FAMILY UNITY IN IMMIGRATION LAW: BROADENING THE SCOPE OF "FAMILY"

by
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Throughout history, the U.S. government has claimed to stand by a strong policy of family reunification. After providing a brief overview of U.S. immigration policy and regulation since the 1800s, this Comment examines the existing statutory framework for family reunification. The author argues that legislation passed by the U.S. Senate in late-May 2006, fails to take family reunification into consideration and, if codified into law, would cause major upheaval in familial structures for mixed-status families, i.e. families consisting of a mix of legal immigrants, undocumented immigrants, naturalized citizens, and U.S.-born citizens.

Focusing on the impact of limitations imposed by a narrow definition of the concept of "family," this Comment argues that current U.S. immigration policy incorrectly focuses on a static concept of family that excludes family models presently existing in the United States, thereby failing to achieve family reunification. To solve this problem, the author argues that the United States should aim to adopt statutory definitions of "family" similar to those used in Canada. This Comment concludes that, to better effectuate its policy of family reunification, Congress must expand the concept of "family" beyond the outdated and narrow definition currently in use.

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I. INTRODUCTION

Most people living in the United States view immigration as a modern issue that is either plaguing or blessing the United States. Depending on where one stands on the issue, one should first understand that the immigration situation today is a product of early American sovereignty. Throughout history, the United States government has claimed to advocate a strong policy of family reunification. Our immigration policy was adopted in a way that Congress thought would best bring families together. One scholar has noted that "[t]he family based immigration system is the cornerstone of our immigration policy."[1] The U.S. Supreme Court has even gone so far as to say that "[i]f any freedom not specifically mentioned in the Bill of Rights enjoys a 'preferred position' in the law it is most certainly the family."[2] There is not a single politician on Capitol Hill that would say they are against family unity. Family, it seems, is supported by everybody.

The problem, however, is that the word "family" is a "culturally based concept[], shaped through a variety of experiences, including cultural and legal."[3] People in the United States use the word "family" to describe many different relationships—from their pets to coworkers in a close-knit company. In the immigration law context, however, the word "family" and who qualifies

[1] Carol Wolchok, *Family-Sponsored Immigration*, 4 GEO. IMMIGR. L.J. 201, 201 (1990).

[2] Moore v. City of East Cleveland, 431 U.S. 494, 511 (1977) (Brennan, J., concurring) (citation omitted).

[3] Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law's Conflicted Answers*, 24 IMMIGR. & NAT'LITY L. REV. 351, 351 (2003).

as "family" is, in fact, limiting because it excludes familial models that are prevalent in the United States. This Comment argues that the refusal to take into account other culturally relevant concepts of family in the immigration law context creates problems for families that contain a mix of both citizens and non-citizens, also known as "mixed-status families."

Part II of this Comment provides a brief historical overview of United States' immigration policy and the current statutory framework that represents the family reunification policy. Part III of this Comment argues that the scope of the word "family" as used in our immigration policy should be changed to include different culturally relevant models of "family," and that doing so will potentially eliminate some of the problems faced by mixed-status families in the U.S. court system. Part IV argues that legislation passed by the United States Senate in late-May 2006, fails to take into consideration the family reunification policy and, if codified into law, would cause major upheaval in familial structures for mixed-status families. The Comment concludes in Part V by stressing the importance of family unity as a continuing goal of U.S. immigration policy.

II. UNITED STATES IMMIGRATION FOR FAMILIES: PAST AND PRESENT

The power of the United States government to regulate immigration is not rooted in any specific text of the Constitution.[4] Therefore, "Immigration law has become an isolated specialty within American law, where normal constitutional reasoning does not necessarily apply."[5] Congress's ability to regulate immigration almost carte blanch gives Congress amazing powers to effectuate positive or negative change for families hoping to reunify or stay unified within the United States. Unlike the enumerated powers to regulate commerce or declare war, which are rooted in specific provisions of the text of the Constitution, the immigration power is rooted in State sovereignty and the doctrine of plenary power.[6] These two concepts—State sovereignty and plenary power—have long been established as the source of Congress's power to exclude people seeking admission into the United States. In the landmark case *Chae Chan Ping v. United States*, the Supreme Court held that: "[t]he power to exclude aliens] is an incident of every independent nation . . . . If it could not exclude aliens it would be to that extent subject to the control of another power . . . . [A nation must be able to defend itself against] vast hordes of . . . people crowding in upon us."[7]

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[4] Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.").

[5] GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 13 (1996).

[6] *Id.* at 14.

[7] 130 U.S. at 603–604, 606.

The interesting aspect of this, worrisome to some, is the fact that an unenumerated power in its amorphous unwritten state is undefined, and therefore potentially limitless. Without much effort, Congress could choose to close the borders to family members altogether. This type of power is unparalleled and should be disconcerting to mixed-status families. "Although the plenary power doctrine does not give Congress unlimited power to *regulate* aliens [who have already entered], it can result in their *exclusion* under conditions which might otherwise be unconstitutional."[8] Thus the framework is set for family reunification in the United States' immigration policy.

A. A Brief Historical Overview of Immigration Policy

In the earlier part of the United States' nationhood, during the 1800s, immigration was lightly regulated.[9] Unlike in the current immigration climate, no one was looking to limit the numerical allowances for different family members. It is fair to assume that immigrants were allowed to bring their whole family with them when they immigrated to the United States.[10] For the most part, early Americans saw immigration as a way to enrich their newly-forged country and provide labor needed to settle and farm the land; however, they actively sought to deter undesirables such as convicts.[11] "[M]any U.S. citizens thought of their new nation as an experiment in freedom—to be shared by all people, regardless of former nationality, who wish to be free."[12] Until the late 1800s, immigrant numbers increased every time the country's demand for labor increased.[13] This unregulated ebb-and-flow of immigration lasted until

[8] Cynthia S. Anderfuhren-Wayne, *Family Unity in Immigration and Refugee Matters: United States and European Approaches*, 8 INT'L J. REFUGEE L. 347, 354 (citing Chae Chan Ping v. United States, 130 U.S. at 606) (emphasis added).

[9] THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 149 (5th ed. 2003) [hereinafter IMMIGRATION AND CITIZENSHIP]; *but see* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1837–38 (1993) (arguing that legal scholars have ignored significant regulations of immigration, such as slave trade regulations, and stating that "a statute regulates immigration if it seeks to prevent or discourage the movement of aliens across an international border, even if the statute also regulates the movement of citizens, or movement across interstate borders, and even if the alien's movement is involuntary.").

[10] Although they may have been allowed to bring their whole families, the financial costs of immigrating were probably a major factor for people and might have determined with whom they would immigrate. *See* MALDWYN ALLEN JONES, AMERICAN IMMIGRATION 177 (2d ed. 1992) (stating that in "early twentieth-century America[,] [during] the increasing prominence of the immigrant . . . great masses of immigrants speaking strange languages, following strange customs, and, with their *children*, outnumber[ed] the native population by as much as two to one." (emphasis added)).

[11] ARISTIDE R. ZOLBERG, A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA 41, 58 (2006) (noting that although Americans wanted immigrants to come and form the country, Americans did not want Britain's convicts).

[12] IMMIGRATION AND CITIZENSHIP, *supra* note 9, at 148.

