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The Invisible Border: Restrictions on Short-Term Travel for Noncitizens

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THE INVISIBLE BORDER: RESTRICTIONS ON SHORT-TERM TRAVEL BY NONCITIZENS

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I. Introduction

As Congress considers immigration reform, public debate has focused on border enforcement and whether undocumented immigrants should be provided with a “path to citizenship.” Underlying this debate is the tacit assumption that issues of border enforcement center on persons who lack a legal status to reside in the United States or who are attempting to evade immigration authorities at the border. Regulation of the border, however, affects millions of immigrants who have a legal status or who have fully presented themselves to immigration authorities in their efforts to obtain permanent status. For many immigrants, their status is secure so long as they remain within the United States—but if they step over that border, they do so at their peril, and they may never be allowed to return to their jobs, families, and communities in the United States.

This role of the border does not appear explicitly in any statute, but results from the interaction of a range of statutory and regulatory provisions, interpretations of those provisions, and enforcement practices. Many lack an articulated rationale: some were enacted without explanation; others are carryovers from past legislative schemes. Taken together, they act as an invisible border which keeps immigrants from traveling. Affected classes include some lawful permanent residents (LPRs), some lawful residents who are seeking to obtain permanent residency status, and other residents pursuing legitimate legal challenges to their removal. For those affected, the critical issue is not their existing status or the grounds on which they could be deported, but whether they traveled outside the geographical borders of the United States.\(^1\)

Limitations on travel may seem like a relatively minor aspect of the burdens of not being a U.S. citizen, but for many noncitizens affected by these rules, being limited in travel may operate as a particularly cruel burden. Immigration practitioners often confront restrictions on the right to travel in the context of clients who face dire personal situations. A client calls and explains that a parent is dying and that doctors have said it is time for family to visit. The client was about to buy a ticket but remembers she was told not to travel. The client wants to know what needs to be done. What statements are necessary from a doctor? All too often, the correct advice is that no statement matters. The client can pay his or her last respects and forfeit the right to remain in the United States or can choose to stay home and suffer the moral pain that comes with not having made the journey to the dying parent’s bedside. When immigration laws and practices limit travel in these situations, it is those laws and practices—not a geographical gulf or prohibitive

\(^1\) Noncitizens, like citizens, also face departure controls which can limit their right to travel out of the country, irrespective of any interest in returning. Immigration and Nationality Act [hereinafter INA] § 215, 8 U.S.C. § 1185 (2000) (all INA citations in this article are to the official print version of the U.S. Code (2000) unless otherwise noted). This article is concerned with the ability to return following temporary travel.
cost—that operate as the immediate limitation on maintaining ties with family abroad.\(^2\)

This situation is hardly unusual: due to the structure of immigration laws, it is difficult for immigrants to bring elderly parents and close relatives to live in the United States.\(^4\) For some classes of relatives, such as parents, there is no immediate route to applying for admission based on a family relationship. Petitions for parents can only be made by citizens and therefore must await the processing of petitions for permanent residence followed by petitions for citizenship.\(^5\) For others, such as unmarried children of LPRs, petitions are subject to delays under the immigration preference system. In addition, changes to the immigration laws in 1996 made it more difficult than ever to sponsor immigration by a family member.\(^6\) At some point, there will be illnesses and deaths of those who are abroad. Clients who are aware of the potential immigration consequences of travel must choose whether to travel and risk their status or ignore the pleas of family abroad.

Immigration practitioners may also see the issue of travel arise in cases where a client is unaware of the risks of taking a trip. A new client may be placed in removal proceedings following travel. The client may explain that she obtained “advance parole” from the immigration agency permitting the trip, or the client with a criminal conviction may explain that she obtained permission to travel from a probation or parole officer. The client asks whether a statement from the person who provided permission would be helpful. Once again, the answer is generally “no.” Express permission by the immigration agency through an award of advance parole does not provide a

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2. In an age of significant migration, noncitizens, like citizens, frequently have close family that live outside their country of residence. See Office of Immigr. Statistics, U.S. Dep’t of Homeland Sec., 2004 Yearbook of Immigration Statistics 5 (2006), available at http://www.dhs.gov/ximgtn/statistics/publications/yearbook.shtml (3.8 million people immigrated to the United States between 2001 and 2004). Families are able to maintain regular contact due to vast improvements in technology, such as inexpensive access to phones and the internet. See Manuel Orozco, Transnationalism and Development: Trends and Opportunities in Latin America (2005), available at http://www.thedialogue.org/programs/policy/trade/remittances. Technology makes it possible to know about, for example, family emergencies, with enough time to travel to the family during the emergency. Similarly, due to the relatively inexpensive cost of travel, noncitizens are often able to afford to travel to visit loved ones in their country of origin. See id. Studies indicate that in some communities periodic travel to the country of origin is the norm, rather than the exception. See Manuel Orozco, Organization of American States, Report, Remittances to Latin America and the Caribbean: Issues and Perspectives on Development 2 (2004) (reporting that in a survey of immigrants who sent remittances, over 80 percent of Dominican nationals surveyed traveled to the Dominican Republic at least once every three years).

3. In my own experience with the clients of Immigrant Rights Clinic at NYU School of Law, this issue arises in almost all cases involving deportation proceedings. In some cases, our clients are charged with removal following a trip. In others, we find that after successfully representing our clients in removal proceedings, we have to advise them not to travel. In both situations, the client’s prime interest in traveling is to visit an elderly or sick relative or to attend a funeral.


6. Under the affidavit of support rules, many immigrants will never be able to afford to sponsor a relative. See 8 C.F.R. § 213a.2(c) (2006).
right to return if the agency decides at the border that the individual is inadmissible.\textsuperscript{7}

The immigration practitioner, as the bearer of bad news, faces the client’s question: “Why?” Why would the U.S. government want to prevent a trip to visit a loved one? Why don’t the reasons for the trip matter? Why force a person to choose between abandoning family in the United States or family abroad?

Of course, not all travel arises in the context of family emergencies, and not all noncitizens know to consult with a lawyer when they are about to travel. Noncitizens may discover that their rights are vastly affected by an excursion to the Canadian side of Niagara Falls,\textsuperscript{8} a shopping trip to Tijuana,\textsuperscript{9} or by participating in a high school chess championship in Europe.\textsuperscript{10} As in other aspects of immigration law, engaging in conduct that is commonplace for citizens can get a noncitizen into a great deal of trouble.

In the years since 1996, Congress and the courts have paid limited attention to restrictions on travel. For example, only one circuit court has considered and upheld the agency’s view that some long-time LPRs are subject to scrutiny for “admissibility” after a trip, no matter how short or innocent the trip might be.\textsuperscript{11} There has also been scattered attention to this issue in Congress.\textsuperscript{12} It is possible that the issue has received less attention than other aspects of the current immigration scheme because the word has spread that travel is dangerous. When travel means the abandonment of status, many immigrants will choose to stay.

This article considers the many ways in which current immigration law limits or restricts short-term travel for classes of noncitizens and degrades their ability to maintain ties across borders. Part II examines rules and policies that make physical movement across the border for some classes of noncitizens a matter of enormous legal consequence, and the increasing relevance of these rules and policies in forcing noncitizens to stay within the confines of the borders of the United States. These multiple rules and practices make restrictions on travel an important phenomenon to be studied.

\textsuperscript{7} See In re G-A-C-, 22 I. & N. Dec. 83, 88 (B.I.A. 1998) (“Even had the district director so desired, he had no statutory authority, nor do implementing regulations create such authority, to advise the applicant that he could leave the United States and be readmitted into this country on his return if at the time of his return the applicant could not establish that he was admissible under controlling law.”).

\textsuperscript{8} Dan Frosch, Four Arizona Students From Mexico Forestall Their Deportation, N.Y. TIMES, July 22, 2005, at A13.

\textsuperscript{9} Aguilera-Ruiz v. Ashcroft, 348 F.3d 835, 836 (9th Cir. 2003).

\textsuperscript{10} John Sullivan, Immigration Service Ends Bid to Deport Bronx Student, N.Y. TIMES, Aug. 23, 2000, at B3.


\textsuperscript{12} For more discussion, see infra text accompanying note 37.
in thinking about the bundle of rights provided to people who are not citizens. Part III of the paper explores the interests of non-citizens in engaging in travel. Part IV considers possible governmental interests in regulating travel by noncitizens. Finally, Part V explores strategies for reform through the courts; agency regulations, interpretations, and practices; and new legislation. The article concludes with a call for a more humane and rational system for regulating travel.

II. IMMIGRATION LAWS AND PRACTICES THAT IMPINGE ON TRAVEL

Restrictions on travel exist for noncitizens across situation and status. Each restriction operates somewhat differently and has its own origin. But each may have the same effect of leading immigration practitioners to advise a client not to travel.

A. Restrictions Faced by Lawful Permanent Residents

Lawful permanent residence is the gold standard for noncitizen status. An LPR may perform most jobs and is eligible for many of the benefits provided to citizens. LPRs, and people on a variety of temporary visas, may travel for short periods of time as freely as their passports and pocketbooks will allow. LPRs are subject to deportation, but generally only if they engage in conduct that makes them deportable. Although the security of LPR status has been shaken in recent years—particularly by laws that retroactively change the consequences of past acts—it remains a relatively secure status. According to the most recent government statistics, there are approximately 11.6 million LPRs in the United States. Each year some become citizens and others become new LPRs. Many LPRs, however, choose to remain in that status for a wide variety of reasons, including the cost of applying for citizenship, delays in processing citizenship applications, difficulties meeting the language and civics test for citizenship, a desire to maintain citizenship in

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13. In addition to rules that alter substantive rights upon travel, there are procedures that regulate travel directly. Most prominent is the special registration program that required noncitizens from twenty-five designated countries who were neither LPRs nor asylum seekers to register their presence and to limit any travel to pre-designated ports of entry. Although aspects of this program were suspended in 2003, the departure control procedures remain in effect. See 68 Fed. Reg. 67,578 (Dec. 2, 2003). Recently, the immigration agency has instituted the US-VISIT program, which collects identifying information, such as fingerprints, from all persons entering the United States. 8 C.F.R. § 235.1(d)(1)(iii) (2006).

