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I. INTRODUCTION

Historically, the United States has been a land of immigrants. For people of many lands, immigration—legal or illegal—was seen as a method of escaping political, economic, or religious problems in their home country.[1] When Congress imposed restrictions on legal immigration with the Immigration and Nationality Act of 1952 ("INA"),[2] many aliens came anyway—illegally. One of the easiest methods for legalizing their stay was for aliens to marry United States citizens.[3] As aliens

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1. *See generally* T. ALEINIKOFF & D. MARTIN, IMMIGRATION: PROCESS AND POLICY 761, 767-69 (1985).

2. 8 U.S.C. §§ 1101-1557 (1982 & Supp. V 1987). The Immigration and Naturalization Service ("INS") administers the INA. The INA categorizes aliens as either non-immigrants or immigrants based on motive for travel to the United States. A non-immigrant does not intend to live permanently in the United States, but rather for a definite period for business, tourism, studies, etc. An immigrant, on the other hand, generally intends to remain in the United States for an indefinite period. *See generally id.* § 1101(a)(15).

3. As amended, the INA gives management of immigration to the INS, sets an annual numerical limit on immigration of 270,000 persons, and divides immigrants into different categories or preferences. *See* Immigration and Nationality Act § 203(a)(1)-(6), 8 U.S.C. § 1153(a)(1)-(6) (1982 & Supp. V 1987) [hereinafter cited by U.S.C. section]. The current version of the statute sets up the categories as follows:

(1) First Preference: 20% of the annual limit for the unmarried sons or daughters of U.S. citizens;
(2) Second Preference: 26% of the annual limit for the spouses or unmarried sons or daughters of permanent resident aliens;
(3) Third Preference: 10% of the annual limit for members of those with professions or exceptional ability in science or art;
(4) Fourth Preference: 10% of the annual limit for married sons or daughters of U.S. citizens;
(5) Fifth Preference: 24% of the annual limit for brothers or sisters of U.S. citizens; and
(6) Sixth Preference: 10% of the annual limit for qualified skilled or unskilled labor.

8 U.S.C. § 1153(a)(1)-(6) (1982 & Supp. V 1987). Each preference is given priority in descending order until all the allotted visas are issued.

Immigrant visas are issued on a first-come, first-served basis using the date of filing of an I-130 relative petition for immigration benefits as the priority date. Because the

discovered the ease with which they could remain in the country by marriage to a citizen, they also discovered the relative ease of entering into a fraudulent marriage.[4]

Concern for sham marriages and the difficulty of the INS in discovering this fraud led Congress to enact the Immigration Marriage Fraud Amendments of 1986 ("IMFA").[5] Section 5 of

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demand for immigration far exceeds the available number of immigrant visas, many of the categories have lengthy waiting lists. *See* [Newsletter] Immigr. L. Serv. (Law. Co-op. & Bancroft Whitney), Immigr. L. Advisory, No. 55 at 1 (July 1989) (listing the priority dates for the various preferences). For example, if a U.S. citizen had filed a petition for her sister to immigrate, she would have had to have filed it by 22 May 1982 for her sister to qualify for a visa interview in July 1989. *Id.*

Congress exempted certain classes of aliens from the numerical limitations. These aliens are classified as immediate relatives and include spouses, minor children, and parents of U.S. citizens. 8 U.S.C. § 1151(b) (1982). Because they are not subject to numerical limitations, these aliens are able to immigrate almost immediately; the only delay they experience is the time required to process their paper work. Thus, they are *immediate relatives*, not preference relatives.

One common misconception is that once an alien marries a U.S. citizen, that alien *automatically* becomes either a permanent legal resident or a U.S. citizen. Unless the citizen spouse files an I-130 petition on behalf of the alien spouse and the INS approves the application, the alien spouse remains in whatever status—legal or illegal—that he or she was in prior to the marriage. (This assertion is based on the personal experience of the author as a Foreign Service Officer.)

4. Aliens saw marriage as an easy way to get around immigration controls since there was no waiting period on a preference list for the spouse of a U.S. citizen. This fomented sham marriages in which an alien married a citizen merely for the immigration benefits and not with an intent to enter into a bona fide relationship. *Fraudulent Marriage and Fiance Arrangements to Obtain Permanent Resident Immigration Status: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 6 (1985) (statement of Alan C. Nelson, Commissioner, INS) [hereinafter *SCIRP*].

