepted this argument and the court granted injunctive relief.¹⁰⁷

The Supreme Court disagreed and reversed. While acknowledging that modern first amendment doctrine protects the right to hear as well as the right to speak,¹⁰⁸ the Court relied on a line of precedent reaching back to the first blanket exclusions of immigrants¹⁰⁹ for the proposition that the authority of Congress to exclude aliens on whatever basis it chooses is plenary and immune from judicial intervention.¹¹⁰ Further, the *Mandel* Court held that the exercise of discretion by Congress's delegate will not be disturbed so long as the executive discloses a "facially legitimate and bona fide reason" for the decision.¹¹¹ The Court declined even to weigh the citizens' asserted first amendment interest against the government's interest.¹¹²

104. See 8 U.S.C. § 1182(a)(28)(D)-(G) (1982).

105. *Mandel*, 408 U.S. at 757-59.

106. *Id.* at 762.

107. *Id.* at 760.

108. *Id.* at 762-63.

109. The Court cited *The Chinese Exclusion Case* (*Chae Chan Ping v. United States*), 130 U.S. 581 (1889), an early, unsuccessful challenge to the Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1945); see *supra* note 12 and accompanying text.

110. *Mandel*, 408 U.S. at 765-67.

111. *Id.* at 769-70. Despite its reaffirmance of the traditional view of Congress's immigration power, *Mandel* did subject the Attorney General's decision to a limited form of scrutiny by requiring a "facially legitimate and bona fide" reason for the denial. *Id.*

One district court seized upon this development to invalidate the exclusion of an alien based upon his homosexuality. The court found that because medical authorities no longer consider homosexuality a mental disorder, the government had failed to advance a "facially legitimate and bona fide reason" for the exclusion. *Lesbian/Gay Freedom Day Comm., Inc. v. INS*, 541 F. Supp. 569, 586 (N.D. Cal. 1982), *aff'd sub nom. Hill v. INS*, 714 F.2d 1470 (9th Cir. 1983). Nevertheless, even the "facially legitimate and bona fide" standard is extremely deferential. See *Fiallo v. Bell*, 430 U.S. 787, 805-09 (1977) (Marshall, J., dissenting) (criticizing such deference as abdication); Comment, *Immigration and the First Amendment*, 73 CALIF. L. REV. 1889, 1906 (1985) (describing *Mandel* test as de facto "rational basis" inquiry).

112. "[T]he courts will neither look behind the exercise of [executive] discretion, nor test it by

Mandel's significance does not lie in its reassertion of Congress's unfettered power to exclude aliens.¹¹³ The case is extraordinary because of the Court's refusal even to balance the first amendment claims of citizens against congressional power in this area. The Court relied upon a long line of precedent, but as the following Sections of this Comment will show, the rationales advanced in those cases for the Court's historical refusal to intervene in immigration matters only draw what strength they possess from the notion that the government has absolute authority over procedures for handling "outsiders" seeking to gain access to the national community. These rationales lose their force when the government's exercise of authority implicates the rights of citizens or resident aliens.

2. *Historical Rationales*

Though the Court has been consistently reluctant to intervene in immigration matters, it has offered an assortment of rationales over the years for its extraordinary deference to Congress and its delegates in this area.

One rationale focuses on control over immigration as a necessary aspect of the sovereign power to conduct foreign relations. Thus, the *Mandel* Court noted that the power to exclude aliens is "'inherent in sovereignty [and] necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers.'" ¹¹⁴ The Court relied on the same rationale in 1892 when it declared it "an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."¹¹⁵ This rationale, cited with approval in *Mandel*¹¹⁶ and in other recent decisions,¹¹⁷ retains its force.

The sovereignty rationale is, however, vulnerable to criticism. It simply does not follow that a power inherent in the sovereignty of the United States is not subject to constitutional limitations. As one writer has observed, "[O]ne can accept the validity of the [sovereign power]

balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." *Mandel*, 408 U.S. at 770.

113. The Court correctly noted that the cases upholding that principle are "legion." *Id.* at 765-66.

114. *Id.* at 765 (quoting Brief for Appellants at 20). The Court noted the nineteenth-century origins of this view, citing *The Chinese Exclusion Case* (*Chae Chan Ping v. United States*), 130 U.S. 581, 609 (1889), and *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). *Mandel*, 408 U.S. at 765.

115. *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892).

116. *Mandel*, 408 U.S. at 765.