14. Longer-term travel poses separate issues. Under the agency’s reading of § 101(a)(13) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(13), travel for more than six months subjects an LPR to inadmissibility scrutiny. In addition, travel of more than six months may breach the continuous physical presence requirements for naturalization under §§ 316(b) & (c), 8 U.S.C. § 1427(b)-(c).


their country of origin, and risks to that citizenship from becoming a U.S. citizen. In addition, an increasing number of LPRs are simply ineligible for citizenship as a matter of law17 or have applied for and been denied citizenship.18

In light of the many rights of LPRs, it may come as a surprise that some lawful permanent residents face deportation, and in some cases mandatory deportation, simply as a result of taking a short trip abroad. The rules that affect travel by LPRs were enacted in the Illegal Immigration and Immigrant Responsibility Act of 1996 (IIRIRA).19 In general, they allow LPRs to travel for up to six months without facing restrictions as a result of travel.20 But for an LPR who admits to having ever engaged in conduct that fits the criminal inadmissibility grounds, any travel, no matter how short, may have serious consequences.21 Although denominated “criminal grounds,” the criminal inadmissibility criteria sweep broadly and extend, for example, to a person who admits to ever having smoked marijuana, whether or not that person was ever arrested.22

1. The Space between Inadmissibility and Deportability

For LPRs, one of the most significant risks of travel comes from the gap between rules of deportability and rules of inadmissibility with respect to any criminal act, conviction or violation. As persons who have already been “admitted,” LPRs do not need to worry about rules of “admissibility” provided they stay within the geographic confines of the United States. However, once they travel, they may be deemed to be seeking a new “admission” on their return. Although there is room for debate about the proper contours of the current rules regarding when a returning resident is treated as seeking a new admission, the government’s position on this matter is quite clear: no matter how short the travel, or how innocent the purpose, any travel will subject an LPR to the full range of inadmissibility rules related

17. There is a lifetime bar on citizenship for any person who was convicted of a crime classified as an “aggravated felony” after 1990. INA § 101(f)(8), 8 U.S.C. §1101(f)(8). This bar is applied even to those whose convictions were not a ground of deportability at the time they were convicted.

18. Almost two million naturalization applications were denied between 1990 and 2004. See RYTINA, OFFICE OF IMMIGR. STATISTICS, supra note 16, at 143.


21. INA § 101(a)(13)(C)(v), 8 U.S.C. § 1101(a)(13)(C)(v). Although there are arguments that this provision should not be read as mandating inadmissibility review, the Board of Immigration Appeals takes the position that it requires such an evaluation following an LPR’s return from a trip. See In re Collado-Munoz, 21 I. & N. Dec. 1061, 1062 (BIA 1998).

to criminal conduct committed prior to the trip.  

The risks of travel for those with any criminal history result in part from the gap between rules of inadmissibility and rules of deportability. The rules on inadmissibility are extremely broad. Perhaps the broadest example relates to drug use—any violation of a controlled substance law, even an extremely minor violation under state law, serves as a ground of inadmissibility. No conviction is required for inadmissibility. In contrast, under deportability rules, an exception exists for a person who is convicted of a single offense of possession of marijuana if the amount in question is less than thirty grams. Moreover, a conviction is generally required for deportability. The “inadmissibility gap” that makes travel the trigger for removability includes people with minor marijuana possession offenses or conduct that did not lead to a conviction.

Similarly, there is a gap between the rules of inadmissibility and deportability for persons convicted of crimes designated as “crimes involving moral turpitude.” For inadmissibility purposes, a single conviction or admission to a single offense can operate as a ground of inadmissibility unless it meets certain exceptions. For deportability purposes, however, a long-term resident must be convicted of two such crimes in order to be deportable. Again, there is an inadmissibility gap for persons who are convicted of a single offense, such as shoplifting, more than five years after their arrival in the United States or who were never convicted of a crime.

The gap between standards of inadmissibility and deportability would not matter if a returning resident were not treated as seeking a new admission. In fact, this is precisely how the law resolved this matter prior to 1996. In Rosenberg v. Fleuti, the Supreme Court ruled that an LPR returning from a “brief, casual, and innocent” trip abroad should not be understood as applying for a new “entry,” and therefore should not be reviewed under inadmissibility (then called excludability) criteria. Fleuti presented a classic case of a gap between inadmissibility and deportability rules. Fleuti was an LPR who had traveled briefly to Mexico. The agency held him excludable on the grounds that he was homosexual, grounds that led to a permissible exclusion at the time. However, the agency could not hold him deportable, because there were no corresponding grounds for deportability. Saying that he should be treated as though he had never left the United States, the

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23. Under the government’s reading, LPRs who travel for any amount of time will be subject to inadmissibility review if they have ever “committed an offense identified in section 212(a)(2) (the inadmissibility provisions), unless since that offense the alien has been granted relief under section 212(b) or 240A(a), which provide for certain waivers of inadmissibility.” In re Collado-Munoz, 21 I. & N. Dec. 1061, 1062 (BIA 1998) (Rosenberg, J., dissenting) (interpreting INA § 101(a)(13), 8 U.S.C. §1101(a)(13)).


Supreme Court overturned his order of removal. 29

_Fleuti_ was a statutory case and did not address whether and how Congress could choose to treat a returning resident under different substantive rules. 30 In 1996, as part of IIRIRA, 31 Congress replaced the statutory language that had been interpreted in _Fleuti_ with language that explicitly created bright line safe harbors for LPRs who travel less than 180 days. Whether the statutory change also added per se rules mandating that some returning residents be treated as new applicants for admission has been a subject of dispute. In _Matter of Collado_, the Board of Immigration Appeals (BIA) concluded that Congress had decided to mandate that some returning residents be treated as new applicants for admission regardless of how long they were away or the reasons for their trip. The only circuit court to address the issue upheld the agency’s reading. 32

Many of the new criteria for returning residents serve as time, place, and manner restrictions on travel. For LPRs without any past criminal history, if they stay away for less than 180 days and do not engage in illegal activity, they will not be subject to an admissibility screen. The specific language that emerged from the Conference Committee on LPRs with past criminal conduct, however, operates differently. As interpreted by the government, it provides that an LPR who travels will automatically be subject to inadmissibility rather than deportability rules if the individual has ever committed an offense that is a ground of inadmissibility and has not previously received discretionary relief. This interpretation collapses criminal inadmissibility rules into the category of persons seeking an “admission,” and means that those who occupy the space between deportability and inadmissibility generally cannot travel without being placed in removal proceedings.

Consider the case of Ms. Joseph, a young woman who immigrated to the United States as a teenager to join her mother, who is now a citizen. A year after she immigrated, Ms. Joseph was found smoking marijuana in high school and received a fifty dollar fine. She was not deportable. A few years later she traveled to St. Lucia to visit her grandmother, who had taken care of her before she immigrated to the United States. On her return, the government took the position that Ms. Joseph’s drug violation made her inadmissible. Although a new immigrant applying for lawful permanent residency

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29. _Id._ at 450-51, 452-53 & n.2, 463.
30. In _Landon v. Placencia_, 459 U.S. 21 (1982), the Supreme Court later ruled that a returning LPR who was charged with illegal activity during the time of absence—in that case illegal smuggling—was entitled to due process protections on her return, but not to the same procedural safeguards as an LPR who has not departed. Although the oldest precedents permit vastly different substantive rights for a returning resident, the Supreme Court has not had other recent occasions to discuss changes in substantive rights to remain as a result of travel.
status could have had this one violation waived, the waiver was not available to Ms. Joseph because she received the violation as an LPR during her first seven years of residency. As an LPR who had not traveled, she would not have been deportable and would not have needed a waiver. But as one returning from a trip, she was treated as inadmissible and ineligible for any waiver. She was detained for over three years while she pursued arguments in immigration and federal courts.\textsuperscript{33}

At a minimum, the practical effect on those who are in the space between inadmissibility and deportability is that, like Ms. Joseph, they will be subject to administrative detention as “inadmissible aliens,” and ineligible for a bond hearing before an immigration judge.\textsuperscript{34} They will also be subject to more difficult standards for release from detention by agency officials.\textsuperscript{35} Additionally, they will be ineligible for some forms of relief, such as voluntary departure without an order of removal, simply by virtue of being designated as “inadmissible.”

More permanent consequences flow from unavailability of forms of relief. Many LPRs who are not deportable while they remain in the country will be ineligible for relief from removal if they are found inadmissible. Relief from removal is unavailable for many offenses that would not make an LPR deportable, because the relief rules for LPRs are written to match deportability and not inadmissibility grounds of deportation.\textsuperscript{36} In Ms. Joseph’s case, for example, the fact that her offense occurred within seven years of her admission serves to bar relief from removal or any waiver, even though she would not have been subject to removal had she not traveled, and even though the offense itself would have permitted a waiver of inadmissibility had she not already received lawful permanent residency status. The finding of inadmissibility, if sustained, is the end of the case. The fact that the person would never have been deported, but for travel, is irrelevant.

\begin{footnotesize}
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\item[33] Families for Freedom, Human Casualties of the War on Immigrants ...: Agatha Joseph and Her Daughter, http://www.familiesforfreedom.org/truth/joseph.htm (last visited Feb. 24, 2007). Ms. Joseph was ultimately released after she was able to get a criminal court to increase her marijuana violation to a misdemeanor and award her youthful offender status—a status that ironically is available for misdemeanors but not for the lesser category of violations. As a youthful offender, her conviction was no longer a basis for removal.
\item[34] INA § 235(b)(2), 8 U.S.C. § 1225(b)(2).
\item[35] A person detained under INA § 235(b)(2) can be released for urgent humanitarian reasons. See 8 C.F.R. § 212.5 (2007). In contrast, a person charged with deportability who is detained may seek bond and may obtain review of a bond determination in front of an immigration judge, unless the person is covered by mandatory detention rules. See INA § 236, 8 U.S.C. § 1226. Mandatory detention under section 236(c) of the INA does not apply to those who were released from prison prior to October 8, 1998, the date on which mandatory detention rules went into effect. See, e.g., Sun Yo v. Greene, 109 F. Supp. 2d 1281, 1282 (D. Colo. 2000).
\item[36] The statutory scheme for inadmissibility provides for waivers under § 212(h) of the INA. 8 U.S.C. § 1182(h). The 1996 amendments, however, bar § 212(h) relief for persons who are LPRs whose convictions took place during the first seven years of residency. This amendment presumably was designed to create a single method for providing relief to LPRs of cancellation of removal and dates to amendments made on the floor in 1996 to a previous version of the cancellation of removal scheme. There is no evidence anywhere that anyone thought about the situation of an LPR who is not deportable—and therefore must rely on waivers that are designed for inadmissibility grounds.
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There is no legislative history providing any insight into a legislative purpose for these consequences. The version of the law that was passed by the two houses in 1996 did not collapse inadmissibility and deportability criteria for returning LPRs.\(^\text{37}\) This language was added in the conference report with no explanation. Thus, without any articulated Congressional reason for subjecting non-deportable LPRs to different rules when they travel, immigration enforcement continues to subject those who travel to differential standards for continued residence in the United States and differential rights to be free of detention. For those who fall within the space between rules of deportability and inadmissibility, travel places ongoing residence at risk. Only by staying inside the boundaries of the United States does the person stay free of any risk of detention and deportation.

2. *Forcing the Hand of Border Inspectors*

Even if an LPR could be deported without travel, travel significantly changes both the agency’s power to exercise prosecutorial discretion and the individual’s procedural rights. These differences are of enormous practical difference to LPRs. A noncitizen who travels faces certain removal proceedings, detention without any independent review, and diminished rights to judicial review, even if that individual would have been left alone while in the United States.