[13] JONES, *supra* note 10, at 185 (explaining that it was "[n]ot merely the phenomenal expansion of American industry but its changing character [that] accounted for the huge volume of the 'new' immigration"); ZOLBERG, *supra* note 11, at 114 (discussing that "the

xenophobia began to seize the minds of the American people when the demographics of the immigrants began to differ from the demographics of the existing population.[14]

In October 1886, the country dedicated the Statute of Liberty.[15] This symbolic dedication with the poet Emma Lazarus's welcoming of the "huddled masses" came during a time when Americans were "beginning seriously to doubt the wisdom of unrestricted immigration."[16] In 1882, the Chinese Exclusion Act[17] was the "first racist, restrictionist immigration law" to be passed in the United States.[18] This Act was fodder for the restrictionists who were looking for reasons to close immigration to "inferior" immigrants whom they claimed were "inherently criminal [or] diseased."[19] These sentiments ultimately led to the establishment of national origin quotas.[20] In 1924, Congress implemented a quota system based on the 1890 census.[21] The Immigration and Nationality Act of 1952, the next major piece of legislation passed, established the preference system given to United States citizens' relatives.[22]

These national origin quotas and family preferences lasted until the Immigration and Nationality Act Amendments of 1965, when national origin quotas were finally eliminated.[23] The quotas were replaced with a per-country cap; one for countries outside the Western Hemisphere and another for countries within the Western Hemisphere.[24] Congress also added preferences

business community reaps the most immediately tangible benefits of immigration as a source of additional labor").

[14] JONES, *supra* note 10, at 185.

[15] *Id.* at 212.

[16] *Id.*

[17] Act of May 6, 1882 (Chinese Exclusion Act), ch. 126, 22 Stat. 58 (repealed 1943).

[18] IMMIGRATION AND CITIZENSHIP, *supra* note 9, at 152; *see also* JONES, *supra* note 10, at 212–214 (discussing anti-Chinese sentiment that led to the passing of the Chinese Exclusion Act). *But see* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration* Law, 105 COLUM. L. REV. 641 (2005) (arguing that the Page Law—passed in 1875, which targeted Chinese prostitutes—was racist and restrictionist because nativists viewed Chinese marriage and sex practices as threatening to traditional American values).

[19] IMMIGRATION AND CITIZENSHIP, *supra* note 9, at 153; ZOLBERG, *supra* note 11, at 207 (shedding light on people's attitudes towards the Chinese, and explaining the fear that the Chinese would contribute to the "'degeneracy' by way of a proliferation of ethnic groups").

[20] IMMIGRATION AND CITIZENSHIP, *supra* note 9, at 158.

[21] Immigration Act of 1924 (Johnson-Reed Act), ch. 190, 43 Stat. 153; *see also* DAVID R. ROEDIGER, WORKING TOWARD WHITENESS: HOW AMERICA'S IMMIGRANTS BECAME WHITE 139 (2005).

[22] Immigration and Nationality Act of 1952 (INA), ch. 477, § 205, 66 Stat. 163, 8 U.S.C. § 1151(b)(2)(A)(i) (2000).

[23] *See* Center for Immigration Studies, *Three Decades of Mass Immigration: The Legacy of the 1965 Immigration Act*, http://www.cis.org/articles/1995/back395.html [hereinafter *Legacy of the 1965 Immigration Act*] .

[24] *See id.; See generally* Hart-Celler Act, Pub. L. No. 89-236, 79 Stat. 911 (1965) (amending the Immigration and Nationality Act of 1952).

for close relatives arriving from the Eastern Hemisphere.[25] Although these seemingly generous immigration allowances may lead one to believe that U.S. policy was neutral, the "United States was, of course, far from free of prejudice at that time, and one part of the 1965 law reflected a change in policy that was in part due to antiforeign [sic] sentiments."[26]

Immigration legislation has frequently been on Congress's agenda. In 1986, Congress made its first major attempt to combat undocumented immigration and passed the Immigration Reform and Control Act (IRCA).[27] This was followed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, in which Congress provided a more efficient process to remove non-citizens with criminal records and also created "an 'expedited removal' procedure that largely eliminate[d] the role of immigration judges in such expulsion decisions."[28] Although some have questioned the constitutionality of expedited removal, Congress can always stand behind State sovereignty and the plenary power doctrine when it comes to dealing with undocumented aliens and their removal.[29]

B. The Immigration and Naturalization Act: Immediate Relatives and Family-Sponsored Preference Categories

To appreciate the problems associated with mixed-status families, it is important to have an understanding of the statutory framework currently in place for family reunification. The Immigration and Naturalization Act (INA) sections that address family immigration are comprehensive but restricted to traditional North American definitions of family. Thus, "The strongest rights to family unification exist between spouses, and between minor, unmarried, and dependent children and their parents."[30] Currently, immediate relatives and other family members are eligible to obtain permanent residence under preference categories that were established for the purpose of reunifying families.[31] The following three Sections will provide a look at the family reunification policy and a brief overview of the relevant statutory provision.

1. The Origins of the Family Reunification Policy

The INA is full of expressions of legislative concern for the protection and reunification of families.[32] The United States Supreme Court acknowledged the INA's legislative history of dedication to family reunification when the Court noted that the record firmly established that congressional concern was aimed

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[25] *See generally Legacy of the 1965 Immigration Act*, *supra* note 23; and Hart-Celler Act.

[26] IMMIGRATION AND CITIZENSHIP, *supra* note 9, at 163.

[27] Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

[28] IMMIGRATION AND CITIZENSHIP, *supra* note 9, at 167; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546.

[29] NEUMAN, *supra* note 5, at 13–14.

[30] Demleitner, *supra* note 3, at 355.

[31] INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (2000).

[32] Anderfuhren-Wayne, *supra* note 8, at 352–53.

at "the problem of keeping families of United States citizens and immigrants united."[33] Other judicial references to the INA have further demonstrated this congressional concern by noting that the INA has a "humane purpose . . . to reunite families,"[34] and also have declared family reunification as "'the foremost policy underlying the granting of preference visas under our immigration laws.'"[35]

2. Immediate Relatives

The "immediate relatives" category of the INA does not take into account all family bonds that are equivalent to those traditionally-understood as "immediate" by traditional North American families. If one falls within the statute's definition of an immediate relative, one is not subject to any of the numerical limits that are placed on other family members.[36] Immediate relatives, as defined by the statute, are limited to "children, spouses, and parents of a citizen of the United States."[37] As generous as these categories may appear, the definitions of the terms "children, spouses, and parents," contain exclusions which eliminate many family members from the immediate relative category.

For example, the definition of "child" found in INA section 101(b)(1) may exclude someone whom a parent considers a child. The statute establishes an age limit and a marital status requirement for individuals who may otherwise qualify as immediate relatives.[38] If one's son or daughter is twenty-one years old or older, he or she is no longer allowed to immigrate with the beneficial status of an immediate relative under the INA. In the United States, twenty-one years marks entry into adulthood, but one does not stop being a "child" and an integral part of one's family at this point. Likewise, if a son or daughter is married, then he or she is no longer categorized as an immediate relative. Once a child marries, one may argue that a husband and wife create their own family, but this view is shortsighted and does not take into consideration cultures where multigenerational households form relationships as close as those who fall under the definition of "immediate relatives."