117. See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

inaxim without conceding that congressional power in this area knows no limits."¹¹⁸

Under the sovereign power rationale, the power to regulate foreign affairs is said to derive not from the Constitution,¹¹⁹ but from the very existence of the United States as a sovereign nation. Yet the Court has never refused to balance individual rights against the government's foreign affairs power outside the context of the exclusion and deportation cases.¹²⁰ To the contrary, the Court has said that the same constitutional restraints "confining Congress in the exercise of any of the powers expressly delegated to it . . . apply with equal vigor when that body seeks to regulate our relations with other nations."¹²¹ There is no precedent, outside the immigration cases, for the notion that a power's nontextual origin places it beyond constitutional control.

Nor does it advance the argument to say, as the Court often has, that the power to exclude aliens is "plenary."¹²² Again, a power's plenary nature does not necessarily exempt it from constitutional restraints. Congress's commerce power, too, has been characterized as plenary, but this merely means that those "regulations of commerce which do not infringe some constitutional prohibition" are shielded from judicial scrutiny.¹²³ Similarly, the President's "plenary and exclusive" power to conduct foreign relations, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."¹²⁴

The Court sometimes advances the rationale that determination of the admissibility of aliens is a political question, or at least one in the nature of a political question. In *Mathews v. Diaz*,¹²⁵ the Court stated that "[t]he reasons that preclude judicial review of political questions

118. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 320.

119. The Constitution does not expressly delegate the power to regulate the entry of foreigners into the country. See Schuck, *supra* note 6, at 24. It comes closest where it authorizes Congress to "establish an uniform Rule of Naturalization." U.S. CONST. art. I, § 8, cl. 4.

120. Note, *supra* note 3, at 973-74; see Rosberg, *supra* note 118, at 321-22; cf. Kleindienst v. Mandel, 408 U.S. 753, 782-83 & n.5 (Marshall, J., dissenting) (citing cases in which individual liberties were weighed against government's foreign affairs power).

121. *Perez v. Brownell*, 356 U.S. 44, 58 (1958), *overruled on other grounds*, *Afroyim v. Rusk*, 387 U.S. 253 (1967). Similarly, the power of the President to conduct foreign affairs derives from the sovereignty of the United States, not from the Constitution. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-20 (1936). This proposition does not imply, however, that the power transcends the constraints imposed by the Constitution. *Id.* at 320; see *infra* text accompanying note 124.

122. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972); *Boutilier v. INS*, 387 U.S. 118, 123 (1967); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 343 (1909).

123. *United States v. Darby*, 312 U.S. 100, 115 (1941).

124. *Curtiss-Wright*, 299 U.S. at 320.

125. 426 U.S. 67 (1976).

also dictate a narrow standard of review" of immigration decisions.¹²⁶

The *Diaz* Court did not elaborate on these reasons or why they compel judicial deference in the context of immigration decisions, except to note that "decisions in these matters may implicate our relations with foreign powers" and involve "a wide variety of classifications [which] must be defined in the light of changing political and economic circumstances."¹²⁷ These statements echo Justice Frankfurter's remark in *Galvan v. Press* that "[p]olicies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government."¹²⁸

These statements do little, however, to justify the Court's extraordinarily deferential approach to this entire class of cases. The Court's most authoritative statement of the political question doctrine, *Baker v. Carr*,¹²⁹ emphasized a case-by-case determination of nonjusticiability.¹³⁰ The doctrine is "one of 'political questions,' not one of 'political cases.'"¹³¹ Even if one accepts the argument that immigration decisions may implicate foreign policy and political considerations, the doctrine does not explain the Court's blanket refusal to scrutinize any number of cases in which such considerations were insignificant or absent.¹³² A case-by-case determination would allow the Court to refuse to hear those cases that present genuine political questions, without closing the door on a whole class of plaintiffs whose claims present no such obstacles to justiciability.¹³³

Still another rationale seems to be based upon the "right-privilege" distinction. Under this doctrine, the government may impose any conditions it likes on benefits that it could choose to withhold altogether.¹³⁴ The Court appealed to the right-privilege doctrine in *Knauff*, stating that

126. *Id.* at 81-82 (footnote omitted).

127. *Id.* at 81; see also *Fiallo v. Bell*, 430 U.S. 787, 796 (1977) (quoting this language).

128. *Galvan v. Press*, 347 U.S. 522, 531 (1954).

129. 369 U.S. 186 (1962).

130. *Id.* at 217.

131. *Id.*; Comment, *supra* note 111, at 1915-16.