Immigration enforcement resources are subject to agency priorities. There are millions of people who could be the focus of immigration enforcement. Some of those same people could be eligible for various forms of immigration benefits, or even citizenship. Within the country, the immigration agency is constantly making decisions about enforcement priorities that reflect both the limited extent of the agency’s resources and the conflicting policies that apply to persons who are deportable.

If an LPR appearing for inspection on return from international travel were treated like those encountered inside the country, the agency could apply the same enforcement priorities. But the agency’s construction of the statute, as requiring a finding of admissibility for returning residents with past criminal offenses, forces the agency’s hand. It must either find the person “admissible” or institute removal proceedings.\(^\text{38}\) As a result, persons who might have been overlooked, even if they presented themselves to the agency

\(^{37}\) The Senate version of the bill, S. 1664, did not change INA § 101(a)(13). The House version changed this definition, but did not create any “inadmissibility gap” for returning LPRs. In the House bill, the exception for persons with criminal charges singled out those with an “aggravated felony” conviction, which is not a ground of inadmissibility. See H.R. Rep. 104-469, at 13-14 (1996). The conference report states that it agrees with the House provision, with modifications. H. R. Rep 104-828, 104th Cong. 207 (1996). But it nowhere indicates an intention to eliminate any ability for a class of LPRs to travel without being subjected to inadmissibility criteria.

through, for example, an application for citizenship, will be placed into removal proceedings, thereby diverting enforcement resources from other forms of immigration law enforcement.

In addition, there are probably hundreds of thousands of LPRs who could be considered deportable but who are not the subject of current enforcement activity absent a new offense. This group includes all LPRs who have some past criminal history but were never sentenced to prison, or who were not identified when in prison, and who have not had further trouble with the law. These people will not become a subject of interest to immigration enforcement unless they affirmatively apply for an immigration benefit, such as citizenship, or travel outside the confines of the United States.

While within the United States, these deportable LPRs benefit from two layers of protection. First, they may not come into contact with the immigration service, and therefore they may never trigger an evaluation of whether they should be placed in removal proceedings. Second, even if they do come into contact with immigration officials, a deportation officer can make a discretionary decision not to place the individual in removal proceedings.

At the border, however, immigration inspectors view themselves as operating outside the realm of enforcement discretion. In their view, they must make an affirmative determination as to whether each individual meets the criteria for admission. In effect, the border is treated as a checkpoint where all are tested and must pass inspection.

While the basis for deportability might have gone unnoticed if the LPR had never left the United States, or it might have been noticed but ignored as a matter of prosecutorial discretion, at the border an inspector will not view herself as having the discretion to ignore a past transgression. The consequences of the lack of discretion to ignore minor infractions is magnified by the technological access of border officials. Data-sharing is more commonplace after 9/11, making it all the more likely that a border inspector will know about old and minor criminal convictions. At the border, the sole issue is whether the inspector believes that there are grounds for placing the person in removal proceedings. Unless the inspector is prepared to rule affirmatively that the person is admissible, arguable grounds of inadmissibility are likely to set the removal process in motion. If not immediately


arrested, the person is likely to be sent to “deferred inspection”\footnote{8 C.F.R. §§ 235.2, 1235.2.} and then placed in removal proceedings. Like those who fall within the space between inadmissibility and deportability, those whose proceedings are triggered as a result of being at the border face administrative detention without an impartial hearing, as well as ineligibility for some forms of relief.

3. Detention

For LPRs, travel also implicates crucial liberty interests and procedural rights. If placed in removal proceedings at the border on grounds of inadmissibility, an individual will be subject to detention under circumstances that would not justify detention if the same person were charged with removability within the country.\footnote{All inadmissible aliens are subject to detention absent an award of parole based on humanitarian factors. \textit{See} 8 C.F.R. § 212.5(b) (requiring “urgent humanitarian reasons” or issues of “significant public benefit” for parole at the border). In contrast, persons charged with deportability in the interior are subject to mandatory detention for specified convictions and only if they were released from custody after October 9, 1998. \textit{See} INA §236(c), 8 U.S.C. § 1226(c); Sun Vo v. Greene, 109 F. Supp. 2d 1281, 1282 (D. Col. 2000).} Even more important in the long-term, a returning LPR will have fewer recognized rights to administrative review of detention. Although the constitutionality of the scheme is a matter of some dispute,\footnote{See, \textit{e.g.}, Mejia v. Ashcroft, 360 F. Supp. 2d 647 (D.N.J. 2005) (applying rational basis scrutiny and finding that disparate treatment of LPRs who travel survives equal protection challenge); Alaka v. Elwood, 225 F. Supp. 2d 547 (E.D. Pa. 2002) (finding substantive due process violation in treating returning LPRs differently from those who had not left the country with respect to mandatory detention categories). Although the Supreme Court’s decision in \textit{Demore v. Kim}, 538 U.S. 510 (2003), upholds the legality of mandatory detention policies, the Court did not have occasion to comment on policies that turn on travel out of the country.} the agency’s position is that an LPR placed in removal proceedings at the border cannot seek a hearing before an immigration judge on the issue of release from detention.

For the LPR seeking advice about whether to travel, the risk of detention may be the strongest factor in the balance. Once detained, a person charged with removal can be placed anywhere in the country and may have limited or no access to family or counsel.\footnote{See generally James F. Smith, \textit{United States Immigration Law as We Know It: El Clandestino, the American Gulag, and Rounding Up the Usual Suspects}, 38 U. C. DAVIS L. REV. 747, 786-97 (describing evolution of the detention system); Margaret H. Taylor, \textit{Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform}, 29 CONN. L. REV. 1647, 1651-52 (1997) (describing the effects of the detention system on access to counsel).} Also, detention is in prison facilities, where detainees face the demeaning conditions of anyone who is incarcerated. The idea of being placed in these conditions is usually frightening and more than enough of a reason not to travel.

B. Restrictions on Applicants for Permanent Residency Status

Persons who are in the process of adjusting from temporary to permanent residency status also compromise their legal rights through travel. In prac-
tice, delays in the immigrant petition process have made following temporary visas with an application for adjustment of status an increasingly common first step toward permanent residency status and, later, citizenship. In addition, the Immigration and Nationality Act (INA) contains limited provisions that allow persons who are not currently in status to adjust to permanent residency status. Persons who have applied for adjustment enjoy numerous benefits. They are eligible for employment authorization and eligible to receive a social security card; also, adjustment allows the transition in status to be made without processing by a consulate outside the country. As a result, adjustment is currently responsible for about half of all new grants of permanent residency.

However, applicants for adjustment, other than holders of certain temporary visas, face obstacles to travel. Those affected include, for example, any person whose visa has expired, those with current valid visas such as student visas and those who lacked visas but are eligible for adjustment. The severity of specific barriers to travel depends on whether applicants have accrued a period of unlawful presence in the United States. The barriers for those with unlawful presence are severe and can lead to a loss of the right to return. The consequences for those who have not accrued unlawful presence are less severe, but nonetheless can have significant practical consequences on travel. It is worth noting that the treatment of travel does not match the treatment of other benefits. For example, all applicants for adjustment can receive employment authorization and a social security card, regardless of past periods of unlawful presence, yet they face punitive policies when they engage in short-term travel.

1. **Permanent Residency Applicants Making the Transition from Temporary to Permanent Status**

As a general matter, immigrants who are applying to adjust from temporary to permanent status may only travel if they receive “advance parole.” Although noncitizens often think of advance parole as a set of “travel

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46. These provisions include the Legal Immigration Family Equity (LIFE) Act, Pub. L. No. 105-119, § 111(a), 11 Stat. 2458 (2000), amending INA § 245(i), 8 U.S.C. 1255(i), which allowed noncitizens in the United States to adjust their status under family or business petitions filed prior to April 1, 2001, without leaving the country and therefore without facing the unlawful presence bars and provisions. In addition, adjustment within the country is available for an immediate relative with a visa immediately available if the person was previously inspected and admitted in any status. See INA § 245(a); 8 U.S.C. § 1255(a).


papers,” as it is described on official government web sites. In fact it provides for a change in the person’s legal status and accompanying rights. On return from a trip, the individual no longer has the status that he or she had on departure. Instead, the person is technically treated as remaining at the border and as “paroled” into the country. If an applicant for adjustment is unaware of the need to seek advance parole, or for some reason does not obtain advance parole, the application for adjustment is deemed abandoned as soon as the person sets foot outside the country. The person will be evaluated for “admissibility” at the border and may be denied entry, simply because the application for permanent resident status would betray an intent to remain in the United States which is inconsistent with the previously authorized intent to remain on a temporary basis.

The advance parole rules stem from the conceptual treatment of temporary visa holders as professing a different “intent” from those who are seeking permanent residency. A temporary visa holder is not supposed to intend to stay permanently, and hence the “intent” connected with the temporary visa may be seen as inconsistent with an “intent” to immigrate. When someone with a temporary visa applies for permanent residency, that action shows a change in intent, and may be inconsistent with the previously granted status. When returning to the border, the applicant for adjustment may be seen as having acted inconsistently with the original visa and therefore cannot be readmitted on that visa. At the same time, the person cannot be admitted under the new status because permanent residency has not yet been granted. “Parole,” which treats the individual as still being at the border, allows for return without ruling on whether the person’s intent is now inconsistent with the previously granted temporary status or allowing an extension on a visa that is deemed inconsistent with the application for permanent status. This treatment of intent ignores the realities of current immigration law, in which delays in the processing of permanent visa applications have made the transition from temporary to permanent status an entrenched part of the immigration process.

The regulatory standard for advance parole requires that the person traveling show a bona fide personal or business reason for the trip. The form application, however, discourages applications and sets a higher standard of

52. Leading immigration lawyer Ira Kurzban reports that “many people go to lawyers or notaries who think advance parole is just ‘travel paper.’ They do not advise the client of the consequence of a return as a parolee and therefore a change in their legal status.” E-mail from Ira Kurzban, Immigration Attorney, to the author (July 11, 2005) (on file with the author).
54. There are exceptions for certain business and family visas, where “dual intent” is allowed and an applicant for adjustment of status to permanent residency may obtain an extension of a temporary visa while the adjustment application is pending. See Kurzban, supra note 50, at 444.
“compelling emergency.” An applicant must pay a fee of $165.00 and submit supporting documents. Processing of the request can take some time, and varies depending on the district. Although reports vary across the country, some practitioners report that it can take several months to obtain advance parole because the agency does not treat these requests as a priority.