Furthermore, INA section 101(b)(1)(D) allows a "child" born out of wedlock to seek immediate relative status.[39] This status is qualified by the child's relationship to either the natural mother or the natural father, but only if

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[33] Fiallo v. Bell, 430 U.S. 787, 795 n.6 (1977) (quoting H.R. REP. NO. 85-1199, at 7 (1957), *reprinted in* 1957 U.S.C.C.A.N. 2016, 2020).

[34] Kaliski v. Dist. Dir. of I.N.S., 620 F.2d 214, 217 (9th Cir. 1980).

[35] Delgado v. INS, 473 F. Supp. 1343, 1348 (S.D.N.Y. 1979) (quoting Lau v. Kiley, 563 F.2d 543, 547 (2d Cir. 1977)).

[36] INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i).

[37] *Id.*

[38] INA § 101(b)(1), 8 U.S.C. § 1101(b)(1) (2000) (defining "child" as an unmarried person under twenty-one years old; but if the child was adopted, the child must have been adopted before the child was sixteen years old).

[39] INA §§ 101(b)(1)(D) and 201(b)(2)(A)(i), 8 U.S.C. §§ 1101(b)(1)(D) and 8 U.S.C. 1151(b)(2)(A)(i)((2000).

the "father has or had a bona fide parent-child relationship with the person."[40] This presumes that a child born out of wedlock does not have a bona fide parent-child relationship, which puts the burden on the father or child to rebut the presumption.

Judging by the definition of "child," it may be implied that Congress places great importance on the parent-child relationship because the relationship is the basis for quite a few immigration provisions. However, it is clear from the statutory age limits requiring a child to be under twenty-one years old and unmarried to be considered an immediate relative,[41] that one's sons and daughters are not necessarily considered one's "child" under the INA. These boundaries limit what constitutes a parent-child relationship. While some may not find the limits objectionable, the problem is that these limits do not account for other forms of parent-child relationships, such as the in loco parentis relationship.

The INA's definition of "child" excludes other important parent-child relationships that are recognized in other areas of law. For example, the concept of in loco parentis is used in the Family and Medical Leave Act of 1993, which allows an employee to take leave to care for an individual who stands in an in loco parentis relationship with the employee.[42] In loco parentis means that a person is in the position or place of a parent.[43] People who are not related as biological or adopted parent and child can still have equally close relationships. Under the INA, a person who is not the biological or adoptive parent of a child, but has developed a similarly close relationship, is not entitled to claim immigration preference under the INA, even if the individual could easily prove the in loco parentis relationship. Thus, a relationship between a primary caregiver grandmother and grandchild, while recognized in other areas of law, would not qualify as a parent-child relationship in the immigration context.[44]

Understanding the term "child" is crucial because "[t]he subtle differences among the various family categories derive primarily from the specific terms of this definition."[45] If a family member is unable to show that he or she is an immediate relative, then he or she is relegated to finding a place in the family-sponsored preference categories.

3. Family-Sponsored Preference Categories

Families face an even greater obstacle under the INA's family-sponsored preference categories. Unlike immediate relatives who are not subject to numerical limits, family-sponsored preference categories are subject to numerical limits. Depending on the country from which one originates, these relatives may also be subject to country-specific numerical limits.[46] Country-

[40] *Id.*; Nguyen v. INS, 533 U.S. 53 (2001) (analyzing the child-father relationship required for the child's citizenship if the child was born out of wedlock).

[41] INA § 101(b), 8 U.S.C. § 1101(b).

[42] Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6.

[43] THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000).

[44] *See* Moore v. City of East Cleveland, 431 U.S. 494, 494 (1977).

[45] IMMIGRATION AND CITIZENSHIP, *supra* note 9, at 278.

[46] INA § 202(a)(2), 8 U.S.C. § 1152(a)(2) (2000).

specific numerical limits are assigned to "oversubscribed chargeability areas," currently including citizens of China, India, Mexico, and the Philippines.[47] The primary predicament that stems from these numerical limits is that more people apply each year than visas are available; this inevitably creates backlogs.[48]

There are four family-based preference categories. The first category is for unmarried sons and daughters of United States citizens who are too old—over twenty-one years old or over sixteen years old, depending on the child's relationship to the parent—to be an immediate relative child.[49] The second category is for spouses and unmarried sons and daughters of lawful permanent resident aliens.[50] The third category is for married sons and daughters of United States citizens.[51] The last category is for brothers and sisters of United States citizens.[52] Each of these categories is allotted a certain number of visas which can be adjusted by Congress.[53]

The INA also makes an effort to avoid separating nuclear families by creating "derivative beneficiaries."[54] Under section 203(d), spouses and children of those admitted under a family-preference category may be admitted under the same preference category and subject to the same waiting period.[55] "Derivative status recognizes the importance of family integrity within American culture and its particular significance to newcomers to the community."[56] However, this provision is also limiting because it excludes family members who arguably should be allowed to make use of the derivative benefit. The derivative benefit only applies to spouses and children whose relationship exists at the time the U.S. citizen or lawful permanent resident alien secured their status; "after-acquired" spouses and children—spouses who married after visa approval, or children born or adopted after visa approval—do not qualify for this benefit.[57]

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[47] BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, VISA BULLETIN FOR JUNE 2006, *available at* http://travel.state.gov/visa/frvi/bulletin/bulletin_2924.html. [hereinafter VISA BULLETIN].

[48] IMMIGRATION AND CITIZENSHIP, *supra* note 9, at 279.

[49] INA § 203(a)(1), 8 U.S.C. § 1153(a)(1).

[50] *Id.* § 203(a)(2), 8 U.S.C. § 1153(a)(2).

[51] *Id.* § 203(a)(3), 8 U.S.C. § 1153(a)(3).

[52] *Id.* § 203(a)(4), 8 U.S.C. § 1153(a)(4).

[53] *Id.* § 203(a)(1)–(4), 8 U.S.C. § 1153(a)(1)–(4). *See also* VISA BULLETIN, *supra* note 47. The Visa Bulletin also provides the priority date for each category. The priority date essentially serves as the "now serving" indicator. For example, priority date for people who filed for the family-based preference category one on April 22, 2001, their has just come up and the Immigration and Naturalization Services is now processing their applications.

[54] IMMIGRATION AND CITIZENSHIP, *supra* note 9, at 280.

[55] INA § 203(d), 8 U.S.C. 1153(d).

[56] Carol Sanger, *Immigration Reform and Control of the Undocumented Family*, 2 GEO. IMMIGR. L.J. 295, 317–318 (1987).

[57] 9 U.S. DEP'T OF STATE FOREIGN AFFAIRS MANUAL § 42.53 n.6.3 (2007), *available at* http://foia.state.gov/masterdocs/09FAM/0942053N.PDF.

III. UNITED STATES IMMIGRATION LAW AND THE SCOPE OF THE WORD "FAMILY"

U.S. immigration law incorrectly focuses on a static concept of family that excludes other presently-existing U.S. family models. The scope of the word "family" is different for different cultures, and even varies from family to family. Ones' own experience is what shapes one's understanding of what is "family." Dorothy Smith, a sociologist who studies family dynamics, uses the acronym SNAF—Standard North American Family—to describe the idealized American family[58] reflected in the INA. SNAF falls short because it excludes family models that are widespread. For example, a white Anglo-Saxon Protestant (WASP) United States citizen can generally identify who is part of their family and who is not, but this may include step-parents and half-siblings. It is likely that the person who raised him or her is the same person who gave birth to him or her. Ask the same question to a first-generation, newly immigrated Latin American national, and they are likely to give a different answer that may include family members that the WASP did not include. Although it is still likely that the person who raised the Latin American national is the same person who gave birth to them, the Latin American national may also include a whole community of family that raised them, playing no less a significant role than their mother, and as such is part of his or her definition of "family." The concept of SNAF excludes both family models, but both family models are wide-spread in North America. Although neither family model is more "correct" or "desirable," under the INA only one restrictive family model is legally recognized by the family-based immigration categories.

