

Article

Immigration Law and the Regulation of Marriage

Kerry Abrams[†]

Introduction	1626
I. Marriage and Immigration Law	1633
A. Marriage as a Central Organizing Principle	1634
B. Congress's Plenary Power to Regulate Immigration	1638
II. Regulating Courtship	1647
A. Family Law and Courtship	1647
B. Immigration Law and Courtship	1650
1. Fiancé Visas	1650
2. The International Marriage Broker Regulation Act	1653
a. Disclosures to International Matchmaking Organizations	1654
b. Visa Application Disclosures	1660
c. Limits on Fiancé Visas	1662
III. Regulating Entry into Marriage	1664
A. Family Law and Entry	1664
1. Formal and Functional Relationships	1664
2. Who May Marry	1665

[†] Associate Professor of Law and Co-Director, Center for Children, Families and the Law, University of Virginia School of Law. A previous version of this paper was presented at the UVA summer faculty workshop in July 2006, and I thank everyone who participated for their comments and questions. Special thanks are due to Anne Coughlin, Brandon Garrett, Julia Mahoney, and David Martin, each of whom gave me extensive feedback on several drafts of this Article. I am indebted to Sinead O'Doherty and Courtney Cass for their excellent research assistance. I also received very useful comments from Muneer Ahmad, Sameer M. Ashar, Michal Barzuza, Linda Bosniak, Michael Collins, Doug Ford, Jill Hasday, Kim Forde-Mazrui, John Harrison, Toby Heytens, Clare Huntington, Rich Hynes, Kevin Johnson, Jody Kraus, Greg Mitchell, Caleb Nelson, Dotan Oliar, Dan Ortiz, Laura Rosenbury, Elizabeth Scott, Chris Sprigman, Leti Volpp, and Walter Wadlington. Copyright © 2007 by Kerry Abrams.

1626	<i>MINNESOTA LAW REVIEW</i>	[91:1625
	B. Immigration Law and Entry	1668
	1. Formal Versus Functional Recognition of Couples	1668
	2. Who May Marry . . . for Immigration Purposes	1670
IV.	Regulating the Intact Marriage	1679
	A. Family Law and the Intact Marriage	1679
	B. Immigration Law and the Intact Marriage	1682
	1. The Immigration Marriage Fraud Amendments	1682
	2. The Violence Against Women Act(s)	1694
V.	Regulating Exit from Marriage	1697
	A. State Family Law and Exit	1697
	B. Immigration Law and Exit	1700
	Conclusion	1707

Joe is single and looking for love. Frustrated with singles bars and blind dates, he does what millions of other people in his position do—he visits an Internet dating website where he meets Susanna. On their Internet profiles, both Susanna and Joe give inaccurate self-portraits. Susanna knocks ten pounds off her weight and omits her two kids by previous boyfriends. Joe adds two inches to his height, mentions that he never drinks, and fails to note that he is a recovering alcoholic with two DUI convictions. By the time they meet and discover these missing pieces of information, it doesn't matter. They have already fallen in love.

Susanna and Joe marry, and she and her two children move to Joe's hometown to be with him. Joe works construction, and Susanna stays home with the kids. About a year later, Susanna decides that the marriage isn't working and divorces Joe. The divorce court rules that the marriage was short-term and that, therefore, Susanna and Joe's separate property has not become "marital property"; the court essentially leaves each of them with the property they brought to the marriage. The court also rules against Susanna's request for alimony, noting that she is twenty-eight years old, has experience as a medical technician, and can easily find work. Susanna and Joe's marriage has a clean break—neither is required to provide for the other in the future.

If we change the facts slightly, however, the outcome changes dramatically. Imagine now that Susanna is not Susanna but instead Svetlana, an immigrant from Ukraine.

She and Joe meet each other on an Internet dating website that enables American men to meet foreign women. Under U.S. immigration law, before the website can provide Joe with Svetlana's e-mail address, Joe has to disclose his criminal background (including his two DUIs), the number of minor children he has, any previous marriages, and a list of all states he has lived in since the age of eighteen. (He can still lie about his height.) Svetlana does not have to disclose anything—including her two children.