In the ordinary case, once advance parole is granted, the individual can continue to pursue the application for LPR status after returning from a trip. For fiscal year 2004, the typical cycle for processing an adjustment application was twenty months. But when things go wrong, the fact of prior travel and return as a “parolee” matters a great deal. The parolee has many fewer rights if the application for LPR status is rejected and he or she is placed in removal proceedings. The parolee has no right to seek voluntary departure. In addition, under current regulations, the fact of travel serves to diminish the parolee’s rights to have new applications for adjustment heard by an immigration judge (although there is a right to renew the prior application). The agency is considering issuing guidance that will limit discretionary awards of adjustment because of “parolee” status. There has been no suggestion that those who had a good reason to travel would be exempted from the restriction in rights that follows “parolee” status. Thus, even when a client is eligible for advance parole and able to obtain it expeditiously, an immigration practitioner may have to counsel against travel due to the risks posed for any future proceedings.

In practice, the burden on travel caused by the advance parole rules

56. Telephone Interview with Michael Patrick, Attorney, Fragomen, Del Rey, Bernsen & Loewy, LLP (June 8, 2006); Telephone Interview with Cyrus Mehta, Attorney, Cyrus D. Mehta & Associates (June 9, 2006).
59. 71 Fed. Reg. 27,585 (May 12, 2006) (interim rule) (limiting ability to pursue adjustment before an immigration judge following return as a parolee).
60. Id. at 27,589.
61. In recent years, there has been much litigation over the rights of parolees to adjust their status in immigration courts. Succar v. Ashcroft, 394 F.3d 8 (1st Cir. 2005) (finding regulation to be outside the authority of the statute). These cases involved both people who engaged in short-term travel and were seeking to adjust their status and those who were initially paroled into the country. After the circuits split on these issues, DHS issued new regulations providing that parolees could seek adjustment, but that most such applications could not be raised in immigration court. 71 Fed. Reg. 27,585 (May 12, 2006).
62. The United States Citizenship and Immigration Services website contains a stern warning about the consequences of not obtaining advance parole. Under the subheading “Caution,” it states: Due to recent changes to U.S. immigration law, travel outside of the United States may have severe consequences for aliens who are in the process of adjusting their status, extending their nonimmigrant stay, or changing their nonimmigrant status. Upon return, these aliens may be found inadmissible, their applications may be denied, or both. It is important that the alien obtain the proper documentation before leaving the United States.
operates as an additional risk of adjusting status while in the United States, through the Bureau of Citizen and Immigration Services, as opposed to leaving the country and pursuing processing through the U.S. consulate abroad. In a list of the pros and cons commonly listed for the two methods of changing one’s status, it is one of the few reasons not to seek adjustment of status within the United States. But the question still remains as to why this requirement makes sense. If there is an interest in discouraging adjustment and encouraging consular processing, how is that accomplished by limiting applicants’ ability to travel? Does it make sense to build the system in a way that encourages lawyers to advise their clients not to travel?

2. Applicants for Adjustment Who Have Accrued Unlawful Presence

Travel has more dire consequences for applicants for adjustment who have accrued “unlawful presence” in the United States. These immigrants may be allowed to adjust their status so long as they do not cross the border. But once they travel, they trigger the three and ten year bars to admission to the United States that were enacted in 1996. The rules regarding “unlawful presence” were enacted as part of the 1996 immigration law changes, through IIRIRA. Congress created bars to the admission of any person who has been “unlawfully present” in the United States. Those unlawfully present for six months are barred from admission for three years. Those unlawfully present for a year are barred for ten years.

The unlawful presence rules only apply once the person has departed from the United States. If a person with unlawful presence is permitted to adjust status without leaving the United States, unlawful presence is not a problem. But a price of this approach is that the person must stay put until all the paperwork is processed, in a process which might take many years.

The quirky rules around unlawful presence might be seen by some as a loophole. But Congress has actually gone out of its way to make it possible for hundreds of thousands of immigrants to seek adjustment of status while within the United States. In the LIFE Act, which was enacted in the wake of the September 11 attacks, Congress created a new category of status called “temporary protected status” which allows immigrants who have been displaced by natural disasters or other humanitarian crises to stay in the United States and adjust their status without leaving.


64. IIRIRA § 301(b), codified at INA § 212(9)(B), 8 U.S.C. § 1182(a)(9)(B).


66. This paper considers the situation of persons with unlawful status who are seeking adjustment and can do so as long as they stay within the country. There is a far larger group of people who have no current route to status but who might acquire such a route due to changes in their lives (e.g., marriage) or changes in the law (e.g., amnesty or new temporary worker programs). For these persons, the unlawful presence rules also mean that remaining in the country is the only route to possible status. If they leave, they will face barriers in the event a route to status develops.

of stories about the harshness of the 1996 laws, Congress expressly provided mechanisms for people to become LPRs without leaving the country, precisely so that they could avoid the bars to admission that would apply if they were prevented from adjusting their status by rules that required travel and then used the travel to bar adjustment. As a matter of policy, these applicants are not targets of enforcement, although they are technically deportable due to their unlawful presence. Applicants under the LIFE Act were required to begin the process of petitions by April 30, 2001. Today, in 2006, many of these petitions are still pending. Meanwhile, these future LPRs, and perhaps future citizens, are not able to travel.

Apart from the LIFE Act, a permanent feature of the U.S. immigration system is its willingness to allow immediate relatives of U.S. citizens, who have been admitted into the country on some status at some time, to adjust their status without any need to leave the country. A spouse of a U.S. citizen may thereby stay with his or her U.S. resident family. However, the spouse must await the processing of the immigrant petition before visiting a family member who lives outside the United States. If the spouse travels, the unlawful presence bar will kick in, and the spouse will not be allowed to return to his or her U.S. family.

Once again, the question is whether this restriction on travel serves any valid purpose, in light of the burdens that it imposes on family and other relationships. As written, the unlawful presence rules appeared to be designed to send a strict message about unlawful presence that would serve as a deterrent to staying in the country without permission. But as is often the case in immigration law, the overarching political situation is full of contradictions, and Congress responded to the plight of families that would be torn apart and hardworking immigrants who wished to regularize their status. The LIFE Act and the provisions for spouses of citizens therefore provide a lifeline for these people, allowing adjustment to permanent residence. But the price, once again, is that the applicant may not travel outside U.S. borders, even if that applicant is prepared to seek (or has obtained) express permission through an award of advance parole.

Recent proposals in the Comprehensive Immigration Reform Act differ from the LIFE Act procedures in their treatment of travel. They would...
provide for a right to travel once a person is granted temporary status en route to LPR status. This feature of the proposals results from apparent recognition of the enormous importance to immigrants of being able to travel to see their families and attend important family events.

C. Treatment of Appeals and Applications as Abandoned

For immigrants of any status who have been placed in removal proceedings, agency regulations require that they remain within the confines of the United States if they wish to pursue certain applications or appeals. Under current regulations, a person with an appeal pending is deemed to have abandoned that appeal if he or she departs from the United States. Similarly, a motion to reopen is deemed abandoned if the person departs from the United States.

These rules affect a wide range of immigrants with valid claims to ongoing residence in the United States. For example, an LPR who has been ordered deported may be able to reverse that judgment through an appeal to the Board of Immigrant Appeals or the federal courts. This process can take many years and it is possible that the particular claim will not be adjudicated until it reaches the courts (because the agency has no jurisdiction, for example, over constitutional issues). A dramatic example is the Supreme Court’s recent unanimous ruling that a conviction for driving under the influence is not an “aggravated felony” that mandates deportation. This issue was decided by the Supreme Court at the end of 2004, more than six years after the Texas immigration agency conducted a well-publicized round-up of 500 LPRs with such convictions. During those six years, travel during the period of an administrative appeal was treated as an abandonment of the appeal and, as a result, an abandonment of lawful permanent residency status.

The regulations governing departure during a pending appeal or motion are perhaps best understood as a vestigial artifact of the pre-1996 system of judicial review. Before 1996, the Immigration and Nationality Act generally contemplated that judicial review would take place in petitions for review filed after the completion of any immigration proceedings. The statute further provided that courts lacked jurisdiction once a person “departed” from the United States. With judicial review based on presence, the statute

73. See Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. § 601(b)(1) (2006) (proposing new INA § 245b(c)) (providing that an applicant who files for adjustment “shall be granted permission to travel pending final adjudication of the application for adjustment of status”). As this article goes to press, the Senate is about to take up Comprehensive Immigration Reform once again.
74. 8 C.F.R. § 1003.4 (2007).
75. 8 C.F.R. § 1003.2(d) (2007).
77. 500 to be Deported for Drunk Driving Convictions, CIII. Trib., Sept. 4, 1998, at 25.
79. INA § 106(c), 8 U.S.C. § 1105a(c) (West 1995).
generally provided for stays of deportation when a matter was filed in court.\textsuperscript{80} The regulations governing departures during agency appeals tracked the statutory framework for judicial appeals.

Since 1996, however, the judicial review scheme is no longer premised on presence. On the contrary, it explicitly allows for deportations to take place while a case is on appeal and thus divorces the judicial review process from the issue of physical presence.\textsuperscript{81} But the pre-1996 regulatory structure has been left in place, restricting travel (or a more extended departure) by those who wish to pursue their defense to a removal action. Thus, a person who is ordered to be deported by an immigration judge cannot leave the country without abandoning his or her appeal to the BIA.

Again, the question is whether this rule makes any sense. If an immigrant has a legitimate claim on appeal, why should a trip eliminate the right to pursue administrative review?

D. \textit{Summary of Restrictions on Travel}

Each of these examples of restrictions on travel poses different challenges both to the analysis of the rights of noncitizens and to strategies for reform. In some cases, the underlying rights of the noncitizens are more robust; in others, the source of restrictions is more vulnerable to attack, due to questions about the restrictions’ statutory authority. But despite their apparent differences, these policies and practices have a common thread: they treat a person differently solely as a result of travel outside the United States.

The effects of travel on noncitizens are described in Table 1. For relevant categories of noncitizen residency situations, the table sets out the nature of an individual’s pre-travel status, the immigration agency’s degree of awareness of the individual’s presence, the risks that the individual faced in the absence of travel, and the effects of short-term travel with any accompanying grounds for removability.