Marriage fraud may be one-sided; *i.e.*, the citizen spouse is unaware of the alien's fraud and believes the relationship to be bona fide, or it may be a contractual arrangement in which the citizen spouse receives compensation for providing immigration opportunities. Comment, *Immigration Marriage Fraud Amendments of 1986: Till Congress Do Us Part*, 41 U. MIAMI L. REV. 1087, 1090-91 (1987) [hereinafter Comment, *Till Congress Do Us Part*].

The number of fraudulent marriages grew tremendously in the 1970s and 1980s. Comment, *Alienating Sham Marriages For Tougher Immigration Penalties: Congress Enacts the Marriage Fraud Act*, 15 PEPPERDINE L. REV. 181, 187-88 & nn.51-54 (1988) [hereinafter Comment, *Alienating Sham Marriages*]. INS officials concluded in 1986 that up to one-third of all marriages involving an alien spouse were fraudulent. *Id.*

5. Pub. L. No. 99-639, 100 Stat. 3537 (codified in scattered sections of 8 U.S.C.) [hereinafter IMFA]. For a detailed analysis of the IMFA, see generally Patterson, Palmer & Brandes, *IRCA, IMFA, and SDCEA: What Does This Immigration Alphabet Soup Spell?*, 39 BAYLOR L. REV. 413, 452-63 (1987); Comment, *Alienating Sham Marriages*, *supra* note 4 at 190-204; Comment, *Till Congress Do Us Part*, *supra* note 4. One of the IMFA's major provisions is a two-year conditional residency for an alien spouse, not the subject of a deportation or exclusion proceeding, after which time the couple may petition for permanent resident status for the alien spouse if the marriage is still bona

the IMFA requires an alien who marries a U.S. citizen while deportation or exclusion proceedings are underway against that alien to leave the United States and reside abroad for two years before the INS can approve a petition for immigration.[6]

In *Smith v. INS*,[7] a federal district court rejected one of the first challenges to Section 5, brought by an illegal alien who married a U.S. citizen while deportation proceedings were pending against him. The alien claimed that Section 5 of the IMFA violated his procedural and substantive due process rights, as well as his equal protection rights under the fifth amendment. This casenote examines the court's reasons for upholding the constitutionality of Section 5 in Part II. In Part III, this casenote analyzes the *Smith* court's reasoning and concludes that the case was decided correctly. In Part IV, this casenote considers other challenges to Section 5 and suggests that the law be changed so that aliens subject to Section 5 undergo a three-year conditional status while remaining in the United States rather than face the two-year exclusion rule. Part V concludes that courts will not overturn Section 5 and therefore the only remedy for persons affected by Section 5 is to petition Congress to amend the IMFA.

II. *Smith v. INS*

A. *Facts of* Smith v. INS

Osagie Latif Ighile, the husband of the plaintiff in *Smith*, was a citizen of Nigeria who was lawfully admitted to the United States on a student visa in March, 1981.[8] In 1982, Ighile married

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fide. During the two-year conditional period, the alien spouse may live in the United States. *See* IMFA § 2, 8 U.S.C. § 1186a (Supp. V 1987).

In addition to the two-year waiting period, criminal penalties for engaging in or promoting sham marriages were dramatically increased as an additional deterrence to marriage fraud. Comment, *Alienating Sham Marriages*, *supra* note 4, at 193.

6. 8 U.S.C. § 1154(h) (1982 & Supp. V 1987). The statute states:

> Notwithstanding subsection (a) of this section a petition may not be approved to grant an alien immediate relative status or preference status by reason of a marriage which was entered into during the period described in section 1255(e)(2) of this title, until the alien has resided outside the United States for a 2-year period beginning after the date of the marriage.

Id.

7. 684 F. Supp. 1113 (D. Mass. 1988).