132. Schuck, *supra* note 6, at 17; Rosberg, *supra* note 118, at 328; see also Note, Adams v. Howerton: *Avoiding Constitutional Challenges to Immigration Policies Through Judicial Deference*, 13 GOLDEN GATE U.L. REV. 318, 325 (1983) (arguing that judicial deference is not justified where exclusion policy does not directly implicate power to maintain international relations).

133. Indeed, the case of a citizen or resident petitioning for adjustment of her spouse's status involves no such policy challenge. The petitioner seeks to take advantage of statutory preference categories and only insists that her privacy and due process rights be respected in the process.

134. The doctrine's roots lie in Holmes's holding, while he was a member of the Massachusetts court, that a police officer could be fired for exercising his first amendment rights:

The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech . . . The servant cannot complain, as he takes the employment on the terms which are offered him.

McAuliffe v. Mayor and Bd. of Aldermen, 155 Mass. 216, 220, 29 N.E. 517, 517-18 (1892).

"[a]dmission . . . to the United States is a privilege . . . granted to an alien only upon such terms as the United States shall prescribe."¹³⁵ In the context of the petition for adjustment of status based upon marriage, the argument might be that the alien seeks a privilege that the government is not obligated to offer at all, so it may condition the privilege upon the surrender of some of the couple's privacy rights.

In the years since *Knauff*, however, the right-privilege distinction has been eviscerated by the Court's rulings that government may not grant a privilege subject to an unconstitutional condition.¹³⁶ Thus the distinction has essentially been abandoned in mainstream constitutional jurisprudence,¹³⁷ and several commentators have argued for its abolition in immigration law as well.¹³⁸

Moreover, even if special factors compel the distinction's preservation with respect to aliens despite its abandonment elsewhere, in this case the "privilege" belongs as much to the citizen or resident spouse as to the alien. It is in fact the citizen or resident spouse, and not the alien herself, who petitions the government for adjustment of the alien's status.¹³⁹

Furthermore, one can hardly argue for preserving the doctrine only in the immigration area without returning to the reasons for treating immigration law differently from other areas of jurisprudence, and thus falling back upon one or more of the rationales previously discussed for the Court's special deference in this area. Labeling immigration a "privilege," then, merely states the conclusion that the Court will or will not grant relief under the circumstances. It does not provide a reason why the relief should be denied.¹⁴⁰

None of the rationales for the Court's extraordinary deference in immigration matters discussed thus far adequately accounts for that def-

135. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); see also *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (A sovereign nation may admit aliens "in such cases and upon such conditions as it may see fit to prescribe.").

136. See *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.") (footnote omitted). This development was anticipated in *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 594 (1926), where the Court said, "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

137. See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

138. See, e.g., Note, *supra* note 3, at 976-77; *Developments, supra* note 6, at 1318-20. One commentator's suggestion in 1982 that the Court had already abandoned this rationale, see Note, *supra* note 3, at 977 n.138, was premature. That same term the Court said: "[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

139. Rosberg, *supra* note 118, at 318 & n.160 (citing 1 C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 3.5(a) (rev. ed. 1977)); see *supra* note 20.

140. See Van Alstyne, *supra* note 137, at 1459-60.

erence. Neither the cases characterizing the government's power as sovereign and plenary nor those appealing to the political question or right-privilege doctrines offer a satisfactory explanation for the Court's blanket refusal to subject claimed constitutional violations by immigration authorities to more than the most superficial scrutiny. Yet the Court continues blithely to cite these precedents,¹⁴¹ simply indicating its unwillingness "to reconsider this line of cases."¹⁴²

3. *An Unstated Rationale*

A frequently quoted observation of Justice Frankfurter may help explain the Court's insistence upon immigration law's special constitutional status. In *Galvan v. Press*,¹⁴³ Frankfurter admitted that "much could be said for the view" that the government's immigration power is subordinate to the due process clause, "were we writing on a clean slate."¹⁴⁴ But, he continued, the slate is not clean: "[T]hat *the formulation of these policies is entrusted exclusively to Congress* has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government."¹⁴⁵ In view of this long history of judicial deference, he concluded, "[w]e are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors."¹⁴⁶

Frankfurter's statement is not very persuasive as an independent rationale for the Court's refusal to intervene in immigration matters. Written in 1954, it followed by only a few days the Court's landmark decision in *Brown v. Board of Education*,¹⁴⁷ holding segregation in public schools unconstitutional, and preceded a period in which the Court scarcely hesitated to "deem [itself] wiser or more sensitive to human rights than [its] predecessors" in interpreting constitutional restraints upon government power in other areas.¹⁴⁸ The Court continued, however, to avoid scrutinizing immigration decisions.¹⁴⁹ But the Frankfurter passage does suggest that something unique about the formulation of immigration policies has established a firm grip on the Court's thinking.