III. \textbf{Do Burdens on Travel Matter?}

Given that noncitizens face a wide range of potential consequences from travel, should we care about burdens on travel? How serious is it for the government effectively to require certain classes of noncitizens to stay within the geographical confines of the United States as a condition of their continued residence? Do such restrictions on movement raise concerns that demand some justification, or can they be ignored as simply one of the many prices this country expects noncitizens to pay in exchange for remaining within the United States?

\begin{thebibliography}{9}
\bibitem{81} See, \textit{e.g.}, Swaby v. Ashcroft, 357 F.3d 156, 159-61 (2d Cir. 2004).
\end{thebibliography}
<table>
<thead>
<tr>
<th>Status While Within United States</th>
<th>Previously Brought to Agency’s Attention?</th>
<th>Detention and Deportation Risk if No Travel</th>
<th>Effect of Short-Term Travel</th>
</tr>
</thead>
<tbody>
<tr>
<td>LPRs Who Are Facing the Inadmissibility Gap: Not Deportable, But Inadmissible</td>
<td>LPR</td>
<td>As an LPR, yes; As a person with a criminal conviction, maybe</td>
<td>No risk</td>
</tr>
<tr>
<td>LPRs Who Are Both Deportable and Inadmissible</td>
<td>LPR subject to removal</td>
<td>As an LPR, yes; As a person with a criminal conviction, maybe</td>
<td>Limited risk of removal, unless case is a prosecutorial priority or came to attention of agency with no prosecutorial discretion exercised; May be eligible for a hearing while in detention</td>
</tr>
<tr>
<td>Applicants for Adjustment With Status</td>
<td>Temporary resident with employment authorization and eligible for LPR status</td>
<td>Yes</td>
<td>No risk, unless applicant has a visa violation and no prosecutorial discretion is exercised</td>
</tr>
<tr>
<td>Applicants for Adjustment Without Current Status</td>
<td>Currently without status but with work authorization and eligible for LPR status</td>
<td>Yes</td>
<td>Small risk, unless case is a prosecutorial priority</td>
</tr>
<tr>
<td>Persons in Removal Proceedings</td>
<td>Any status</td>
<td>Yes</td>
<td>Depends on outcome of case</td>
</tr>
</tbody>
</table>

As a legal matter affecting judicial review of restrictions on travel, the seriousness of the interests implicated by these restrictions could affect the

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82. *See, e.g., supra* text accompanying notes 36-37.
level of justification required as a matter of due process,\textsuperscript{83} or the willingness of courts to apply clear statement or equivalent doctrines in interpreting statutory provisions.\textsuperscript{84} But apart from the ability of courts to regulate restrictions on travel by noncitizens, the real world meaning of these restrictions matters for advocacy regarding regulatory or legislative change. Although many policies restricting travel lack any current articulated rationale from Congress or the immigration agency, change depends on whether the current rules are seen as a problem.

Restrictions on travel are different from more general restrictions on free movement. The entire field of immigration and refugee law is about restrictions on free movement across borders. It delineates who can and cannot immigrate and therefore affects the rights of people across the globe to relocate. Restrictions on travel, in contrast, concern the right to leave temporarily and return to one’s place of residence in the same status or, in the case of applicants for adjustment, the right to return with the same claim to consideration for permanent residence status.

Restrictions on travel also present challenges to the typical frame by which immigration advocates and courts think about the permissibility of restrictions on the right to remain in the United States. Typically, courts focus on the extreme harshness of separating a person from “all that makes life worth living.”\textsuperscript{85} In protecting the noncitizen, the frame suggests that everything important to the noncitizen is within the United States and that nothing outside matters.

Burden on travel fit poorly into this standard frame. The interests that noncitizens have in travel are rooted in aspects of the noncitizen’s life that are located outside the United States. These interests—in maintaining family ties, at being present at major life events, and engaging in business, as well as broader interests in being free to travel—all concern an interest in being able to leave the borders of the United States on a temporary basis and then return to a home within the United States. Lenity is equally appropriate in designing rules that allow for pursuit of family and work lives without triggering the severe penalty of deportation. But the rhetoric needs adjusting to recognize that noncitizens have important interests that fall outside the country’s

\textsuperscript{83} Even in basic rationality review, the seriousness of the interests implicated by a statute can affect the way in which the court approaches the due process inquiry. See, e.g., Nancy Morawetz, \textit{Rethinking Retroactive Deportation Laws and the Due Process Clause}, 73 N.Y.U. L. REV. 97, 132-34 (1998) (discussing cases that conclude that a rationale that supports prospective application of a deportation statute would not be adequate to support retroactive application); \textit{see also} City of Cleburne, Tex. v. Cleburne Living Center, 477 U.S. 432, 446 (1985); Plyler v. Doe, 457 U.S. 202, 216 (1982).

\textsuperscript{84} Clear statement or other substantive statutory interpretation presumptions may be applied when there are important interests at stake through the constitutional avoidance doctrine, the rule favoring interpretations that conform with customary international law or the rule of lenity. See generally Brian G. Slocum, \textit{The Immigration Rule of Lenity and Chevron Deference}, 17 GEO. IMMIGR. L. J. 515 (2003).

borders, while they retain a primary interest in preserving their status and home within the United States.

A. The Intrinsic Value of Freedom to Travel

A broad conceptualization of the interests implicated by freedom to travel and return to one’s place of residence can be found in early cases concerning the liberty interest of citizens in international travel. Although case law has since qualified this right, it serves as a valuable framework for thinking about the broader interest that all persons have in free travel.

In *Kent v. Dulles*, the Supreme Court extolled the virtues of international travel as a value in and of itself. Announcing that a right to travel was part of the “liberty” protected by the Constitution, the Court treated freedom of movement as part of the frontier history of the United States. It lauded the value of travel in self-fulfillment, helping Americans learn about the world, engage in commerce, and maintain ties with friends and family.

Cases following *Kent v. Dulles* have continued to affirm a liberty interest, for citizens, in international travel. They have recognized, however, counter-vailing interests that can justify restrictions on travel. In particular, the Court has upheld national security and foreign policy justifications for the revocation of passports and for general restrictions on travel to specific countries. In *Haig v. Agee*, the Court upheld the revocation of a passport on the grounds that the holder of the passport was engaged in activities that were likely to cause harm to the United States. In *Zemel v. Rusk*, the Court upheld restrictions on travel to Cuba.

In permitting restrictions on travel, however, the Court has not retreated from the idea that a right to free travel is part of a basic conception of liberty. Most of these ideas about the interest in travel are equally applicable to noncitizens. Noncitizens, like citizens, may benefit from the educational value of travel; may have job-related or education-related reasons to travel; may seek to wander, explore, and discover the world; and may take umbrage at being told that the price of being a resident is that they must never venture outside that set of borders. The only interest described in *Kent v. Dulles* that may apply differently is the societal interest in encouraging citizens to acquire perspectives from abroad. Noncitizens, at least if they arrived as adults, may be presumed to be more informed about the world outside the United States. Still they may have all the more interest in traveling to study or experience the history and culture of a land they left behind, especially for those who left at a young age.

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87. In *Haig v. Agee*, 453 U.S. 278 (1981), the Court upheld the revocation of a passport on the grounds that the holder of the passport was engaged in activities that were likely to cause harm to the United States. In *Zemel v. Rusk*, 381 U.S. 1 (1965), the Court upheld restrictions on travel to Cuba.
B. **Specific Interest in Business Travel**

Another significant reason for travel is for work.\(^8^8\) In many areas of work, travel is simply part of the job. A person who cannot travel, or who faces significant risks upon traveling, may not be able to perform his or her job.\(^8^9\)

In the context of some non-immigrant visas, the INA is solicitous of the need to travel. For some employment-based visas, current law expressly recognizes the need to travel during any later adjustment of status and permits travel without the need for advance parole.\(^9^0\) But business travel is not limited to persons whose visas are business-related. A person who originally arrived on a student visa, and who then marries and seeks adjustment to LPR status, will be permitted to work with employment authorization. That person’s job may include some need to engage in business travel during the period of adjustment. Similarly, LPRs may well have jobs that require them to engage in travel; they therefore have an interest in rules that do not inhibit their ability to maintain their employment.\(^9^1\) When the ability to travel is compromised, there are consequences for the noncitizen’s job and career development, as well as for his or her contributions as a taxpayer.

C. **Specific Interest in Travel to Maintain Family and Cultural Ties**

Noncitizens may have a more specific interest than many U.S. citizens in travel to maintain their familial, associational, and cultural ties. Noncitizens are born outside the United States;\(^9^2\) many will have family members in their countries of origin or in other countries where they have lived. Generally, if the noncitizen lacks permanent residency status, he or she will have no ability to bring even the closest family members into the United States.\(^9^3\) Even if the noncitizen is an LPR, the immigration law limits petitions to spouses and unmarried children and imposes significant delays on the ability of these

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90. *8 C.F.R. § 245.2(a)(4)(ii)(C).*


92. INA § 301(a), 8 U.S.C. § 1401(a). The one exception is the children of diplomats, who, even if born in the United States, generally do not acquire its nationality, because the parents were not “subject to its jurisdiction.” Anna Marie Gallagher, *Doctrine of Jus Soli*, 3 IMMIGR. L. SERV. 2d § 14-16 (2007); *see* U.S. v. Wong Kim Ark, 169 U.S. 649, 657-58 (1898) (detailing the historical rationale).

93. Some temporary visas allow for bringing spouses or children. *See, e.g.*, *8 C.F.R. § 212.7(c)(4)* (spouses and children of J-1 visa holder); *8 C.F.R. § 214.2(h)(9)(iv)* (spouses and children of H-1B, H2A&B, and H-3 visa holders).
persons to immigrate.94

It has always been the case that some immigrants sought to travel to maintain family and other ties.95 But immigration in today’s world is all the less likely to mean severing oneself from a prior life in another country, as it did for some classes of immigrants in the past.96 Inexpensive travel coupled with rapid communications allow many who immigrate to be able to travel to their countries of origin for various reasons, including important family occasions, vacations, and holidays.97

Furthermore, technology has made it easier to maintain strong ties between opportunities for in-person meetings.98 Through telephones, webcams, e-mail and internet calls, immigrants may stay in very close contact with their family abroad.99 Indeed, newspapers report a boom in businesses related to technologies that allow immigrants to maintain close ties with their families abroad.100 In one way, these technologies mitigate the effect of restrictions on travel. To the extent that family ties are better maintained through videoconferencing, e-mail, and phone calls than they were by letters, travel could be seen as less crucial to those who want to maintain close ties. But virtual technologies can also have the opposite effect. More intense contact, through phone and videoconference, may strengthen ties and make it all the more excruciating to be physically separated for long periods of time, or in some cases, permanently. Indeed, studies show that immigrants are also

95. Travel was the impetus for much of the litigation since the nineteenth century on the rights of “excluded” aliens. See, e.g., Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) (exclusion of LPR returning after a twenty-one month absence); Chae Chan Ping, v. United States, 130 U.S. 581 (1889) (exclusion of immigrant who had traveled with a permit to return to the United States to resume his residence). Substantial numbers of past immigrants also relocated back to their countries of origin, although it is not clear to what extent they were able to travel prior to doing so. See SASKIA SASSEN, GUESTS AND ALIENS 71 (1999) (reporting that between 1905 and 1915, 1.2 million Italians who had immigrated to the United States returned to Italy).
96. My mother, who traveled from Ireland to Canada by way of Liverpool, England in 1930, describes the sense of total loss that some families experienced at that time when their family members emigrated. At the port where her boat departed, there was a group of women dressed in black keening to express their sorrow at the loss of their sons who were emigrating. They never expected to see their sons again. But the historical experience, however, is not one of uniform severing of ties. See supra note 95.
99. One study of immigrants who send remittances found that 60 percent call their home country on a weekly basis. MANUEL OROZCO, supra note 2, at 2.
100. See Joseph Berger, What’s on TV? A View of Loved Ones From Afar; Videoconferences Give Immigrants a Link to the Families They Left Behind, N.Y. TIMES, Jan. 8, 2005, at B1; Brian Gow, Embracing Illegals, BUSINESS WEEK, July 18, 2005, at 56 (reporting on international calling plans marketed to immigrant communities); Teresa Borden, A Way to See Eye to Eye Over Borders, ATLANTA JOURNAL-CONSTITUTION, July 6, 2005, at F1.
traveling at high rates to visit their countries of origin.\textsuperscript{101}

Interference with family relationships runs counter to the general thrust of immigration law.\textsuperscript{102} Under the priority system for immigration, family relationships are highly valued as a basis for allowing people to immigrate.\textsuperscript{103} Presumably, this is because we assume that family relationships matter and that families should be allowed to be together. Under this priority system, family members must wait, sometimes for many years, before obtaining the status that will allow them to bring family members to the United States.\textsuperscript{104} It is bizarre to allow policies that would weaken these family ties at the same time that immigration law prioritizes reunification of family members.