8. Memorandum in Support of Plaintiffs' Motion for Summary Judgement at 2, Smith v. INS, 684 F. Supp. 1113 (D. Mass. 1988) (No. 87-1988-C). A student visa (F-1) is a non-immigrant visa which usually permits an alien to remain in the United States during the extent of studies at an approved institution. *See* 8 U.S.C. § 1101(a)(15)(F)(i)

his first wife, a U.S. citizen named Elizabeth Millner.[9] By 1984, he was no longer residing with Millner.[10] Ighile moved in with his second wife, Kelly Smith, in April, 1985,[11] while at the same time his first wife filed an I-130[12] petition on his behalf to legalize his immigration status. His first wife withdrew the petition in July 1985, without specifying a reason for her action.[13] The INS began deportation proceedings against Ighile in late 1985, and he married Smith in 1986.[14]

When Smith filed an I-130 petition to classify Ighile as an immediate relative[15] under the INA, she was informed that Section 5 of the IMFA prevented the INS from approving the petition until after Ighile had left the United States and resided abroad for two years. At that time, the INS granted Ighile voluntary departure from the United States by a specific date.[16] Smith and Ighile filed an action in federal district court in Massachusetts claiming that Section 5 violated their constitutional rights of equal protection of the laws and due process under the fifth amendment.[17] The court rejected their petition and held that Section 5 was constitutional.[18] Smith and Ighile did not appeal the decision.

(1982).

9. Memorandum in Support of Defendants' Motion for Summary Judgment at 4, Smith v. INS, 684 F. Supp. 1113 (D. Mass. 1988) (No. 87-1988-C) [hereinafter Defendant's Memorandum].

10. *Id.*

11. *Id.* at 5.

12. An I-130 petition is the INS form used to petition for immigrant benefits on behalf of an immediate relative or preference relative.

13. Defendant's Memorandum, *supra* note 9, at 5. Under the INA, the INS must proceed to deport an alien when the petition has been withdrawn unless the alien qualifies for immigration benefits under some other provision of law. *See* Comment, *Regulating Administrative Discretion: Immigration and Marriage*, 4 YALE L. & POL'Y REV. 479, 481 (1986). Presumably, Ighile no longer qualified as a student.

14. Smith v. INS, 684 F. Supp. 1113, 1115 (D. Mass. 1988).

15. For an explanation of the difference between an immediate relative and a preference relative, see *supra* note 3.

16. 684 F. Supp. at 1115. Voluntary departure is preferable to deportation for most aliens because formal deportation prohibits the later legal return of an alien to the United States without undergoing a lengthy waiver process which the INS has discretion to deny. T. ALEINIKOFF & D. MARTIN, *supra* note 1, at 465. An alien granted voluntary departure is not excluded from returning legally to the United States and does not require any waiver. *Id.*

17. 684 F. Supp. at 1116.

18. *Id.* at 1115.

B. *The District Court's Holding*

The district court upheld the constitutionality of Section 5 while rejecting several arguments raised by Ighile and Smith. The court rejected the plaintiffs' argument that Section 5 denied equal protection of the law by treating aliens subject to deportation proceedings differently than aliens not under those proceedings.[19] The court also rejected plaintiffs' equal protection assertion that because marriage was deemed a "fundamental right"[20] by the Supreme Court, and that Section 5 unduly burdened that right, their equal protection claim warranted a higher standard of review than the rational basis test usually applied in immigration cases,[21] that of strict scrutiny. Finally, the court denied plaintiffs' claim that Section 5 violated constitutional guarantees under both procedural and substantive due process grounds.[22] Plaintiffs claimed that the law constituted an irrebuttable legislative presumption that their marriage, and all such marriages covered by Section 5, were per se fraudulent. They asserted that this predetermination denied Smith of liberty to marry without affording her an opportunity to rebut the presumption of fraud[23] and thus violated her substantive due process rights.

III. Analysis of *Smith v. INS* and the Future of Section 5

A. *The Equal Protection Argument*

The *Smith* court first considered the equal protection argument. The court recognized that Smith's right to marry whomever she chose was burdened by Section 5, and INS's argument that she was free to leave the country with Ighile did not lessen the burden.[24] However, the court refused to apply the strict judicial scrutiny test applicable to fundamental rights as the stan-

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19. *Id.* at 1116-17. For a discussion of equal protection guarantees for aliens, see *infra* notes 24-38 and accompanying text.

20. Beginning with Griswold v. Connecticut, 381 U.S. 479 (1965), the Court recognized a penumbra of fundamental rights which, although not specifically mentioned in the Constitution, are protected by the Constitution. These rights include the right to marry, to raise children as the parents see fit, and to obtain an abortion in some circumstances, among other rights. For a more detailed explanation of fundamental rights, see generally J. Nowak, R. Rotunda & J. Young, Constitutional Law, 457-61 (2d ed. 1983).