A. The INA's Model of Family

The INA recognizes a narrow model of family. If one examines the INA, it is clear that the statute reflects normative judgments about which family member belongs in which category. For example, the statute reflects the assumption that a citizen's unmarried sons and daughters over twenty-one years old are no longer "immediate relatives," and moves them to the first family preference category.[59] However, some families in the United States would consider their unmarried sons and daughter over twenty-one years old still a part of the immediate family, especially since it is not uncommon for twenty-one-year-old college graduates to live with their parents to save money.[60]

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[58] *See generally* Dorothy E. Smith, *The Standard North American Family: SNAF as an Ideological Code*, 14 J. FAM. ISSUES 50–63 (1993) (documenting the social relations in the SNAF, which is an ideological code that is a constant generator of procedures for selecting syntax, categories, and vocabulary in the writing of texts and the production of talk, and for interpreting sentences, written or spoken, ordered by it).

[59] INA § 203(a)(1), 8 U.S.C § 1153 (2000).

[60] Andrew Beveridge, *Living at Home After College*, GOTHAM GAZETTE, June 29, 2005, *available at* http://www.gothamgazette.com/article//20050629/5/1463 (evaluating the statistics of college graduates returning home).

Likewise, citizens and legal permanent residents are also not able to petition for their grandparents' admission into the United States based on family-preference categories.[61] The INA also does not recognize same-sex partners "family," even though this family model is becoming more prevalent in the United States.[62] As a result of the narrow family model embodied in the INA, many families find themselves without the right to reunification and unity.

B. A Right to Family Reunification and Unity: Mixed-Status Families

The right to family reunification is limited by the definition of "family" in the INA. "[T]he family immigration system is tightly regulated by a number of factors: [before any other considerations are examined],[63] the person must fall within one of the relationships that is recognized in the immigration statute."[64] But what happens to the family member if the relationship is not recognized by the INA? Because the family based immigration system is highly restrictive, familial relationships that fall outside the traditional INA definitions of parent or child are unable to attain family reunification. This frustration is best expressed by the following:

> It is not possible to bring anyone else who might be important to you. You can not bring a grandparent, even if he or she is part of your nuclear family. You can not bring a niece or a nephew, [whom] you may have raised, unless they have been legally adopted as your own child before age sixteen.[65]

For families whose members do not fall within the defined terms of the statute, the goal of legal family reunification can seem impossible and hopeless. This hopelessness for a complete legal family reunification—some family members will be admitted legally while others will be denied admission—drives some families toward finding avenues for illegal immigration and, as a result, creates mixed-status families.

Assuming, however, that one has successfully found a category for admission under INA, there are still obstacles to overcome before family reunification is realized. Some "children of United States permanent residents from Mexico [have waited] ten to twelve years to be lawfully reunited in the United States."[66] The next section of this Comment will explore the situation of mixed-status families and their right to family reunification and unity.

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[61] INA §§ 201, 203, 8 U.S.C. §§ 1151, 1153 (2000) (addressing family-based immigration preferences without mentioning grandparents).

[62] *Id.* (defining family members without mentioning same-sex partners).

[63] The INA has other substantive provisions that also form grounds for inadmissibility. *See* INA § 212, 8 U.S.C. § 1182 (2000) (defining classes of aliens that are ineligible for visas or admission).

[64] Wolchok, *supra* note 1, at 203.

[65] *Id.* at 202.

[66] *Id.* at 202–03.

1. Living in Limbo: Mixed-Status Families

More and more people living in the United States are part of a mixed-status family. "Nearly 1 in 10 U.S. families with children is a mixed-status family."[67] This includes families with members that are legal immigrants, undocumented immigrants, naturalized citizens, or U.S.-born citizens.[68] The proportion of mixed-status families is higher in areas where immigrants are concentrated, as in California and New York.[69] Scholars attribute these family models to two elements of the United States' immigration law. One factor contributing to mixed-families is birthright citizenship.[70] Another factor is the so-called "immigration policy's abiding commitment to the goal of family unification."[71] This policy actually leads to the creation of mixed-status families. For example, assume that a woman is admitted to the United States and becomes a naturalized citizen. She marries a foreign national and he is admitted for purposes of family unification and becomes a legal permanent resident. They have children in the United States, and these children are birthright citizens. However, the woman wants to bring her grandmother to the United States because the grandmother was in loco parentis, but legal means of entry are not possible so she enters illegally. This family is now a mixed-status family.

The mixed-status family model is becoming more prevalent and its increase should come as no surprise as a result of the United States' immigration laws.[72] Legislation like Senate Bill 2611, which attempts to deal with illegal immigration and border security, "might serve the goal of reducing illegal immigration, [but does so] at the expense of family unity."[73] The dynamics of these families are constantly changing because family members' immigration statuses may change. One factor stays the same: they live in apprehension of having their family torn apart. These families face tough decisions if one family member is undocumented. They can:

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[67] MICHAEL E. FIX & WENDY ZIMMERMAN, URBAN INSTITUTE, ALL UNDER ONE ROOF: MIXED-STATUS FAMILIES IN AN ERA OF REFORM (1999), *available at* http://www.urban.org/MichaelEFix [hereinafter ALL UNDER ONE ROOF].

[68] *Id.*

[69] *Id.* ("Over a quarter of California families with children, and 14 percent of New York families with children, are mixed-status families.").

[70] Birthright citizenship is an express grant of citizenship written into the Fourteenth Amendment of the U.S. Constitution, which was intended to give the recently emancipated slaves citizenship. The Citizenship Clause reads: "All persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1. Birthright citizenship is only linked to being born on the soil of the United States, and has nothing to do with whether one's parents are legally or illegally present in the United States. Recently, there have been attempts to pass a House bill that would strip birthright citizenship. This idea has been gaining support, but it has not been seriously considered as a possibility. *See* H.R. 698, 109th Cong. (2005).

[71] ALL UNDER ONE ROOF, *supra* note 67, at 2.

[72] David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrations in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL'Y 45, 52 (2005).

[73] ALL UNDER ONE ROOF, *supra* note 67, at 1.

> (1) leave the United States with the whole family, including U.S.-born citizen children; (2) have only the unauthorized parent leave, creating a single-parent family in the United States; or (3) remain in the United States as an intact family, at the risk of getting caught and deported and then not being able to reenter for 3 or 10 years.[74]

These tough choices are not just limited to an undocumented parent; they are also experienced by spouses, grandparents, and even children because any family member could be undocumented and therefore face similar decisions.