Families also occupy a special place in domestic constitutional law. In \textit{Moore v. City of East Cleveland},\textsuperscript{105} the Court overturned a housing ordinance on due process grounds because it prohibited extended family members from living together. Although the substantive due process reach of \textit{Moore} may be limited, it continues to represent a recognition of the importance of the interest that extended family members have in being together.

Similarly, international treaties recognize the interests of family members in avoiding arbitrary interference with family life. The International Covenant on Civil and Political Rights contains a general prohibition on “arbitrary or unlawful interference with . . . family.”\textsuperscript{106} In a general comment addressing the position of aliens, the High Commission for Human Rights notes that while the Covenant does not generally address “the right of aliens to enter or reside in the territory of a State Party,” it may cover these issues when they implicate, for example, “respect for family life.”\textsuperscript{107} Similar provisions are found in the Article 12 of the Universal Declaration of Human Rights, as well as in the American and European Conventions. Some cases have relied on these international standards to read ambiguities in deportation statutes in ways that preserve the right to a hearing on family equities prior to deportation.\textsuperscript{108} In doing so, they have invoked interests in family integrity as sufficiently weighty to read statutes in ways that would allow continued

\textsuperscript{101} Id. tbl.15.2 (showing frequency of travel by those who send remittances); see also MANUEL OROZCO, supra note 2, at 13 (reporting that 70 percent of the passengers on \textit{Grupo Taca} flights to El Salvador are Central Americans).

\textsuperscript{102} Even in the context of highly regulated travel for citizens to Cuba, there are special rules to allow limited visits to family members. See 31 C.F.R. § 515.561 (2007).

\textsuperscript{103} See INA § 201(c), 8 U.S.C. § 1151(c).

\textsuperscript{104} For example, in July 2006, processing for second preference petitions for spouses of LPRs was for petitions filed in September 1999, a wait of almost seven years. Dep’t of State, Visa Bulletin for July 2006 (Jan. 9, 2006), available at http://travel.state.gov/visa/frvi/bulletin/bulletin_2943.html.

\textsuperscript{105} 431 U.S. 494 (1977) (plurality opinion).


\textsuperscript{107} U.N. Human Rights Comm’n, General Comment No. 15, ¶ 5 (Nov. 4, 1986).

permanent residence of persons who would otherwise be deported. Travel is also addressed in the Convention on the Rights of the Child (CRC). The CRC provides that when a parent and a child live in different countries, the child shall have the right to “personal relations and direct contact” with the parent and that States should consider applications for reunification in a “positive and expeditious manner.”

A far more modest claim is made by those who are already residents of the United States and who simply wish to be free to travel on a short-term basis to visit family. These immigrants are not seeking a different status. Instead, they seek to maintain and protect family ties across borders without requiring any grant of status to the family members who are outside the country. The limited nature of the claim underscores the need for some justification for laws interfering with travel that would help maintain family relationships.

D. Travel for Illnesses and Funerals

A subset of the more general interest in facilitating family ties is the very basic interest in being present at a time of serious family illness or funeral. Practitioners report that a significant number of cases in which noncitizens have immigration problems as a result of travel arise from these situations. This is not surprising, since important religious and family obligations may lead people to travel at times of serious illness or death irrespective of expense. The person who does not travel may feel deep moral pain at not having made the effort to be with family under such compelling circumstances or at being prevented from doing so.

In domestic law, there is widespread recognition of the special interest of family members in being together for an event such as a funeral. Prisons, for example, have temporary furlough programs that allow prisoners to be


1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

110. Telephone Interview with Maria Navarro, Staff Attorney, The Legal Aid Society (July 17, 2006).
transported by security personnel to attend a family funeral. These programs require significant state expense in recognition of the enormous interests that are at stake. Although states have significant discretion in how they administer these programs, courts have recognized that depriving a prisoner of access to these programs could constitute cruel and unusual punishment, if done so selectively to cause the prisoner psychological distress.111 Similarly, the Family and Medical Leave Act offers express recognition of the interest of family members in being able to spend time with ill family members despite the disruption caused by shifting work forces.112 These laws recognize the essential importance to most people of fulfilling family commitments as part of their moral and social identity as well as the social value of accommodating these commitments.

Funerals also raise important interests in religious observance.113 These religious interests find separate protection in international treaties. The ICCPR, for example, specifically protects both the right to adopt a religion and to manifest the religion through worship and observance.114 Restrictions on observance are limited to those necessary to protect the public safety, order, health, morals, or the fundamental rights and freedoms of others.115 These provisions underscore the seriousness of blanket restrictions on travel that impose high costs on those who would honor their religious obligations.

IV. GOVERNMENTAL INTERESTS RELATED TO SHORT-TERM TRAVEL

Although restrictions on travel permeate the statutory and regulatory scheme governing noncitizens, they are not necessarily the result of some reasoned judgment that travel is problematic. Some of the examples described in this article were enacted with no explanation;116 others are carryovers from an old legislative scheme.117 Some result from the panoply of consequences that are generally applied to persons who seek “admission” as opposed to those facing deportation, a distinction that continues in the law despite the nominal merging of exclusion and deportation proceedings into “removal” proceedings.118 Whatever their origins, it is valuable to explore

112. 29 U.S.C. §2612(a)(1) (providing for unpaid leave in cases of a family member’s serious illness).
113. Anthropologists have long recognized the central role of death and funeral rites to the world’s religions. See Clifford Geertz, The Interpretation of Cultures 162 (1973) (quoting Bronislaw Malinowski).
114. ICCPR, supra note 106, art. 18.
115. Id. at 12.
116. See discussion on INA § 101(a)(13), supra Part II.A.
117. See discussion on departure during judicial review, supra Part II.C.
118. Once categorized as a person seeking admission—either through exclusion from section 101(a)(13) or as a result of “parole” status—a noncitizen is generally subject to a set of rules that also apply to those with no connection to the United States who are seeking admission with no prior residence. But see Landon v. Plascencia, 459 U.S. 21 (1982) (discussing greater rights that accrue with status and time of residency).
the governmental interests that might be served by existing policies. By exploring these interests, it is possible to assess the degree to which current restrictions on short-term travel match governmental interests and the degree to which they needlessly infringe on the interests of noncitizens.

A. Monitoring Border Crossings

The government has an inherent interest in monitoring its border and ensuring that those persons who enter have no ill will towards the United States. Indeed, a number of governmental programs are designed to monitor visitors and holders of other temporary visas. Requiring documents for travel could be seen as a way to keep tabs on who is traveling and why they are traveling. The interest in identification documents for travel, however, could only provide a justification for some of the restrictions on travel. LPRs, for example, have government-issued identification as well as passports from their countries of origin. For LPRs who are affected by restrictions on travel, it is hard to see how an interest in identification documents is related to the de facto restrictions they face.

Beyond documentation, an interest in monitoring the border could include an interest in enhancing enforcement power at the border. Policies that make a returning noncitizen inadmissible or admissible only through an exercise of parole have the feature of placing that person in the procedural realm of maximal enforcement power. At the border, the government enjoys greater ability to detain and deport than in the interior.

It is far from clear, however, that border security is aided by refusing to restore those who return from trips to the status they enjoyed prior to their travel. Domestically, the allocation of enforcement resources reflects priorities with respect to the importance of different forms of enforcement as well as affirmative policies to insulate some persons for enforcement. Enforcement officials have the discretion either to allow a person to pursue and obtain citizenship, to place that person in removal proceedings, or to leave the person alone. As an example, there is an explicit internal enforcement directive which creates additional procedures that must be followed before placing a veteran in removal proceedings. From an enforcement perspec-
tive, policy is distorted when rules require that this same person be placed in
removal proceedings simply because the person is at the border, returning
from a brief trip abroad. Furthermore, the overtaxing of enforcement re-
sources diverts attention from the more difficult work of identifying genuine
threats at the border.122

B. Bureaucratic Ease

The government also has an interest in limiting bureaucratic expense. Elaborate procedures to determine the reasons for travel, as are used in the
advance parole system, could be seen as a burden on governmental resources.
Similarly, individualized procedures for determining the reasons for travel,
under the Fleuti doctrine, could be seen as an unnecessary expenditure of
resources.

The current patchwork of policies on travel varies in terms of the use of
procedures that permit travel without individualized processing of the rea-
sons for travel. There are classes of people who cannot travel without risking
their status, no matter what the reason. Other classes can travel without a
reason. Still other classes can travel only by following a process that
examines their individual reasons for travel.

Assuming that bright line tests that avoid individual adjudication are
desirable, there is considerable choice in the design of the test. It would be an
easy bright line matter, for example, to provide no change in status for a
person who travels or to a person who travels for up to a specific amount of
time. In the context of LPRs, for example, the prevailing view of the 1996
changes for LPRs without criminal convictions is that they allow for trips of
up to six months without subjecting the individual to any evaluation for
inadmissibility. Those who uphold this view of the statute argue that the six
month period substitutes a bright line test for the previous case law approach
of “brief.”

Similar bright line rules could be designed to accommodate those who
need to travel for family emergencies or business. For example, there could
be a rule that excludes trips of thirty days or less from the ban on travel for
those caught in the “inadmissibility gap.” Such a rule would provide a safe
haven for trips involving family emergencies, without imposing bureaucratic
costs in processing paperwork about the emergency.

A full assessment of bureaucratic ease and expense should also consider
the bureaucratic costs associated with policies that penalize those who travel.
With respect to returning permanent residents, for example, it may appear to
be cheaper and simpler to treat a person as inadmissible based on the mere
fact of travel than to make a fact determination about the reasons for travel.

undermines genuine enforcement interests).
But once that determination is made, it triggers a host of other costs for the agency, including evaluating inadmissibility, detention, processing, and litigation costs that could be avoided through a more judicious determination of who to charge with removal.