Despite finding out about Joe's prior drinking problems, Svetlana falls for Joe. In order to qualify for a fiancé visa to come to the United States, Svetlana must meet Joe in person, so he makes an expensive trip to Ukraine for that purpose. They discover that they are as attracted to each other in person as they were over e-mail, and Joe also discovers that Svetlana has two children. In order to facilitate their living together, Joe sponsors Svetlana and her two kids on a fiancé visa; they come to the United States, and Joe and Svetlana marry less than three months later, as they must to prevent her deportation. When Svetlana applies to become a permanent resident, Joe files the required affidavit of support as her sponsor, attesting that his income is sufficient to support a wife and two children. The couple undergoes an interview in which they must prove to immigration officials that their marriage is *bona fide*—that they are marrying for love, and not just to obtain immigration status for Svetlana.

Joe and Svetlana are successful in demonstrating the *bona fides* of their marriage, and Svetlana obtains conditional permanent residency. Because she and Joe have been married for less than two years at the time of her immigration, she must wait two more years before achieving actual permanent residency (a green card). The marriage is rocky, and Svetlana suspects early on that it may have been a mistake. But she hopes for the best, and she wants that green card. So she does the things that her lawyer advises her to do to convince the immigration authorities that her marriage has been genuine from the beginning. (As it was—like most people, Svetlana thought her marriage was going to succeed when she entered into it.) She continues to live with Joe, opens joint bank accounts, and even becomes pregnant with his child. When the two years are up, Joe and Svetlana are interviewed again by immigration officials, who determine that their marriage is *bona fide*. Svet-

lana gets her green card, and within a few weeks files for divorce.

Along with the divorce papers, Svetlana files a lawsuit to enforce the affidavit of support that Joe filed to sponsor her as an immigrant. Despite the court's refusal to grant Svetlana alimony or a share of Joe's pre-marriage property, the court holds that Joe must pay Svetlana the amount of money per year that it would take to keep her and her two children above 125% of the poverty line: \$20,112 dollars in 2005, and likely more in future years. This obligation will end only when Svetlana becomes a citizen or has worked for forty Social Security quarters (about ten years). Svetlana does neither, so Joe continues to support Svetlana and her children until his death.

Joe and Susanna's encounters with family law are fairly typical examples of how state law regulation of marriage currently operates. Marriage can be thought of as having four stages: the courtship stage, in which the couple meets and decides to marry; the entry stage, in which the couple undergoes whatever licensing and ceremonial requirements are necessary to achieve marital status; the intact marriage stage, in which the couple is legally married; and the exit stage, in which the couple divorces, has the marriage annulled, or one of the spouses dies. State marriage law today primarily regulates marriage only during the entry and exit stages, and even then, the regulation is very light.

Typically, the only requirements for getting married are reaching a certain age, not being already married, and finding a mate of the opposite sex who is not a close blood relative. Likewise, in the vast majority of jurisdictions, couples can get divorced for any reason or no reason at all. No matter whether one spouse is a liar, a cheat, a thief, a killer, or an addict—and no matter whether he lies to his prospective spouse about the fact that he is one of those things—if he can find someone to marry him, he can get married, and the state will have nothing to say about it. And if he wants a divorce, he can get one, even if he behaved very badly during the marriage and his spouse was a saint.

In contrast, immigration law regulates heavily all four stages of marriage. As shown through the story of Joe and Svetlana, immigration law permits government intervention at all points in a marriage, from the very early stages of courtship until "death do us part," even when the couple has already chosen to part by divorcing. And immigration law does not just af-

fect the marriages of immigrants—it also affects the marriages of citizens like Joe, if they happen to marry foreigners. If family law is defined as any law that regulates “the creation and dissolution of legally recognized family relationships, and/or determines the legal rights and responsibilities of family members,”¹ then for people in Joe or Svetlana’s position, federal immigration law *is* family law.

It should not be surprising that federal immigration law has a lot to say about marriage. Legal immigration status is a scarce resource: many people want it and Congress has made the decision to limit access to a select group of people—those who are family members of U.S. residents or citizens, those who are sponsored by U.S.-based employers, and those lucky few who win a diversity lottery and are randomly chosen for admission.² Because marriage is the most common legal mechanism for creating state-sanctioned couplehood, marriage is an important category for family-based regulation.³ In 2005 alone, nearly 300,000 immigrants were granted permanent residence as spouses of U.S. citizens or residents.⁴ Once Congress has decided to use marital status as a means of granting immigration status, it necessarily follows that Congress will define and interpret what marriage means and shape and regulate marriage through the immigration process.