A seldom-stated rationale which emphasizes the alien's status as an

141. See, e.g., *Plasencia*, 459 U.S. at 32; *Fiallo v. Bell*, 430 U.S. 787, 792 & n.4 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 767 (1972).

142. *Mandel*, 408 U.S. at 767.

143. 347 U.S. 522 (1954).

144. *Id.* at 530-31.

145. *Id.* at 531 (emphasis added).

146. *Id.*

147. 347 U.S. 483 (1954).

148. See, e.g., *In re Gault*, 387 U.S. 1 (1967) (due process rights of juvenile in delinquency proceedings); *Miranda v. Arizona*, 384 U.S. 436 (1966) (rights of suspect in police interrogation); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (indigent defendant's right to court-appointed counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (illegally obtained evidence inadmissible in state criminal trials).

149. Rosberg, *supra* note 118, at 323-24.

"outsider" to American society may offer a clue to the nature of this unique factor. In 1904, rejecting an alien's first amendment challenge to his deportation in *United States ex rel. Turner v. Williams*,¹⁵⁰ the Court said, "[T]hose who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise."¹⁵¹ While the notion that the Constitution has no extraterritorial application has apparently been rejected by the Court,¹⁵² it is nonetheless probable that the tendency to view the alien as one who does not "belong" to the national community is pervasive and colors much of the traditional legal thinking about immigration law.

What force the traditional approach to the government's immigration power does possess seems to derive from the concept that the power to exclude outsiders is an essential aspect of defining the national community. Professor Schuck has written, "In a constitutional system marked by an extraordinary degree of political, institutional and social fragmentation, manifestations of solidarity and nationhood can exercise a potent hold over the judicial, as well as the lay, imagination."¹⁵³ In a real sense, the determination of whom to admit to permanent residence in this country is the process of defining the national community: Congress "excludes" a group of persons it labels "aliens" while simultaneously embracing others as potential members of the community.¹⁵⁴ When Congress decides who may become a member of the national community, the judiciary may share a sense of solidarity with Congress rather than solicitude for the interests of those who fall outside the circle. "The idea of sovereignty, so elusive in our domestic constitutional structure," writes Schuck, "may come closest to being reified and recognizable when a unified national government deploys its laws against one who is plausibly seen as an outsider—as, quite literally, alien."¹⁵⁵

This notion of solidarity serves to fill some gaps in the historical sovereignty-based rationales for the Court's special treatment of immigration cases. The Court appears to endorse the view that decisions respecting membership in the community are *sui generis*.¹⁵⁶ Without the

150. 194 U.S. 279 (1904).

151. *Id.* at 292; see also *Yue Ting v. United States*, 149 U.S. 698, 737-38 (1893) (Brewer, J., dissenting) ("The Constitution has no extraterritorial effect, and those who have not come lawfully within our territory cannot claim any protection from its provisions.").

152. See Note, *supra* note 3, at 978-83.

153. Schuck, *supra* note 6, at 17.

154. They may be considered "potential members" in the sense that many of those admitted to permanent residence will eventually become naturalized citizens, with the right to vote and hold public office.

155. Schuck, *supra* note 6, at 17.

156. Such decisions are, in one writer's words, "of a different order of importance from most other decisions subjected to constitutional scrutiny." Martin, *supra* note 89, at 199. But see Comment, *supra* note 111, at 1922 (questioning whether Congress is qualified to define the attributes

support of this unstated rationale, the Court's explanations for its special deference to Congress in immigration matters are inadequate.

There is an important corollary to this notion that "outsiders" are entitled to less protection under the Constitution. It follows that those who have established ties to the national community—those who in some sense do "belong"—are entitled to correspondingly greater solicitude for their rights.