C. **Proxies for Attachment and Abandonment**

Restrictions on travel for LPRs may bear some connection to the government’s interests in limiting the right to reside in the United States to noncitizens who demonstrate a level of attachment to the United States and an interest in proceeding to citizenship. Years of residence are used throughout the INA to determine levels of attachment to the United States. For example, the requirements for applying for citizenship look to years of residence.\(^{123}\) Similarly, in determining citizenship acquired at birth, periods of residence are required of the individual or the parent of the individual.\(^{124}\) If these statutory periods of residence serve as proxies for attachment, perhaps travel serves as a proxy for the opposite quality—a lack of attachment to the United States and a governmental interest in subjecting those who travel to higher scrutiny.

The analogy between short- and long-term travel, however, seems weak. Indeed, the very same statutory provisions that restrict those with longer-term absences from receiving citizenship or immigration benefits create explicit statutory exceptions for shorter-term travel.\(^{125}\) These provisions recognize the multiple interests that can lead to short-term travel and do not attempt to categorize them.

Furthermore, an assumption that external ties indicate a lack of attachment is in tension with explicit policy requiring that LPRs wait long periods of time to arrange for their family members to immigrate. Those immigrants who are “waiting in line” for legal processing of family immigration papers face very long time periods before they can be reunited with their families in the United States. Unless the governmental objective is to sever the ties with family (which would sharply contradict existing immigration policy) travel is simply a necessary aspect of compliance with immigration laws.

D. **Circumvention of Consular Processing**

With respect to persons seeking adjustment of status, one plausible governmental interest is to stem interest in the adjustment process and encourage consular processing. Recent proposed regulations limiting the use of adjustment for persons paroled into the United States cite evasion of the

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123. INA § 316, 8 U.S.C. § 1427 (West 2007).
124. INA § 301(d), (e), (g), 8 U.S.C. § 1401 (d), (e), (g).
125. See, e.g., INA § 316(b), 8 U.S.C. § 1427(b) (setting forth rules on absences for persons applying for citizenship).
consular processing system as a prime area of concern. But the interest in channeling people through consular processing does not translate into an interest in treating differently those adjustment applicants who happen to travel and those who do not travel. Although these persons have shown some ability to travel in and out of the country, their underlying adjustment application will be based on the same basic U.S. ties as other adjustment applicants.

Perhaps the interest is in discouraging adjustment applicants by removing one privilege: namely the privilege of travel. But why that privilege? If travel has deep personal meaning that is rooted in values that the United States has an interest in promoting (such as respect for family, religious observance, and humane compassion for the ill), and if travel may be important to the human capital development of a new immigrant, why choose that particular “privilege” as one to be circumscribed in order to create incentives for consular processing? Limitations on travel are a clumsy instrument and do little more than ask adjustment applicants to place bets on whether they will be needed abroad at a family emergency.

E. Encouraging the Departure of Undesirables

One case suggests that policies that apply harshly to those who travel may be justified as a means to rid the United States of undesirable noncitizens. One recent case, for example, speculated with respect to the policy of applying different rules to LPRs who travel that “Congress may well have concluded that by providing unique disincentives for departed criminal aliens to attempt return, it would thereby ease the burden imposed on the already scarce resources devoted to apprehending and excluding inadmissible aliens attempting to cross our borders.” The incentive structure, however, must be evaluated in terms of the full set of incentives that are created. By creating disincentives to travel, the rules discussed in this article force a choice in advance of travel, not simply during a trip. Indeed, it seems implausible that noncitizens would make a decision after a trip about whether to return, based on these policies. Either noncitizens know the policies in advance, and they therefore incorporate the policies into their decision whether to travel; or they do not know, and they are likely to learn the surprising consequences of travel when they arrive back after a trip.

The weakness of this suggested rationale is underscored by cases which have upheld the opposite rationale for policies that were more advantageous to those who traveled. In the first of the 1996 deportation laws, the Antiterrorism and Effective Death Penalty Act of 1996, new restrictions on relief from deportation were written to apply to the then-existing system of

deportation proceedings for those within the country, but not to exclusion proceedings for those at the border. When this distinction was challenged on equal protection grounds, the government argued that the distinction represented a rational governmental policy to encourage LPRs with convictions to travel so that they could be more easily identified by enforcement officials on their return. Applying a very deferential standard of review, some courts upheld this rationale.\textsuperscript{128} As implausible as that rationale was, it demonstrates recognition that rules on travel will affect decisions whether to travel and cannot be justified merely on the ground that those affected are in some way less desirable.

Of course, it is true that if those affected by existing policies are deemed “undesirable,” and if some will travel, then the policies lead to some attrition in the population that remains in the United States. Indeed, some restrictionist advocacy groups expressly promote policies of attrition.\textsuperscript{129} But unless the goal is simply to reduce the immigrant population, policies that seek to deport on the basis of travel ought to require justifications based on treating differently those noncitizens who travel. It is hard to see why a person, for example, with a fifteen-year-old marijuana violation, is made undesirable by virtue of taking a short trip.

\section*{V. Strategies for Reform}

Reform of existing de facto travel restrictions could come from the courts, the agency, or Congress. In each arena, recognition of the fundamental interests affected by policies that impinge on travel, and an assessment of the perverse incentives and costs imposed by existing interpretations of the law, provide the possibility of reform.

\subsection*{A. Court-Based Reform}

The courts have a role to play in determining whether de facto restrictions on travel are in fact required as a matter of congressional design. Although they have ventured into this area with respect to some of the travel restrictions described in this article, there has been remarkably little testing of recent travel restrictions in the courts.\textsuperscript{130} The relative lack of attention may

\textsuperscript{128} LaGuerre v. Reno, 164 F.3d 1035, 1041 (7th Cir. 1998); Chuang v. U.S. Att’y Gen., 382 F.3d 1299 (11th Cir. 2004) (quoting LaGuerre); Alfarache v. Cravener, 203 F.3d 381, 382 (5th Cir. 2000) (quoting LaGuerre); Almon v. Reno, 192 F.3d 28, 31 (1st Cir. 1999) (quoting LaGuerre); Jurado-Gutierrez v. Greene, 190 F.3d 1135, 1153 (10th Cir. 1999) (quoting LaGuerre); see also Servin-Espinoza v. Ashcroft, 309 F.3d 1193, 1196 (9th Cir. 2002).


\textsuperscript{130} The circuit courts have dealt with restrictions on adjustment for those who returned to the country after receiving advance parole. \textit{See also supra} note 66. However, the question whether returning residents are subject to different rules of removability from those who do not travel, for example, has only been decided by the Third Circuit. \textit{See Tineo}, 350 F.3d at 382.
stem from uncertainty about the legal arguments or from the degree to which noncitizens have internalized the restrictions and simply not put them to the test through travel. But inasmuch as there will always be those who lack knowledge of the restrictions, and others who will travel out of obligation even when it threatens their ability to return, there will be opportunities to test the restrictions to determine whether they in fact are mandated by Congress.

One restriction that has been somewhat tested in the courts is the restriction on travel for LPRs who can be charged with inadmissibility due to some criminal act, even if that act would not make the person deportable—the “inadmissibility gap.” The agency interpretation of the statute, which creates a bright line rule that collapses inadmissibility and deportability rules for those who travel, is based on a contested reading of the statutory text. The legal question that the courts have identified is whether the agency’s reading of the statute is subject to deference when reviewed in court. Unfortunately, none of the cases that have presented this “inadmissibility gap” issue have squarely presented the implications of the agency’s rule. The case that led to the agency’s interpretation of the law did not involve a person who was in fact inadmissible. Jesus Collado, the subject of a case, was an LPR who traveled briefly and was charged with inadmissibility on his return. Mr. Collado had a single conviction for a misdemeanor. He was charged as inadmissible for having a single crime involving moral turpitude. His lawyer argued that he should have been treated as a returning resident and not subjected to an inadmissibility analysis. It was on these facts that the BIA decided that Congress had created a bright line rule mandating that LPRs who traveled be subjected to the criminal grounds of inadmissibility, even if they were not deportable. Ironically, the entire legal issue had been irrelevant to Mr. Collado’s case—the immigration judge dismissed the case on remand because Mr. Collado was not in fact inadmissible.

In the only circuit court decision to consider the Collado case, the “inadmissibility gap” issue arose in a case in which a returning resident would face inadmissibility if he were subject to scrutiny on his inadmissibility. However, in that case the individual was also deportable; therefore, he was not affected by the “inadmissibility gap.” The Court held that the

132. Tineo, 350 F.3d at 396-97.
134. Tineo, 350 F.3d at 384, 388. The Tineo decision reports that Mr. Tineo had five convictions, two of which were for New York petty larceny. These convictions could have been charged as two crimes involving moral turpitude, a deportability ground listed in INA § 237(a)(2)(A)(ii). It also
language of the statute was ambiguous but ultimately determined that it owed *Chevron* deference to the reading of the statute that had been adopted by the agency.\(^{135}\)

The use of *Chevron* principles to uphold the *Collado* decision is questionable. As Brian Slocum has argued elsewhere, *Chevron* deference does not supplant a court’s obligation to apply rules of statutory construction, including the rule of lenity.\(^{136}\) In addition, the inadmissibility gap problems raise serious issues of equal protection for LPRs who are subject to different treatment only if they travel.\(^{137}\) These issues, however, were not considered in the *Collado* decision, because they were not presented by the case. Furthermore, the BIA, which lacks jurisdiction to consider constitutional issues, did not factor such avoidance into its decision, despite the urging of its dissenting member.\(^{138}\)

In the case of restrictions on travel, there is also a serious case to be made reports that Mr. Tineo had drug convictions, which would have made him deportable under INA § 237(a)(2)(B).

\(^{135}\) See *Tineo*, 350 F.3d at 396 (discussing ambiguity in the grammatical construction of the new inadmissibility rules). The *Tineo* court also did an independent examination of the statutory text that led it to agree with the agency’s interpretation. Its discussion showed an unfortunate misunderstanding of the legislative history. The House bill did not create conditions that made it impossible for an LPR to travel without triggering a different set of rules on whether the person was removable. See *supra* text accompanying note 37. In addition, the House report’s discussion of the *Fleuti* doctrine states unease with letting an LPR, who is “attempting to enter or has entered the United States without inspection and authorization by an immigration officer,” avoid admissibility standards. H.R. Rep. 104-469, 104th Cong., 2d Sess. 226 (1996). The case cited by the House for this proposition, *id.* at n.5124 (citing *In re Romero* (BIA, Dec. 19, 1990)), is not published on the BIA web site and is no longer available through the BIA library. Telephone conversation with Karen Drummond, July 18, 2006.

\(^{136}\) Slocum, *supra* note 84; Brian G. Slocum, Canons, The Plenary Power Doctrine and Immigration Law (unpublished manuscript) (on file with author). The *Tineo* court offered a nod to the rule of lenity, 350 F. 3d at 391, but failed to apply its principles in the wake of an ambiguous statutory provision.