Mixed-status families face harsh consequences because undocumented family members are evaluated as individuals under U.S. immigration law. The border patrol recently carried out a plan called Operation Desert Denial, which was a five-day patrol hunting for immigrant smugglers along U.S. Interstate 40.[75] Wendy Ortiz, a twelve-year-old U.S. citizen, was detained along with her two younger U.S.-citizen siblings and undocumented parents; Wendy's mother was forced to sign a voluntary departure form.[76] Both her parents have been deported, and Wendy Ortiz and her siblings are now under the care of her aunt.[77]

The conservative Center for Immigration Studies' position is that this type of immigration enforcement is the only way to compel undocumented immigrants to leave.[78] This position does not fully appreciate the problems faced by mixed-status families. An undocumented immigrant does not define himself or herself as merely an undocumented immigrant. Rather, an undocumented immigrant's identity is often based, first and foremost, on their relationship with their family members. Enforcement that compels undocumented immigrants to leave the United States does nothing to change the fact that they have families in the United States with whom they long to be. If they entered illegally once to be with family, they are likely to enter illegally again. Consider the following examples.

Irma Palacios entered the United States illegally with her six siblings, and the family took advantage of the 1986 amnesty law.[79] Unfortunately, Palacios and two of her sisters remained illegal due to a paperwork error.[80] This was eventually corrected, but they continue to live as a mixed-status family because the youngest sister, Isela, married an undocumented immigrant. The family is still in agony over the possibility that their family's unity is in jeopardy.[81]

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[74] *Id.* at 7.

[75] *Morning Edition: Border Patrol Separates Family with Mixed Citizenship* (National Public Radio broadcast June 1, 2006).

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] Arian Campo-Flores et al., *America's Divide*, NEWSWEEK, Apr. 10, 2006, at 28, 31.

[80] *Id.*

[81] *Id.*

Anna Salazar is a California native married to Roberto, an illegal immigrant.[82] When he was younger, Roberto attempted to use his employer to gain legal status, but failed.[83] The two married five years ago and have two sons who are U.S. birthright citizens, but Roberto is now facing "deportation to Mexico and a possible 10-year exile from the country where he has lived since he was 8."[84] The INA denies admission for immigrants who have been previously removed, regardless of family-status or circumstances.[85]

Mixed-status families are constantly wrestling with issues of seeking legal status and family unity. If a family member pursues legal status, but is for some reason denied, this family member has just exposed the fact that she is not legally in the United States. As one scholar observes:

> [The Immigration Reform and Control Act's][86] failure to treat families as a unit forces many undocumented aliens to balance the opportunities of legalization against the potential disruption of their families: a harsh and unusual choice in the context of American immigration law, which incorporates the principles of family unity throughout the Immigration and Nationality Act (INA).[87]

As much as someone may want to legitimize their immigration status, it is unlikely to outweigh their need for family unity. There should be no doubt that all undocumented immigrants desire legal status, but the mixed-status families' concerns are sympathetic because nobody wants to be forced to leave their family. Some may argue that mixed-status families should simply return to the country of origin of the undocumented family members if their desire is to stay together, but this argument fails to recognize the United States' long-standing preference for family reunification and its history built on immigrants. If the desire is to send everyone back to their country of origin, then let that be the policy. Instead, the INA selectively allows some family members to enter legally, but not others. Families should be allowed to immigrate as families.

Besides concerns regarding undocumented family members, these mixed-status families also face challenges regarding their legally-present members. The Ortiz children and Salazars' two sons are birthright citizens, and are thus entitled to be in the United States because the plenary power to exclude does not extend to U.S. citizens on U.S. soil. Some groups, however, have argued that children of undocumented immigrants should not automatically get U.S. birthright citizenship.[88] Ira Mehlman, the spokesman for Federation for American Immigration Reform (FAIR), has said, "It doesn't make any more sense than if someone breaks into your house and gives birth and the child is

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[82] Tyche Hendricks, *Stakes High for Families*, SAN FRANCISCO CHRON., Apr. 3, 2006, at A1, *available at* http://sfgate.com/cgi-bin/article.cgi?file=c/a/2006/04/03/IMMIG.tmp.

[83] *Id.* at A3.

[84] *Id.* at A1. The article does not indicate whether Roberto was actually deported.

[85] INA § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(a) (2000).

[86] INA § 245A(d)(2)(B)(i), 8 U.S.C. § 1255a(d)(2)(B)(i).

[87] Sanger, *supra* note 56, at 296.

[88] Hendricks, *supra* note 82 (interviewing Ira Mehlman of the Federation for American Immigration Reform (FAIR) about the group's views on citizenship).

considered part of your household."[89] Mehlman forgets that at one point all Americans immigrated[90] and someone in each family gained citizenship through *jus soli.* Most of the first Americans with birthright citizenship had parents who were not American citizens. If one continues to reason through Mehlman's analogy, one would conclude that his comparison is short sighted. The Salazars' children, for example, have one U.S. citizen parent. According to Mehlman's analogy, if this U.S. citizen parent is a part of the U.S. household, the "someone" who breaks into the house (the undocumented immigrant) is actually married to someone who is a member of the household. This baby already belongs to the household—the U.S. household under Mehlman's analogy—and therefore should be entitled to birthright citizenship.

2. Family Reunification and Unity: A Human Right

Family reunification should be recognized as a part of the fundamental human right of family unity. The Universal Declaration of Human Rights describes the family as "the natural and fundamental group unit of society . . . entitled to protection by society and the State."[91] Most people would agree that family unity is an important human right. Indeed, "most international human rights documents recognize a right of family unity."[92] One could argue that a right to family unity is not the same as a right to family reunification because reunification has to do with family members at some point immigrating away from others.[93] After all, family separation is caused by someone's affirmative actions to depart. The reasons for moving can range from being separated by war to looking for better economic opportunities. Because of these different circumstances, immigrant's motivations should not be weighed equally. Families torn apart by war deserve more sympathetic treatment, provided to them through asylum and refugee laws, and families divided by better economic opportunities should bear the consequences of their own decisions.

These arguments miss the mark, however, because it is impossible to declare family unity as a human right without acknowledging family reunification as a necessary extension of that right. Family reunification leads to family unity. One cannot value family unity without also valuing family reunification, because reunification effectuates family unity.

At least one example exists where a United States court has recognized this principle that the right to family unity includes the right to family reunification. In the late-1800s, the U.S. District Court for the District of Oregon heard two habeas corpus claims from the wife and child of a Chinese merchant named Wong Ham.[94] The merchant had been a long-time resident of Portland, Oregon, and had visited China to bring his wife and child with him to

[89] *Id.*

[90] Native Americans excluded.

[91] Universal Declaration of Human Rights, G.A. Res. 217A, at 71, GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

[92] Anderfuhren-Wayne, *supra* note 8, at 349.

[93] *Id.* at 349–50.

[94] *In re* Chung Toy Ho, 42 F. 398 (D. Or. 1890).

the United States. Under section 6 of the Act of July 5, 1884,[95] which was "passed 'to execute' the stipulations"[96] of the Treaty of China of November 17, 1884,[97] a Chinese leaving the United States had to have a certificate for re-admission. While the merchant himself had received a certificate, his wife and child had not and were detained on the ship trying to re-enter the U.S.[98] The court held in *In re Chung Toy Ho* that family reunification was a "natural right," and recognized this right as an extension of the right to family unity:

> [O]n being sent for by him . . . a Chinese merchant who is entitled to come into and dwell in the United States is thereby entitled to bring with him, and have with him, his wife and children. The company of the one, and the care and custody of the other, are his by natural right; and he ought not to be deprived of either . . . .[99]

The court could have determined that Wong had affirmatively and voluntarily separated from his wife and child, and that by doing so he willingly gave up his right to family unity. The court understood the inherent disconnect between supporting family unity but not supporting family reunification. It must be concluded that the right to family unity cannot be effectuated without the right of family reunification.