21. 684 F. Supp. at 1116.

22. *Id.* at 1118. For a discussion of the differences between substantive and procedural due process, see *infra* note 40 and accompanying text.

23. 684 F. Supp. at 1118.

24. *Id.* at 1116.

dard of review. The court quoted *Shaughnessy v. United States ex rel Mezei*,[25] stating, "It has long been recognized that the power to expel or exclude aliens is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.' "[26]

Congress has power to make substantive policy choices in immigration matters that would be unconstitutional in other areas.[27] However, courts do not give Congress absolute deferrence in immigration matters. Immigration laws are subject to a rational basis test.[28] That test is limited to determining if there was any rational link between the statute in question and a legitimate federal interest.[29]

The *Smith* court correctly rejected the plaintiffs' argument that although immigration usually warrants only a rational basis scrutiny, when dealing with a fundamental right, such as marriage, it should warrant strict scrutiny.[30] The court relied on *Fiallo v. Bell*,[31] in which the Supreme Court was faced with three sets of fathers of illegitimate children who sought immigration benefits, either for the father or the children, on the basis of the relationship. The plaintiffs challenged sections 101(b)(1)(D) and (b)(2) of the INA, which permit an unwed mother to give or receive immigration benefits, but precludes a natural father from giving or receiving similar benefits. The Court held that Congress has wide latitude to act in immigration matters subject only to a rational basis analysis, even though that action burdens a fundamental right.[32]

Thus, the *Smith* court was correct in applying a rational basis test to Section 5. The court found that Congress could have had a rational basis for treating aliens who married while under

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25. 345 U.S. 206 (1953). In *Shaughnessy*, a permanent resident alien traveled abroad, remaining in Hungary for nineteen months. When he returned to the United States, the INS refused to permit him entry. He was held on Ellis Island for twenty-one months. The district court and the Second Circuit permitted him to reside in Buffalo, New York, after posting bond. The Supreme Court held that Congress had virtual autonomy in immigration matters and stated that the Court would not substitute its judgment for that of Congress and the INS, thus upholding the INS's exclusion.

26. 684 F. Supp. at 1116 (quoting *Shaughnessy*, 345 U.S. at 210).

27. 684 F. Supp. at 1116-17.

28. *Id.* at 1116.

29. *Id.*

30. *Id.* at 1117.

31. 430 U.S. 787 (1977).

32. *Id.* at 792. The Court stated, "It is not the judicial role in cases of this sort to probe and test the justifications for the legislative decision." *Id.* at 799.

deportation proceedings differently from those aliens who married when they were not subject to such proceedings.[33] The court stated that Congress could legitimately believe that an alien threatened with deportation could be more likely to resort to fraud to circumvent immigration controls than one not subject to imminent deportation.[34]

Other courts also have held almost exclusively that Congress has plenary control over immigration matters.[35] Equal protection claims generally warrant only a rational basis test,[36] unless the plaintiff falls within a suspect class.[37] Although alienage is a suspect class, this class consists only of *legal* aliens, not illegal aliens.[38]

B. The Due Process Arguments

The *Smith* court was unable to distinguish between the plaintiffs' procedural and substantive due process arguments because both claims stated that the plaintiffs should be given the opportunity to rebut the presumption of fraud in their marriage.[39] The court should have done its constitutional law homework; it is a fundamental proposition that substantive due process protects certain fundamental rights, while procedural due process guarantees that when liberty or property rights are abridged, the person whose rights are abridged must be provided adequate notice and the opportunity for a fair hearing.[40]

The *Smith* court stated that absent a protected interest in liberty or property, procedural due process guarantees did not

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33. 684 F. Supp. at 1117.

34. *Id.*

35. *See* Comment, *Till Congress Do Us Part*, *supra* note 4, at 1102.

36. *See, e.g.*, Massachussetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312, 314 (1976).

37. *See id.* at 312 & n.4. For a general discussion of suspect classifications, see J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 20, at 590-99.

38. See Plyler v. Doe, 457 U.S. 202 (1982), in which the Supreme Court held that although illegal aliens were not part of the alienage suspect classification, the Texas legislature could not deny public education to the children of illegal aliens. *Id.* at 210 & n.9.