The Court has acknowledged this corollary. In *Landon v. Plasencia*,¹⁵⁷ the Court held that a resident alien returning to the United States from abroad was entitled to due process in exclusion proceedings. While stating that "an alien seeking *initial* admission to the United States . . . has no constitutional rights regarding his application,"¹⁵⁸ the Court went on to say that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."¹⁵⁹ In *Plasencia's* case, these "ties" included her job, her home, and her immediate family, the latter in particular "rank[ing] high among the interests of the individual."¹⁶⁰

In some ways, *Plyler v. Doe*¹⁶¹ represents an even more interesting acknowledgment that an alien's rights increase with the ties she establishes to the community. In *Plyler*, the Court required a state to provide free public education to the children of illegal aliens.¹⁶² Though the case can be read as a mere reaffirmation of federal supremacy in immigration matters,¹⁶³ it is nonetheless remarkable that the Court so exerted itself on behalf of the children of aliens whose very presence here violates immigration laws.¹⁶⁴ A plausible explanation for this solicitude is the Court's acknowledgment that notwithstanding their undocumented status, illegal aliens and their children are participating members of American society.

Evidence that this idea influenced the *Plyler* Court's thinking

of a good potential citizen: "If anything, this is a reason to pursue judicial review rather than avoid it.").

157. 459 U.S. 21 (1982).

158. *Id.* at 32 (emphasis added).

159. *Id.* The Court cited *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950), in which it had said, in dictum, that an alien acquires an "ascending scale of rights as he increases his identity with our society."

160. *Plasencia*, 459 U.S. at 34.

161. 457 U.S. 202 (1982).

162. The Court said the state had failed to advance a substantial interest capable of justifying the unequal treatment of such children. *Id.* at 230.

163. *But see* Schuck, *supra* note 6, at 57 (disputing this conclusion).

164. The Court did distinguish between parents who had entered illegally (noting that "[p]ersuasive arguments support the view that a State may withhold its beneficence" from them) and the children, who were present in the country through no fault of their own. 457 U.S. at 219-20. But while the children's plight may have been compelling, they were nonetheless illegal aliens. Thus the Court's concern for their rights still represents a significant departure from its historical approach.

appears at several points in the opinion. The Court noted that illegal aliens "contribut[e] their labor to the local economy and tax money to the state fisc."¹⁶⁵ Illegal aliens, it said, constitute a "shadow population" in the United States numbering in the millions, many of whom have established a "permanent attachment to the Nation"¹⁶⁶ and can be expected to remain in this country permanently despite their illegal status.¹⁶⁷ It quoted the Attorney General's testimony before Congress that many illegal aliens "have become, in effect, members of the community."¹⁶⁸

Having grown up here, the children whom the State sought to exclude from its schools were particularly likely to remain and perhaps attain citizenship.¹⁶⁹ To deny them an education, the Court said, would be to deprive them of "the basic tools by which individuals might lead economically productive lives to the benefit of us all."¹⁷⁰ The notion that such children have achieved de facto membership in the community may account for the Court's concern that they not be denied the education which "prepares individuals to be self-reliant and self-sufficient participants in society."¹⁷¹

Plyler and *Plasencia* thus suggest that American immigration law may be undergoing an important transformation. The relationship between the United States and aliens can no longer be defined as simply as the sovereignty and plenary power rationales suggest, nor may the due process claims of those over whom the government exerts its immigration authority be denied as easily as *Knauff* suggests.¹⁷² By beginning to focus on "the functional social linkages actually forged between aliens and the American people,"¹⁷³ and not so much upon sovereign power and territorial limits, the Court points the way to more complex analysis of the due process claims of aliens. This development presents, for the first time, the possibility of introducing into the immigration context the kinds of protection of individual rights and dignity now taken for granted in other areas of jurisprudence.¹⁷⁴

165. *Plyler*, 457 U.S. at 228.

166. *Id.* at 218 & n.17.

167. *Id.* at 207, 222 n.20.

168. *Id.* at 218 n.17.

169. *Id.* at 207 n.4; see also *id.* at 239 (Powell, J., concurring) (noting lower courts' findings that "an uncertain but significant percentage of illegal alien children will remain in Texas as residents and many eventually will become citizens.").

170. *Id.* at 221.

171. *Id.* at 222 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)).

172. See *supra* text accompanying note 5.

173. Schuck, *supra* note 6, at 50.

174. *Id. passim.*

C. Community Membership and Due Process

A person's status for purposes of challenging the immigration laws improves as her ties to the national community increase. Once this status flexibility is acknowledged, the reasons once thought to justify the Court's deference in all immigration cases can no longer justify such an approach where the rights infringed belong to citizens as much as to aliens.