\(^{137}\) Courts have found equal protection problems with rules that favor LPRs who have traveled and returned over those who never traveled. See *Francis v. INS*, 532 F. 2d 268, 272 (2d Cir. 1976). Some courts have upheld provisions in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) that led to more favorable treatment to those who traveled. See *supra* text accompanying note 128. In those cases, the government argued that it was rational to prefer LPRs who traveled because “1) denying relief to deportables but not excludables encourages criminal aliens already in the United States to leave voluntarily; 2) criminal aliens at large in the United States pose a greater threat than those abroad seeking to return; and 3) at the time of AEDPA’s enactment, the number of criminal aliens in deportation proceedings was ten times the number in exclusion proceedings.” *Servin-Espinoza v. Ashcroft*, 309 F. 3d 1193, 1196 (9th Cir. 2002). It is likely that in an equal protection challenge, the reverse justifications would be offered to support reading section 101(a)(13) as less generous to those who travel. But even if some justification could be mustered, and even if a court would ultimately sustain it as rational based on a rationale offered in Court, it remains the case that the discriminatory treatment raises a serious issues.

\(^{138}\) Similarly, the *Tineo* court noted several constitutional issues that it was not addressing. However, given that statutory interpretations arising from constitutional avoidance are binding in other factual contexts, see *Clark v. Martinez*, 543 U.S. 371, 381 (2005), the court should have considered the constitutional implications for other cases of the statutory interpretation it was adopting. One of those implications is that finding a returning LPR inadmissible triggers a different and constitutionally suspect set of detention rules. Another is that the interpretation of the *Tineo* court would make some LPRs unable to travel under any circumstances, without triggering inadmissibility, rather than making them subject to reasonable regulation of their travel.
for applying rules of avoidance of conflict with international law.\textsuperscript{139} The United States is party to the International Covenant on Civil and Political Rights, which restricts arbitrary interference with family life and with religious observance.\textsuperscript{140} These restrictions can be applied to entry decisions; therefore, they can be applied to persons who have an established residence and take a brief trip abroad. Avoidance of a conflict with family and religious obligations would suggest a construction of the statute that would accommodate the right to travel for these purposes.

The wisdom of close judicial scrutiny is highlighted in the example of returning residents. The legislative history offers absolutely no clue about what Congress might have sought to achieve in creating different removability rules for LPRs who travel.\textsuperscript{141} The explanation of the rule in the House report pertained to a different proposal for triggering inadmissibility which would have singled out LPRs with aggravated felony convictions\textsuperscript{142}—a group that by definition is deportable and would not present the kind of equal protection and arbitrariness issues presented by the final law, as interpreted by the BIA. This legislative history is indicative of the lack of attention to the very public values that many rules of statutory construction are designed to protect.\textsuperscript{143}

\section*{B. Regulatory Reform}

At the agency level, reform could be achieved through regulatory and sub-regulatory reforms. At the regulatory level, the agency could choose to adopt interpretations of the governing statutes that permit travel. At the sub-regulatory level, agencies could develop systems that are more responsive to legitimate interests in travel.

A good candidate for regulatory reform is the restriction applied to persons who are challenging their removal orders. Under current regulations, a noncitizen in removal proceedings who has a removal order and is pursuing an appeal cannot depart from the country without being deemed to have withdrawn the appeal. Travel, no matter how short or for what purpose, is treated as execution of the removal order.\textsuperscript{144}

There is nothing in the current version of the INA that requires treating travel as an abandonment of an appeal. At most, the INA provides for treating a returning LPR in removal proceedings as a person seeking admission,

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\begin{itemize}
  \item \textsuperscript{139} See generally Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) (providing that courts should avoid interpretations of statutes that conflict with international law).
  \item \textsuperscript{140} See supra text accompanying notes 109-12.
  \item \textsuperscript{141} See supra note 37.
  \item \textsuperscript{142} Id.
  \item \textsuperscript{144} See 8 C.F.R. § 1003.4; see also Aguilera-Ruiz v. Ashcroft, 348 F.3d 835 (9th Cir. 2003).
\end{itemize}
which could expand the grounds for seeking removal.\textsuperscript{145} Instead, the regulation which treats travel as an abandonment of an appeal appears to be a holdover from the previous statute, which stated that an order of deportation shall not be reviewed if the alien “has departed from the United States after the issuance of the order.”\textsuperscript{146} Under that previous statute, both administrative and judicial review generally required continued presence, although even that requirement was subject to interpretation of what constituted a “departure.”\textsuperscript{147}

In 1996, the statutory scheme for judicial review was completely revamped. It is now undisputed that a person can continue to pursue a judicial appeal of a removal order after leaving the country.\textsuperscript{148} Indeed, the government has vigorously argued against stays of removal to allow people to be deported while their judicial appeals are pending.\textsuperscript{149} The regulation that treats any departure as an abandonment of an administrative appeal is therefore nothing more than a vestigial artifact of a previous regime.

New regulations could harmonize the treatment of persons with appeals pending with the treatment of persons in proceedings before an immigration judge. Persons charged with deportability must pursue their administrative remedies to protect their long-term right to remain in the United States. But absent a specific statutory directive to treat any trip as an abandonment of status, a person who is dutifully following appeal procedures and exhausting administrative remedies should not be barred from honoring obligations that could require some short-term trip outside the confines of the United States. At the very least, the agency owes some reasoned explanation for why it has imported old regulations from an outdated appeals system in a way that impinges on familial interests.

At a sub-regulatory level, agency reform could take the form of changing the procedures for documenting status so as to allow for travel. For adjustment applicants, documentation interests are currently satisfied through the procedures for advance parole. These procedures could be significantly streamlined. Under current procedure, the agency provides two separate documents: an employment authorization document\textsuperscript{150} and an advance parole document.\textsuperscript{151} As a result, it engages in two sets of bureaucratic

\textsuperscript{145} See INA § 101(a)(13)(C)(iv), 8 U.S.C. 1101. This subsection can also be read more narrowly, in much the same way as the subsection at issue in \textit{Collado}. \textit{See In re Collado-Munoz}, 21 I. & N. Dec. 1061 (Rosenberg, Lory dissenting).

\textsuperscript{146} INA § 106(c), 8 U.S.C. § 1105a(c).

\textsuperscript{147} See, e.g., Marrero v. INS, 990 F.2d 772 (3d Cir. 1993).

\textsuperscript{148} See \textit{Ngururih} v. \textit{Ashcroft}, 371 F.3d 182, 192-93 (4th Cir. 2004).

\textsuperscript{149} For example, in \textit{Bharti} v. \textit{Gonzales}, 126 S. Ct. 1942 (Mem) (2006), the petitioner sought a stay of removal from the Supreme Court since his removal order turned on the criteria for treating a drug possession conviction as an aggravated felony. The stay was denied by a five-four vote. The Solicitor General submitted a twelve page brief opposing a stay. Bharti’s case is currently pending before the Fifth Circuit, but Bharti has been left to pursue his case from outside the country.

\textsuperscript{150} 8 C.F.R. § 274a.12-14 (2007).

\textsuperscript{151} 8 C.F.R. § 212.5(f) (2007).
processes and requires two fees. One streamlined procedure could produce a
single document that provides identification, accounts for the person’s status,
and lists the individual’s rights with respect to work and travel. Indeed, it is
unclear that there even needs to be separate processing of permission to
travel. The single document that shows status as an adjustment applicant
could serve as the travel document. Such a streamlined procedure would
provide more ready access to travel documents when emergencies arise and
could help to cut back on agency processing times and backlogs.

C. Statutory Reform

The simplest solution lies with Congress. Congress could completely fix
the problem of unreasonable restrictions on travel by rewriting the statutory
provisions governing admission. The basic objective of statutory reform
would be to allow short-term travel that does not alter the status of the person
who has traveled, and reform could be accomplished through mechanisms
that minimize bureaucratic costs. One likely mechanism would be a time
limit on travel that is automatically provided to a person and varies with any
given status. Those who travel within their time limit would not lose their
pre-existing status. Those who stayed away longer would have to justify their
time away in order to be granted their previous status.

The current rule for most LPRs is that they can avoid scrutiny on
inadmissibility by staying out of trouble when they travel and not traveling
for more than six months.152 However, LPRs with criminal offenses that fit
inadmissibility grounds have no way to avoid inadmissibility scrutiny.
Legislative reform could split the difference by continuing to restrict the right
of these LPRs to travel while permitting travel for short periods of time.
Although the most compelling case for travel exists in cases of personal
emergency, an across-the-board permission to travel for a set short period of
time would minimize the bureaucratic costs of evaluating the reasons for a
specific trip.

The House Judiciary Committee took a partial step in this direction in
2002 with respect to the rules on returning LPRs. Under the Family
Reunification Act,153 LPRs who fit in the gap between inadmissibility and
deportability criteria would be allowed to travel for thirty days without losing
status as an LPR.154 Similarly, those who are deportable but who could
benefit from prosecutorial discretion if the border official were not required
to make an up or down assessment of the person’s “admissibility” would be
allowed to travel without forcing border officials to make an affirmative

154. They could also avoid inadmissibility for trips of up to sixty days if they were unable to
Cong., 2d Sess. 18 (2002).
determination of whether the person is “admissible.” This proposal meant that LPRs with a criminal conviction would have lesser travel rights, but they would not be subjected to the kind of extreme no-travel rule that applies under current law.

For adjustment applicants who are currently handled through the advance parole system, there could also be a statutory exception to the provision on admission that exempts short trips. Alternatively, Congress could continue to expand the group of people who are exempted from advance parole requirements and are allowed to retain their previous visas under a dual intent doctrine. These noncitizens—for example, those with certain business visas—are permitted to return to their prior status when they travel, with no evaluation of the reasons for their travel.¹⁵⁵ This system is responsive to the complete range of interests that the noncitizen may have in travel. It is also the only system that fully accommodates the more particular interest in emergency travel that is compromised by bureaucratic procedures.¹⁵⁶

VI. CONCLUSION

Despite being scattered throughout immigration law and practice, and despite the fact that they do not affect all noncitizens, restrictions on travel—particularly on short-term travel required to attend to family emergencies—deserve the attention of courts, agency officials, and Congress. Travel restrictions must be understood and addressed in terms of their impact in practice: they place noncitizens in the impossible position of having to choose between their fundamental obligations to family and their interest in preserving their residency in the United States, which itself might be necessary to fulfill critical family obligations. When these choices serve no serious governmental interest, they are wrong, and they are not likely to be policies consciously intended by Congress in its statutory scheme. The courts, agency officials, and Congress should act to remedy this chronic situation, in which practitioners must advise their clients that they may only travel at their peril.

¹⁵⁵. 8 C.F.R. § 245.2(a)(4)(ii)(C) (listing visas that do not require advance parole); see supra Part III.B.