C. Broadening the Scope of "Family"

When a government chooses to adopt a strong family reunification policy, it must follow through by recognizing that "family" cannot be limited to a statute's narrow view of who is and who is not "family," when society itself reflects different models than those embodied in the statute. "Relations between immediate family members—spouses or parents and children, 'legitimate' or 'illegitimate'—constitute family life with little need for extensive inquiry."[100] However, stopping at this point fails to fulfill the United States' policy goal for family unity. A resounding policy for family reunification cannot be limited to only the legal "family" as defined in the INA, but must encompass the social family as well.[101] "Many scholars express concern that hegemonic images of the Normal American Family are ethnocentric and that they denigrate the style and beliefs of . . . immigrant[s] . . . ."[102] This concern demonstrates the importance of broadening the definition of "family."

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[95] Act of July 5, 1884, ch. 220, 23 Stat. 116.

[96] *In re Chung Toy Ho*, 42 F. at 398.

[97] 23 St. 13, art 2.

[98] *In re Chung Toy Ho*, 42 F. at 398.

[99] *Id.* at 400.

[100] Anderfuhren-Wayne, *supra* note 8, at 356.

[101] *Id.* at 357.

[102] Karen Pyke, *"The Normal American Family" as an Interpretive Structure of Family Life among Grown Children of Korean and Vietnamese Immigrations*, 62 J. OF MARRIAGE & FAM. 240 (2000).

1. The North American Family Model Versus Other Cultural Family Models

The SNAF image may be more prevalent in movies, television shows, magazines, and books, but this does not make it the only family model in the U.S. Many movies and television shows depict fathers who work, mothers who cook and clean (she may have a job, but her dominant role is caretaker), and children who are all in school.[103] "Scholars concerned about the impact of such images point to those who blame family structures that deviate from th[e] norm for many of society's problems and who suggest policies that ignore or punish families that don't fit the construct."[104] The cultural values of these "deviant" types of families are considered abnormal to the SNAF. In reality though, other family models exist all over the world and throughout the United States.

> Single person and two-person households have come to play an ever more important role, as have other models—grandparent-grandchild households, for example—in which others, relatives and non-relatives, live in the household, either in addition to or instead of the expected nuclear family members . . . . Despite its diminished reality, immigration law is based on the assumptions of the dominant model.[105]

The question remains, though, if family dynamics are changing in the United States, why do immigration laws continue to preference the SNAF model of family?

In most of the different ethnic groups immigrating to the United States, family structures are multigenerational.[106] Growing up in the Asian culture, I myself have experienced a multigenerational family with cousins and grandparents living under the same roof. For most of my life in the United States, my paternal grandfather was a primary caregiver. My cousins in Taiwan lived with our maternal grandparents, two sets of aunts and uncles, and all of their children. Each family member contributed to the well-being—both financially and emotionally—of the entire family.

Many Latin American communities are known for viewing entire villages as helping to raise the children of all.[107] "[T]he most significant characteristic of the Chicano family has been identified as familism . . . ."[108] Researchers

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[103] *See generally* DAVID CROTEAU & WILLIAM HOYNES, MEDIA/SOCIETY: INDUSTRIES, IMAGES, AND AUDIENCES 176–179 (3d. ed. 2003) (discussing that the ideals of television families are often not found in reality).

[104] Pyke, *supra* note 102, at 241.

[105] Demleitner, *supra* note 3, at 368 (footnotes omitted).

[106] Peggye Dilworth-Anderson, Linda M. Burton & William L. Turner, *The Importance of Values in the Study of Culturally Diverse Families*, 42 FAM. REL. 238, 240 (1993).

[107] Interview with Tim Klingler, Ph.D. candidate at U.C. Santa Barbara for Spanish (May 30, 2006). Tim and his wife Leslie have done extensive work with Hmong refugees in Illinois, and have lived and worked with communities in Latin America, especially Costa Rica; *see* LESLIE HAWTHORNE KLINGLER, WALK THESE STONES: ENCOUNTERS ALONG A COSTA RICAN VILLAGE ROAD (2001) (detailing their experiences working in Costa Rica).

[108] Sanger, *supra* note 56, at 313.

have found that Mexican-Americans, when compared to Anglo-Americans, are more likely to rely on relatives for emotional support.[109]

In ethnographic studies of African-American families, researchers have found relations that exist "between *fictive kin* (non-blood kin who relationally define themselves as family) are as strong and lasting as those established by blood,"[110] and provide support and mutual aid in an extended family.

None of these models are "better" than the North American model, but the are different. Even so, U.S. immigration law seems to prefer the North American Model, which defines family, perhaps, even more narrowly than the actual, average North American family.[111]

A question to ask ourselves is why we seem to hold immigrants seeking admission into the United States to a narrowly standard of "family" than we do our own native families already living the U.S.? If our own American society cannot reflect the ideals of our laws, how can we expect others to conform to our idealized standards? For example, the United States may deny admission to a foreign national with a criminal history.[112] However, a United States citizen with a criminal history who goes on vacation will be admitted back to the United States.[113] One possible explanation is the desire to limit admissions to people who we think will add to the quality of our society and to not admit those people who will add to or exacerbate our society's problems. We, as members of our society, can decide who we want to include.[114] While this idea may be applicable when immigration laws exclude criminals,[115] prostitutes,[116] and people with communicable diseases,[117] it loses applicability when applied to family models. The function of family is subjective and unique to each family unit. It is clear that "[t]he idea of what constitutes a family and its

[109] *See generally* Susan E. Keefe, Amado M. Padilla & Manuel L. Carlos, *The Mexican-American Extended Family as an Emotional Support System*, 38 HUM. ORG. 144 (1979) (detailing the unique social dynamics of Mexican-American families).

[110] Dilworth-Anderson, Burton & Turner, *supra* note 106, at 240.

[111] *See* Women's Educational Media, That's a Family: Statistics on US Families, http://www.womedia.org/taf_statistics.htm (reporting that "[o]ne child out of 25 lives with neither parent" and "approximately 2 million American children under the age of 18 are being raised by their lesbian and gay parents"). These prevalent family models would not qualify for family reunification under U.S. immigration law.

[112] See INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) for section on criminal inadmissibility grounds.

[113] *See* Vance v. Terrazas, 444 U.S. 252, 263 (1980) (reiterating the rights associated with citizenship and burdens the government must overcome before expatriation).

[114] For a more thorough discussion of membership theory relating to immigration and criminal laws, *see* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 396–403 (2006) (arguing that "[w]hen membership theory is at play in legal decisionmaking, whole categories of constitutional rights depend on the decisionmaker's vision of who belongs.").

[115] See INA § 212(a)(2), 8 U.S.C. § 1182(a)(2), for section on criminal inadmissibility grounds.

[116] INA § 212(a)(2)(D), 8 U.S.C. § 1182(a)(2)(D) (prostitution inadmissibility grounds).

[117] INA § 212(a)(1), 8 U.S.C. § 1182(a)(1) (health-related inadmissibility grounds).

positive characteristics needs to be expanded."[118] Although advocating that each family be allowed to define themselves for immigration purposes would be ideal, this solution would lead to an unworkable rule. Instead, the United States should broaden its family categories so that they are broader and more flexible, similar to Canada's immigration laws.