First, while it is one thing to deny that an alien seeking entry has any due process rights with respect to his application for admission, it is quite another to refuse to acknowledge the due process rights of citizens when these rights have allegedly been infringed by immigration procedures. The government has the same obligation to respect citizens' rights in administering immigration laws as it does in administering welfare, selective service, and tax laws.¹⁷⁵ None of the Court's historical rationales can adequately account for its extraordinary deference in immigration matters except insofar as these are legitimized by the notion of supreme congressional power to deal with "outsiders" to the national community. The same rationales cannot simply be transplanted into cases where government practices infringe the rights of an "insider"—a citizen or a resident alien. As Justice Marshall said, dissenting in *Kleindienst v. Mandel*, "[W]hen the rights of Americans are involved, there is no basis for concluding that the power to exclude aliens is absolute."¹⁷⁶

Second, the proposition that a foreign-born person who has married a U.S. citizen or resident is an "outsider" to the American community is dubious. The Court has indicated that the rights of a person confronting the immigration authorities are defined by her relations to the American community.¹⁷⁷ It is difficult to imagine a more intimate and compelling relation than marriage to a citizen of that community.

As early as 1888, the Court called marriage "the most important relation in life . . . having more to do with the morals and civilization of a people than any other institution."¹⁷⁸ There are probably as many Supreme Court opinions recognizing the fundamentally intimate nature of the marital tie¹⁷⁹ as there are those affirming judicial deference in immigration matters. The *Plasencia* Court seemed to recognize marriage as a tie affecting the alien's status when it called her interest in rejoining

175. Rosberg, *supra* note 118, at 326.

176. 408 U.S. 753, 782 (1972) (Marshall, J., dissenting).

177. *Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *see supra* text accompanying notes 157-60.

178. *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

179. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 383-84 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

her husband and children in the United States "a right that ranks high among the interests of the individual."¹⁸⁰ And, finally, the very existence of preferences and exemptions for spouses of citizens and resident aliens under the immigration laws¹⁸¹ indicates Congress's acknowledgment of the strong ties between such persons and the national community.

In any case, whether or not the alien's marital ties to the national community should trigger greater judicial solicitude for his rights, the rights of both spouses are at issue in the context of a petition for adjustment of an alien spouse's status. The alien's rights are bound up with those of his marital partner, since what intrudes into the marital privacy of either spouse a fortiori intrudes into that of the other. Denying the claim on the basis that it implicates Congress's power over admission of aliens would allow the government to legislate away the fundamental rights of American citizens.¹⁸²

The government's obvious interest in preventing the use of fraudulent marriages to circumvent immigration laws merely indicates that the Court must weigh competing interests, as it often must when considering a due process claim. The Court is no less capable of balancing interests in this area than in the many other areas of law in which it is regularly called upon to do so.¹⁸³ But the Court's current approach, denying that the alien has any due process rights at all with respect to his application, prevents it from reaching the point of balancing interests to determine what process is due. Similarly, the Court's extraordinary deference to Congress's power over immigration forecloses such a weighing of interests, even when the rights at stake are claimed by a citizen. That deferential standard, despite its long line of supporting cases, is inappropriate where the rights of citizens and aliens with strong ties to the national community are at stake.

180. 459 U.S. at 34; see *supra* text accompanying note 160.

181. See *supra* text accompanying notes 15-18.

182. See *Fiallo v. Bell*, 430 U.S. 787, 800 (1977) (Marshall, J., dissenting) (Congress has no "license to deny fundamental rights to citizens according to the most disfavored criteria simply because the Immigration and Nationality Act is involved."); Comment, *supra* note 111, at 1925 (protection of citizens' first amendment rights should not be lowered simply because exclusion power implicated); Note, *supra* note 132, at 324, 327 (deference results in effective denial of citizens' constitutional claims).

183. In fact, balancing is precisely what the Court directed the lower court to do on remand in *Plasencia*. 459 U.S. at 34-37. If courts are competent to weigh a resident alien's interests in reentering the country against the government's interests, despite the government's sovereign power over immigration, they should accord the privacy rights of citizens and resident aliens similar treatment.

One commentator has attempted such a balancing of interests and concluded that the INS' investigatory procedures unjustifiably infringe the right to privacy because they are poorly tailored to the end they purport to serve, and because there are less intrusive means of detecting sham marriages. See generally Note, *supra* note 33.

IV FIRST AMENDMENT CASES DISTINGUISHED

As discussed in Part III, the interference with rights of United States citizens or resident aliens by a given immigration procedure, standing alone, does not compel relief. In *Kleindienst v. Mandel*,¹⁸⁴ the Court rejected such a claim where the first amendment rights of United States citizens had allegedly been violated.