39. Smith v. INS, 684 F. Supp. 1113, 1117-19 (D. Mass. 1988). The plaintiffs argued that their substantive due process rights were violated because section 5 burdened their fundamental right to marry without providing them an opportunity to demonstrate that their marriage was bona fide. Their procedural due process argument was that they were deprived of a right without the opportunity to a hearing. *Id.*

40. For a more detailed explanation of these differences, see J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 20, at 416-24.

attach regardless of the effect of governmental action.[41] The court held that the ordinarily protected interest of liberty of marriage did not carry with it a right to have one's alien spouse live in the United States without complying with immigration regulations.[42] The court correctly rejected the plaintiffs' substantive due process arguments relating to irrebuttable presumptions. The plaintiffs relied on *Cleveland Board of Education v. LaFleur*[43] to argue that government may not establish presumptions which unduly burden fundamental rights without giving affected parties the opportunity to rebut the presumptions. Although recognizing the validity of *LaFleur* in its sphere, the court stated that this case was more similar to *Weinberger v. Salfi*.[44]

In *Salfi*, the Supreme Court heard a case in which Congress denied social security benefits to individuals who married annuitants within nine months of the annuitants' death.[45] The Supreme Court rejected the idea that *Salfi* dealt with the fundamental right of marriage. It used a rational basis test and concluded that Congress, concerned with the possibility of marriage fraud to obtain social security benefits, could reasonably determine that denial of benefits to certain spouses based on time factors, without a possibility of individual hearings to determine the validity of the marriage, would deter fraud.[46]

In other words, the statute questioned in *Salfi* dealt with a right to receive government benefits, not with the right to marry. Section 5 is similar to the social security statute; Congress removed all consideration of fraud from those specific marriages insofar as the INS was concerned, and required as a policy decision that all aliens covered by the section leave the United States whether or not the marriage was bona fide.[47] Thus, the *Smith* court was correct in applying the *Salfi* rationale to Sec-

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41. 684 F. Supp. at 1118.

42. *Id.*

43. 414 U.S. 632 (1974). In *LaFleur*, the Board of Education created a presumption that a woman who was five months pregnant was not fit to continue teaching. *Id.* at 641. The Supreme Court invalidated the Board's maternity leave regulations, holding that the statute was overbroad and thus unduly burdened a woman's freedom of choice in family matters or marriage. *Id.* at 646-48, 651.

44. 422 U.S. 749 (1975).

45. *Id.* at 777.

46. *See id.* at 777.

47. Smith v. INS, 684 F. Supp. 1113, 1118 (D. Mass. 1988).

tion 5, even though the effect might be unfairly harsh on a bona fide marriage.

Courts usually apply the rational basis test to due process arguments, unless the right allegedly being abridged is deemed fundamental, in which case they apply a strict scrutiny.[48] Although the Supreme Court held in *Loving v. Virginia*[49] that marriage is a fundamental right, the *Smith* court correctly perceived that the right to marry was not being denied—merely the priviledge of having Smith's spouse live in the United States.[50] In other words, Section 5 deals not with an alien's right to marry, but rather the alien's right to receive immigration benefits. Applying that rationale in *Smith v. INS*, the district court correctly found that Congress had a rational basis for determining that the greater risk of marriage fraud among aliens subject to deportation proceedings merited the two-year exclusion rule of Section 5.[51]

The *Smith* court correctly rejected the INS argument that Section 5 did not burden Smith's right to marry at all. Making a U.S. citizen choose between leaving the United States for two years to accompany the alien spouse abroad or separating from the alien spouse during the two-year requirement does impose a burden on the freedom to marry. When a statute burdens a fundamental right, courts usually apply a higher standard of review than rational basis, requiring a compelling state interest, narrowly tailored to meet the specific interest.[52] The *Smith* court was correct in applying the rational basis test rather than a higher standard of review, however, given the Supreme Court's ruling in *Fiallo v. Bell*[53]

Even if the *Smith* court would have applied a higher standard of review, that would not have caused a different result. The courts have held that Congress does have a plenary or com-

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48. *See supra* notes 20-22 and accompanying text.

49. 388 U.S. 1, 12 (1967).

50. 684 F. Supp. at 1113. The court stated, "Although the plaintiffs point out that the statute imposes burdens on their marital relationship, the constitutionally recognized liberty interest in marriage does not encompass the right to have one's alien spouse remain in this country." *Id.*

51. *Id.* at 1119.

52. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

53. 430 U.S. 787 (1977). The Court held that Congress had greater latitude to deal in immigration matters than would be permissable in other activities. *Id.* For an explanation of *Fiallo*, see *supra* note 31 and accompanying text.

pelling interest in controlling the nation's borders.[54] The legislative history of the IMFA demonstrates that Congress tailored the bill to deal with the real problem of sham marriages.[55] Thus, Section 5 would almost certainly pass constitutional muster even were it subject to the compelling state interest test.

IV. No Hope in the Courts, and a Suggested Amendment

A. *Other Courts Are Likely to Follow* Smith

Several federal courts have considered the validity of Section 5 since *Smith* was decided—all have follwed *Smith*'s rationale.[56] Similar cases will probably continue to arise under Section 5 since the program in which aliens who had lived in the United States since January 1982 could apply for amnesty has expired.[57] Aliens who did not take advantage of or qualify for the amnesty may see marriage to a U.S. citizen as the only way to guarantee their ability to remain in the country and work.

Congress's plenary power over immigration is the rock upon which plaintiffs' hopes will invariably founder. Many courts may agree with the *Smith* court that Section 5 is burdensome on a U.S. citizen's fundamental right to marry, and yet the courts will probably dismiss the case because Congress had a rational basis

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54. Shaughnessy v. United States *ex rel* Mezei, 345 U.S. 206, 210 (1953).

55. *See SCIRP*, *supra* note 4, at 1, 6-7.

56. In Anetekhai v. INS, 685 F. Supp. 599 (E.D. La. 1988), *aff'd* 876 F.2d 1218 (5th Cir. 1989), a Nigerian student in the United States married a U.S. citizen while under deportation proceedings. The court upheld the constitutionality of § 5, citing *Smith*, and rejected claims similar to those raised in *Smith*.

In Escobar v. INS, 700 F. Supp. 609 (D.D.C. 1988), a Salvadoran illegally in the United States married a U.S. citizen after he had withdrawn his application for political asylum and while under a voluntary deportation order. The court also relied on *Smith* and rejected all challenges to § 5.

In Almario v. Attorney General, 872 F.2d 147 (6th Cir. 1989), a Phillipine man entered the United States on a visitors' visa. When he overstayed his visa, the INS began deportation proceedings against him. He married prior to his departure date, and brought suit when the INS refused to adjudicate his residency because of § 5. The sixth circuit cited *Smith* in upholding the constitutionality of § 5.

In Minatsis v. Brown, 713 F. Supp. 1056 (S.D. Ohio 1989), the court considered a case similar to *Smith*. A Canadian man married a U.S. citizen while he was legally in the United States. He then moved in with another woman, divorced his first wife, and married the second. While the divorce was still pending, the INS instituted deportation proceedings against Minatsis. The court also relied on *Smith* to reject constitutional challenges to § 5.

57. In 1986, Congress instituted an amnesty program, under which all aliens who had lived continuously in the United States since before January 1, 1982 could apply to the INS and become legalized. The law was codified at 8 U.S.C. § 1255(a) (1982 & Supp. IV 1987).

for enacting Section 5.[58] Plaintiffs will face an almost insurmountable battle convincing a court that Congress's power to regulate immigration should be subject to a strict judicial scrutiny standard of review, given the Court's recognition of Congress's plenary power in immigration matters.[59] Plaintiffs may still claim that Section 5 constitutes an irrebuttable presumption that their marriages are fraudulent, and thus the statute should be subject to the *LaFleur* strict scrutiny test. However, courts are not likely to accept that logic, but instead will hold that the rational basis standard applied in *Salfi* is more appropriate.[60]

B. Problems with Section 5 and Suggested Amendments

The *Smith* court did not deal with one defect inherent in Section 5: it is unclear whether an alien who marries and becomes subject to Section 5's two-year exclusion would then be subject to the two-year conditional status required of non-Section 5 aliens, thus creating a potential four-year wait.[61] The legislative history of the IMFA is totally silent on this point. Therefore, courts will be on their own in interpreting this aspect of the law.

Rather than leave this question to the courts to decide, Congress should amend Section 5 to remove the two-year conditional status requirement from aliens subject to Section 5. The requirement that such aliens leave the United States for two years should be considered sufficient to deter marriage fraud, and therefore full permanent resident status should be granted to Section 5 aliens when they have proven the bona fides of their marriages.