2. A Broader Definition of "Family": Canada's Example

The United States should adopt an immigration model that is similar to Canada's model. Like the United States, Canada has a policy for family reunification. However, unlike the U.S., Canada's policy is more effectively carried out in its immigration statutes. Canada's Immigration and Refugee Protection Act of 2001[119] expanded the definition of "family" to include family members that are not presently included under U.S. immigration law. The first apparent difference is the inclusion of a "common-law partner or conjugal partner."[120] This allows same-sex partners to enter Canada as a member of the family. Under the INA, the U.S. doesn't acknowledge same-sex partners as "family," even if the country of origin acknowledges the two as a married couple. In order to adopt a policy similar to Canada's policy, the U.S. does not need to recognize the same-sex marriage, but merely that same-sex partners have family bonds that should be protected under United States' immigration laws.

Canada also allows "the mother or father of the sponsor's mother or father" to enter as a member of the family.[121] Therefore, a petitioning citizen or legal permanent resident would be able to bring their grandparent to Canada. The inability to bring in one's grandparent to the United States under existing family preference categories, is a source of major frustration for many immigrants, especially if they come from a culture where families are multigenerational and grandparents are considered part of the "nuclear" family.[122] If the U.S. is to effectuate its policy for family reunification, then Congress should amend the "immediate relative" category to include grandparents. Hence, when birthright U.S. citizens, naturalized citizens, or legal permanent residents reach the age of twenty-one[123] they would be able to petition for the admission of their grandparents. This chance would solve some of the mixed-status family's problems.[124]

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[118] Dilworth-Anderson, Burton & Turner, *supra* note 106, at 240.

[119] Immigration and Refugee Protection Act, 2001 C. Gaz., ch 27, § 3 (1)(d) (Can.) (stating as an objective of the Act "to see that families are reunited in Canada").

[120] Immigration and Refugee Protection Regulations SOR/2002-227, § 117(1)(a).

[121] *Id*. at § 117(1)(d).

[122] Wolchok, *supra* note 1, at 202.

[123] INA § 201, 8 U.S.C. § 1151(b)(2)(A)(i) (stating that in the case of children sponsoring their parents, children must be "at least 21 years of age").

[124] While a maximum of twenty-one years (less if the petitioner is not a birthright citizen) may seem long and lead some to doubt whether families would wait for legal admission or if they would still enter illegally, my research has led me to believe that no one, if they could help it, would choose to enter illegally if given a viable method of legal entry. Currently, the wait for family-preference category one from the Philippines is fifteen years.

For some U.S. citizens and legal permanent residents, another source of frustration is not being able to sponsor relatives whom they have raised as their own children, but that are not necessarily their biological children.[125] However, Canada has recognized that these types of relationships must be included within the definition of "family," and are necessary if family reunification is to be more than just an aspirational goal. If an orphan is under the age of eighteen and is unmarried, Canada will allow him or her to enter as long as the child is "a child of the sponsor's mother or father" (a brother or sister), "a child of a child of the sponsor's mother or father" (a nephew or niece), or "a child of the sponsor's child" (a grandchild).[126] The United States should adopt these provisions.

Canada's broadest expansion of "family" is the inclusion of any relative, regardless of age, as a member of the "family class." If the petitioner does not have any family members that fall within the aforementioned family categories, the petitioner is allowed to bring in *any* relative.[127] Canada recognizes that despite the fact that someone may have no *blood* relatives, he or she may still have family-like relations that are worthy of protection by the country's immigration laws. This final category provides a necessary element of flexibility to encompass different notions of "family."

3. Broadening the Scope of "Family" and its Effects on Mixed-Status Families

The definition of "family" cannot remain static because the status quo has led to problems with family reunification and created mixed-status families. As discussed above, undocumented immigrants often desire to legitimize their presence, but because of the possibility of family separation, they tend to avoid drawing attention to themselves. Many of the problems facing mixed-status families would be solved if they could have entered legally in the first place. Assuming *arguendo* that a majority of people seeking entry have some familial contact to the United States, they would have more opportunities to seek sponsorship among those already in the United States. After receiving permission to enter, their families would then be derivative beneficiaries. The United States could even provide a threshold standard in order to take advantage of the family petitions. For example, Canada has considered a standard requiring the sponsored individual to be "known and emotionally important to" the sponsor.[128] If the "known and emotionally important" standard is adopted in the United States, Congress could create factors for an

And, for family-preference category four from the Philippines the wait is twenty-three years. *See* Visa Bulletin, *supra* note 47.

[125] Wolchok, *supra* note 1, at 202.

[126] Immigration and Refugee Protection Regulations SOR/2002-227, § 117(1)(f) (Can.).

[127] Immigration and Refugee Protection Regulations SOR/2002-227, § 117(1)(h) (Can.).

[128] CANADA, DEP'T OF CITIZENSHIP & IMMIGRATION, IMMIGRATION LEGISLATIVE REVIEW ADVISORY GROUP, NOT JUST NUMBERS: A CANADIAN FRAMEWORK FOR FUTURE IMMIGRATION 47 (1997).

immigration officer to use, such as actual familial kinship relationship, length of acquaintance, length of shared residence, geographical distance between residences, knowledge of each other's personal histories, number of shared experiences, and strength of bond, which would aid in a flexible application of derivative beneficiary status.

Critics of expanding the scope of "family" may argue that the Department of Homeland Security—more specifically the INS—is already overwhelmed by the number of entrants, pointing to the log jam in the priority dates. They may claim that an expansion of those who may qualify as "family" will burden an already overburdened agency and that examining each applicant's relationship would be too cumbersome and difficult. Consider, however, that the U.S. Customs and Border Patrol (CBP) recently received a nearly 4.8% budget increase under President Bush's Fiscal Year 2006 budget.[129] This equals a $6.7 billion total budget. If people are given more legal avenues to enter the United States, fewer people will attempt crossing the borders illegally. The money saved could then be diverted to deal with a heavier volume of family applications. Not only are there enough resources to administer this broader definition of "family,"

> [C]ountries find it to their advantage to admit close family members of migrants. Often they are able to facilitate the integration process and to enable the migrant to establish him- or herself more quickly . . . . The presence of family members also reduces remittance abroad—a useful benefit for the receiving countries since the immigrants will spend the money on consumption or investment in their new home country.[130]

When all factors are considered, a broader scope of "family" seems to be a win-win situation.

Furthermore, mixed-status families who are in court facing the deportation of one or more of their family members will be given more opportunities to demonstrate "exceptional and extremely unusual hardship"[131] for their family members if they are deported. Under the current statute, a deportable immigrant can resist deportation if they demonstrate that their deportation will cause hardship to a family member that is a U.S. citizen or legal permanent resident who is the deportable "alien's spouse, parent, or child."[132] Although Congress may have wanted to limit this type of relief, it fails to consider that "exceptional and extremely unusual hardship" is not limited to spouses, parents, or children. For example, the deportation of an individual in loco parentis, such as a grandmother, would be excluded from using this relief even if her deportation would cause extreme hardship for a birthright citizen grandchild. Broadening "family" to include extended blood kin and fictional kin makes this relief for removal more humane.

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[129] Robert Longley, *Border Security Gets $6.7 Billion in Bush 2006 Budget*, ABOUT.COM, Feb. 2005, *available at* http://usgovinfo.about.com/od/defenseandsecurity/a/homeland06.htm.

[130] Demleitner, *supra* note 3, at 372–73 (2003).