The *Mandel* decision does not necessarily mean, however, that all challenges based on the violation of a citizen's or a resident alien's rights must fail. This Part discusses the possibility that the availability of relief may vary depending on the rights involved and the nature of the underlying relationship between the alien and the citizen. It suggests that the Court's gradual recognition that a person's status under the immigration laws changes as his United States community contacts increase offers a limiting principle. This principle may assuage the Court's fears that recognizing the constitutional rights of aliens might inundate the Court with challenges to the immigration laws.

In *Mandel*, the Court expressed concern that if it recognized first amendment limits on the immigration power based on the claims of citizens who wish to hear and associate with an excluded alien, "courts in each case would be required to weigh the strength of the audience's interest against that of the Government . . . according to some as yet undetermined standard."¹⁸⁵ The Court found this prospect unacceptable, noting that in nearly every case where an alien is excluded for voicing disfavored political views, "there are probably those [Americans] who would wish to meet and speak with him."¹⁸⁶

Part III of this Comment observed that there is no reason for the Court to decline to perform in immigration law the kind of balancing of interests it routinely performs in other areas.¹⁸⁷ The Court's concerns about applying an "as yet undetermined standard" seem disingenuous, since a very similar balancing of interests occurs whenever it considers a first amendment challenge.¹⁸⁸

Perhaps the Court's real concern was that, even though first amendment rights were "implicated" in Mandel's exclusion,¹⁸⁹ such a general right of association as that asserted by the plaintiffs was too tentative to balance against the government's interest in efficient administration of

184. 408 U.S. 753 (1972).

185. *Id.* at 769.

186. *Id.* at 768.

187. See *supra* text accompanying note 183.

188. See, e.g., *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68-75 (1983); *United States v. O'Brien*, 391 U.S. 367, 377 (1968); Comment, *supra* note 111, at 1897.

189. *Mandel*, 408 U.S. at 765.

the immigration laws. A claimed right of association, at least in the immigration context, may require a greater showing of existing, particularized ties between the citizen or resident and the excluded alien than the plaintiffs in *Mandel* could muster.

First, although the *Mandel* Court acknowledged a first amendment right to receive communications as well as to make them,¹⁹⁰ it assumed that *Mandel* himself, as a nonresident alien, had no first amendment rights.¹⁹¹ The Court has had few occasions to consider whether one can assert a first amendment right to hear what another has no first amendment right to say, because nearly all its cases upholding the right to hear also involved the right to speak.¹⁹² *Lamont v. Postmaster General*,¹⁹³ where the Court denied the government's authority to withhold delivery of "communist political propaganda" arriving by mail from abroad, is an exception, but *Lamont* did not involve the right of association. In any event, with the possible exception of *Lamont* the Court has never recognized a constitutional right to associate and communicate with one who has no constitutional right to make the communication.¹⁹⁴

Second, the *Mandel* Court expressed concern that in every exclusion case there are probably citizens who wish to speak and associate with the excluded alien.¹⁹⁵ If that interest could independently form the basis of a first amendment challenge to the immigration laws, either the courts would be caught up in endless challenges based upon some citizen's asserted right to associate with the foreigner seeking entry, or "every claim would prevail, in which case the plenary discretionary authority Congress granted the Executive becomes a nullity."¹⁹⁶ Without something more than this general interest in future association, the plaintiffs' first amendment argument "would prove too much."¹⁹⁷

The Court's "floodgate" concerns are not well taken. A balancing standard could deal adequately with those cases where nothing more than a desire to associate with the excluded alien is asserted. Be that as it may, *Mandel* may still allow a successful constitutional challenge to

190. *Id.* at 762-63.

191. *Id.* at 762.

192. See, e.g., *Thomas v. Collins*, 323 U.S. 516 (1945); *Martin v. City of Struthers*, 319 U.S. 141 (1943). But cf. *Stanley v. Georgia*, 394 U.S. 557, 564-65 (1969) (private possession of obscene materials, though a privacy interest, also implicates first amendment right to receive).

193. 381 U.S. 301 (1965).

194. In a later case, the Court sustained a challenge to censorship of prisoners' mail by focusing on the first amendment rights of those outside the prison to whom the letters were addressed. *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974). But the Court did not explicitly recognize a right to receive a communication from one who has no protected interest in sending it, as it reserved the question of the extent of the prisoners' first amendment rights. *Id.* at 408.

195. See *supra* text accompanying note 186.

196. *Mandel*, 408 U.S. at 768.

197. *Id.*

immigration procedures where the rights of a citizen or resident are implicated and where the status of the alien is raised by the presence of existing, particularized ties to the national community.