This suggested amendment raises another concern: after an alien has resided for two years abroad, during which time the U.S. citizen spouse may have remained in the United States, how may a couple demonstrate the bona fides of their marriage relationship, since the INS relies heavily on cohabitation as an indication of the validity of a relationship?[62] It appears that the U.S. citizen spouse must choose to live abroad during the two-

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58. *See, e.g.*, cases cited *supra* note 56.

59. *See* Comment, *Till Congress Do Us Part*, *supra* note 4, at 1102.

60. *See Id.* at 1107. In the cases cited *supra* note 56, the courts all relied on *Smith*'s application of a rational basis standard.

61. *See* 8 U.S.C. § 1154(h) (Supp. V 1987).

62. *See* Comment, *Alienating Sham Marriages*, *supra* note 4, at 199.

year exclusion period if he or she wants to remain married to the alien spouse and eventually live in the United States.

Congress's intent in enacting the IMFA was to deter aliens and U.S. citizens from entering fraudulent marriages to circumvent immigration regulations.[63] Congress also intended that the IMFA protect unwary U.S. citizens from unscrupulous aliens.[64] It appears that Section 5, while deterring some incidents of fraud, directly contravenes the general precepts of immigration law by separating some bona fide families. Yet if Section 5 were amended to require adjudication of the bona fides of a marriage on a case-by-case basis, Congress's specific purpose of deterring marriage fraud could be defeated.[65]

One article suggests that the answer to the problem of Section 5 is that an alien facing deportation or exclusion proceedings should wait to marry until after the proceeding has concluded.[66] The alien would then leave the United States, marry the U.S. citizen abroad, and not be subject to Section 5. Although this approach would provide a way for some to circumvent the law, it does not help those aliens who already have a bona fide marriage but are subject to Section 5's restrictions. The attempted end run around immigration controls might even be considered suggestive of attempted marriage fraud by the INS.

Section 5 could be amended by Congress in such a way as to leave intact a deterrence against marriage fraud while at the same time reducing the harsh effects on bona fide marriages. Rather than require all aliens subject to deportation or exclusion proceedings to leave the United States for two years, Congress could place a three-year conditional status on alien spouses subject to Section 5 similar to the two-year conditional status for aliens who are not subject to Section 5. The Section 5 aliens would then be permitted to remain in the United States during the three years, but would have to demonstrate the bona fides of their marriage at the end of the three-year period. The INS would still be able to refuse the conditional status to any alien that could not establish the bona fides of his or her marriage at the time of the initial I-130 petition adjudication.

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63. *Id.* at 183. A major purpose of the INA and other immigration law is family reunification. *Id.* at 200.

64. *See SCIRP*, *supra* note 4, at 14.

65. Smith v. INS, 684 F. Supp. 1113, 1120 (D. Mass. 1988).

66. Patterson, Palmer & Brandes, *supra* note 5, at 463.

One possible argument against the three-year plan is that unscrupulous citizen spouses might use the threat of dissolving the marriage, thus subjecting the alien spouse subject to deportation proceedings, to blackmail the alien spouse.[67] However, this argument applies equally to the two-year conditional status already in place, and therefore should not be a significant factor in rejecting the three-year proposal.

Another potential argument against the three-year plan is that it treats aliens subject to Section 5 differently than those non-Section 5 aliens. This argument should not be accepted, however, because the whole tenor of federal court decisions is that however harsh may be the effects of a statute, Congress can treat different catagories of aliens disparately.[68] Certainly the three-year status would be less harsh than the two-year exclusion rule, and yet could still deter some marriage fraud.

V. Conclusion

The *Smith* court correctly upheld the constitutionality of Section 5 of the IMFA. Although the effects of this statute may appear harsh, Congress has wide authority over immigration matters and courts are not likely to examine too closely laws such as the IMFA. The *Smith* court did not give complete deference to Congress, however, since it stated that there had to be a rational basis for the law. Unfortunately for many aliens in similar positions to Mr. Ighile, the court determined that Congress did have a real basis for enacting the statute. Future challenges are unlikely to succeed, and the only remedy for aliens and their citizen spouses seems to be to petition Congress to amend Section 5 to incorporate a three-year conditional status for Section 5 aliens.

Michael Evans

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67. Comment, *Alienating Sham Marriages*, *supra* note 4, at 201.

68. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787 (1977); Smith v. INS, 684 F. Supp. 1113 (D. Mass. 1988).