[131] INA § 240A(b)(1)(D). 8 U.S.C. § 1229b(b)(1)(D) (2000).

[132] *Id*.

The petitioner in *I.N.S. v. Hector*[133] would have undeniably benefited from this proposed broadening of the definition of "family." In that case, an aunt was being deported but sought relief by arguing that her teenage nieces who live with her would bear extreme hardship.[134] The lower court had found that the relationship between the aunt and the nieces was the functional equivalent of a parent-child relationship.[135] The Supreme Court of the United States, however, reversed and held that "Congress, through the plain language of the statute, precluded this functional approach to defining the term 'child'."[136] This family was torn apart because the statutory definition of "child" failed to recognize a different model of parent-child relationship between an aunt and niece as the functional equivalent to that of a biological parent and child.

In *In re Andazola-Rivas*, a single mother of two U.S. citizen children failed to meet the "very high standard" of "exceptional and extremely unusual hardship."[137] Despite having two U.S. citizen children, the presence of her mother and siblings in the U.S., and having no family in Mexico, the Board of Immigration Appeals held that there was no proof of hardship beyond what would normally occur as a result of deportation.[138] Granted, most of her family was present in the United States illegally,[139] but if the family categories encompassed a broader standard, Andazola-Rivas could have shown that her deportation was an extreme hardship because other family members, such as her mother and siblings, would experience hardship. If family unity is to remain an important value in American society, broadening the scope of family in U.S. immigration law can help keep families together.

Additionally, courts should not be able to use family reunification as a basis for deportion. The court in *In re Monreal-Aguinaga* held that two U.S. citizen children would not suffer extreme hardship as a result of their father's deportation, but in an effort to legitimize its holding quickly added that deportation of the children with their father would reunite the family.[140] The court stated that there were no particular health problems or other unusual factors that would satisfy the extreme hardship standard.[141] Again, had the scope of "family" been broadened to include more blood and fictive kin, such as parents, grandparents, or siblings, the petitioner may have had a better probability of receiving relief from removal.

4. Precedent Already Set in the Courts for Expanding the Scope of "Family"

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[133] 479 U.S. 85 (1986) (per curiam).

[134] *Id.* at 86.

[135] *Id.* at 87.

[136] *Id.* at 90.

[137] 23 I&N Dec. 319, 322 (BIA 2002).

[138] *Id.* at 324.

[139] This could potentially have been different if the scope of "family" had been broadened, giving all of them more viable options to enter legally.

[140] 23 I&N Dec. 56, 64 (BIA 2001).

[141] *Id.* at 65.

Broadening the scope of "family" is consistent with current U.S. law because U.S. courts have been willing to broaden the notion of "family" in other areas of the law. Identifying the necessity for a broader definition of family, courts have struck down laws that attempt to limit "family" to only nuclear families. One notable Supreme Court case is *Moore v. City of East Cleveland*.[142]

In this case, a homeowner grandmother was convicted of violating a housing ordinance which allowed only members of a single family to live in the same dwelling unit.[143] In the ordinance, only certain family members were recognized as "family."[144] Inez Moore lived with her son and two grandsons, Dale, Jr. and John Moore, Jr. Since John Moore Jr. was Dale's first cousin and not his brother, his residence in the household violated the ordinance.[145] The Court stated that the Cleveland ordinance "slic[ed] deeply into the family itself . . . mak[ing] a crime of a grandmother's choice to live with her grandson."[146] The Court granted protection to this de facto parent-child tie, and stated: "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition."[147]

This case was decided in 1977. Almost thirty years have passed, and yet U.S. immigration laws fail to embrace this broader concept of extended families and the importance of their roles in family unity and reunification. Congress should amend the immigration laws to include a broader scope of "family," paralleling the housing law because the goals of family unity are the same.

Courts, however, are traditionally reluctant to step in and stop Congress from exercising its plenary power. Congress's plenary power is great because it derives from the concept of sovereignty and statehood,[148] and it is arguable that "family" within the context of immigration is within the scope of Congress's plenary power. However, if family unity and reunification is a human right, then the right to family unity and reunification must have existed prior to the establishment of Congress's powers under the Constitution.[149] Congress's plenary power rests on the sovereignty of its people. Family unity and reunification is a right beyond the reach of Congress's plenary power because it is fundamental to humanity.

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[142] 431 U.S. 494 (1977).

[143] *Id.* at 497.

[144] *Id.* at 496.

[145] *Id.*

[146] *Id.* at 498–99.

[147] *Id.* at 504.

[148] *See supra* Part II.

[149] Press Release, United Nations, High Commissioner Says the Message of the Universal Declaration is of Hope Equality, Liberation and Employment (Dec. 4, 1998) (Mary Robinson, UN High Commissioner for Human Rights, 1997–2002, stating "[h]uman rights are inscribed in the hearts of people; they were there long before law-makers drafted their first proclamation.").

IV. CONGRESS'S CURRENT ATTEMPTS TO ADDRESS IMMIGRATION PROBLEMS

There is no doubt that something must be done to solve the current immigration problems. Senate Bill 2611 was an attempt to deal with current immigration problems, and focused on trying to end the backlog of priority dates, increasing border protection, and giving undocumented individuals a chance to legalize their status.[150] This would allow undocumented immigrants who have been in the country for more than five years to apply for citizenship, provided they pay fines and any back taxes owed.[151] Those who have been in the country for two to five years, numbering around three million, would be allowed to stay in the country without fear of deportation, but after three years would have to return to their country of origin and could apply for citizenship at border check points.[152] Those in the country for under two years would be deported to their country of origin.

While Senate Bill 2611 touts family unity as an important concern—using the words "family unity" nine times throughout the 795 page document—the Senate failed to enact proper measures that would effectuate this purpose. For example, if the petitioner is eligible for legalization,[153] only a spouse or child under twenty-one years of age is eligible to adjust their status along with the petitioner.[154] Other family members are not included in the bill, which does very little to alleviate the problems faced by mixed-status families because they will still face the possibility of separation. Family members who are eligible for legalized status will still weigh the need for family unity against benefits of legalization. It is doubtful they will choose the latter.

V. CONCLUSION

Over the past few months, millions of Americans have voiced their concerns over illegal immigration. Those who support strengthening border patrols and deportation claim that their beliefs are not anti-immigrant or racist, but rather, are merely anti-illegal immigration.[155] If this is true, then these same people should support broadening the definition of "family" because opening more options for legal immigration will decrease the amount of illegal immigration. It is important that Congress and its constituents recognize that immigration laws often affect families. Mixed-status families are not mixed by

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[150] S. 2611, 109th Cong. (2006).

[151] *Id.*

[152] *Id.*

[153] See *id.* § 601(b)(1) for residency requirements, employment requirements, tax repayment requirements, criminal record clearance, and required basic citizenship skills.

[154] *Id.*

[155] Lynnette Curtis, *Anti-illegal Immigration Summit Scheduled*, LAS VEGAS REV. J. (NEV.), May 26, 2006, at 6A, *available at* http://www.reviewjournal.com/lvrj_home/2006/May-26-Fri-2006/news/7616353.html, (quoting Mark Edwards, founder of Wake Up America, a Las-Vegas-based organization: "We are against illegal immigration, . . . [w]e are not racists, xenophobes . . . .").

choice. They often have no other avenue for family reunification. By broadening the definition of family, the United States can better effectuate its policy of family reunification.