The right to marital privacy of a citizen or resident alien and her nonresident alien spouse invokes an existing interest particular to the spouses. In contrast, the first amendment claims in *Mandel* were based on a potential relationship between the excluded alien and an ill-defined group—those in America who would have been able to associate with him had he been admitted. An existing, particularized relationship between the alien and the national community, especially a tie so fundamental and intimate as marriage, supports greater judicial solicitude.

Moreover, this principle may facilitate a distinction between the many cases in which the Court holds that an alien is not entitled to relief from those that merit judicial intervention. The Court's own developing tendency to view the ties between the alien and the national community as a factor in determining the alien's constitutional status¹⁹⁸ may provide a limiting principle, allowing it to introduce some protections into the immigration context without undermining its longstanding policy of leaving to Congress the power to deal with aliens who have no claim on American society beyond their desire to enter. When the immigration authorities deal with a person who has fundamental, existing ties to the national community in a process that threatens to sever those ties, the courts can and should require more substantial procedural protections.

The *Mandel* decision's treatment of the first amendment claims of U.S. citizens remains controversial. Perhaps the Court should have applied a less deferential standard of review, given the fundamental importance of first amendment rights.¹⁹⁹ However, the case does not necessarily indicate that all challenges to the immigration power, including those which involve the rights of citizens, must fail. The opinion allows the argument that functional ties between an alien and the national community require the courts to subject immigration procedures to more serious scrutiny than they customarily apply.²⁰⁰

198. See *supra* text accompanying notes 157-74.

199. See *Mandel*, 408 U.S. at 772 (Douglas, J., dissenting); *id.* at 782-84 (Marshall, J., dissenting); see also Comment, *supra* note 111, at 1925 ("Because of the lack of justification for deference and the preeminence of first amendment values among constitutional values, the Supreme Court should reconsider [*Mandel*]" (footnotes omitted)).

200. Such a distinction was available to the Court in *Fiallo v. Bell*, 430 U.S. 787 (1977). There, citizens and resident aliens challenged on equal protection grounds the denial of preference status based on the relationship of illegitimate children and their natural fathers, when such preferences are available to such children and their mothers. (Thus the alien unwed mother of a U.S. citizen or resident is entitled to a preference, as is the alien illegitimate child of a female U.S. citizen or resident, but no such preference can be based upon the relationship between an illegitimate child and his natural father. See 8 U.S.C. §§ 1101(b), 1151(a)-(b), 1182(a) (1982).) But the Court declined to address the importance of the familial relationships involved, and it disposed of the case simply by

CONCLUSION

Marriage's peculiar status as a fundamental bond between two persons, creating a zone of privacy into which the government may not lightly intrude, is well established. The existence of such a bond between an alien and a member of the national community (a citizen or a resident alien) has two important implications for immigration law. First, the constitutionality of the Immigration and Naturalization Service's procedure for processing petitions based upon marriage is questionable, given its potential for abuse of discretion and intrusions upon protected marital privacy interests. The procedures, if they violate anyone's rights at all, violate the *couple's* rights—those of the citizen or resident spouse as well as those of the alien (to the degree the latter are recognized by the courts). Whatever justification might exist for allowing the INS virtually unfettered discretion in dealing with nonresident aliens, none exists for subjecting citizens and resident aliens to arbitrary infringement of their acknowledged rights.

Under the Supreme Court's previous immigration decisions, however, such abuses would be essentially unassailable, were it not that marriage to a member of the national community creates a compelling bond to the community which elevates the constitutional status of the claim. The rationales advanced by the Court do not justify its refusal to subject immigration decisions to judicial scrutiny except insofar as they are legitimized by the notion of Congress's exclusive power to deal with "outsiders" to the community. One who has married a citizen or a resident alien is not, however, an outsider, since marriage is as fundamental a bond as any recognized in the Court's jurisprudence. Because such fundamental ties to the community enhance the status of the constitutional rights asserted, the due process interests of the married couple merit judicial attention.

Such interests should be carefully weighed against the government's interests in controlling immigration and detecting immigration fraud, not merely brushed aside. The long line of decisions that the Court cites in support of its abdication of constitutional scrutiny of immigration decisions simply does not justify a similar response in the context of applications for adjustment of status based on marriage.

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reaffirming Congress's sovereign power to classify which foreigners shall be admitted and which excluded. 430 U.S. at 794-95 & n.6. *Fiallo* thus fits firmly within the traditional approach.

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