Despite its important role in regulating marriage, federal immigration law is not generally thought of as a form of family law. Scholars, lawyers, and courts generally look to state family law as the domain of marriage regulation. Family law scholarship has never considered in detail how immigration law might function as family law and thereby regulate familial relationships in ways that go far beyond what state family law would

1. Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 871 (2004).

2. There are also special categories for refugees and asylum seekers who wish to migrate because they are being persecuted in their countries of origin. See Immigration and Nationality Act (INA) §§ 207–208, 8 U.S.C. §§ 1157–1158 (2000).

3. A handful of states have recently adopted, either by statute or by court order, civil unions for same-sex partners. See *infra* Part III.A. And some states will recognize domestic partnerships for limited purposes. See *infra* notes 169–72 and accompanying text. But in most jurisdictions, marriage remains the primary way in which the state recognizes intimate adult relationships.

4. OFFICE OF IMMIGRATION STATISTICS, 2005 YEARBOOK OF IMMIGRATION STATISTICS 18 tbl.6, 20 tbl.7 (2006).

consider permissible.⁵ Indeed, a pervasive myth in case law is that state family law has a monopoly on the marriage business: federal courts abstain from hearing state family law cases⁶ and strike down statutes if they think that Congress has gone beyond the scope of its Commerce Clause powers and is threatening to interfere with domestic relations issues.⁷ But there is a large body of law that some scholars have recently shown constitutes federal family law.⁸ This body of federal family law includes the law of federal income tax,⁹ bankruptcy,¹⁰ social security,¹¹ welfare,¹² Indian affairs,¹³ family leave,¹⁴ and interstate

5. Cf. Hasday, *supra* note 1, at 877–78 (including a brief discussion of the effect of the immediate relative category on family law rights).

6. See *Ankenbrandt v. Richards*, 504 U.S. 689, 696–97 (1992) (recognizing a domestic relations exception to federal diversity jurisdiction for cases involving the issuance of a divorce, alimony, or child custody decree).

7. See *United States v. Morrison*, 529 U.S. 598, 599, 617–18 (2000) (overturning section 13981 of the Violence Against Women Act (VAWA) as exceeding Congress's power under the Commerce Clause and expressing a concern that if the Court were to uphold the civil rights remedy in VAWA, Congress could use the Commerce Clause to justify legislating the area of "family law and other areas of state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant"); *United States v. Lopez*, 514 U.S. 549, 564 (1995) (noting in dicta that if Congress's powers were not so limited then Congress could "regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody)").

8. See Libby S. Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197, 197–258 (1999); Kristin Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761, 1761–65 (2005); Hasday, *supra* note 1, at 875–80; Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1370–86 (1998); Judith Resnik, "Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682, 1721–30 (1991); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 947–1046 (2002).

9. See generally Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469 (1997); Patricia A. Cain, *Dependency, Taxes, and Alternative Families*, 5 J. GENDER RACE & JUST. 267 (2002); Shari Motro, *A New I Do: Towards a Marriage-Neutral Income Tax*, 91 IOWA L. REV. 1509 (2006).

10. See generally Tisha Morris Federico, *The Impact of the Defense of Marriage Act on Section 302 of the Bankruptcy Code and the Resulting Renewed Interest in the Equitable Doctrine of Substantive Consolidation*, 103 COM. L.J. 82 (1998).

11. See generally Dorothy A. Brown, *Social Security and Marriage in Black and White*, 65 OHIO ST. L.J. 111 (2004).

12. See generally Adler, *supra* note 8; Tonya Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229 (2000); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1647 (2005).

family court jurisdiction.¹⁵ And as I demonstrated in a previous article, from the time of the passage of the first federal immigration law in 1875, immigration law has used and shaped the institution of marriage in myriad ways.¹⁶

Just as family law scholarship has neglected to consider immigration law as a form of family law, immigration scholarship has largely passed by the family law aspects of immigration. Despite the reality that a majority of immigrants enter the country through relationships to U.S. citizen or resident family members, the family law aspects of immigration law have been overshadowed in immigration scholarship by constitutional questions (e.g., the plenary power doctrine, theories of citizenship), the role of labor incentives in immigration (e.g., labor markets, employer sanctions), and the role of criminal law in immigration law (e.g., deportation categories, consequences of plea agreements).¹⁷ Only a handful of scholars have considered family-based immigration as a serious topic for scholarship.¹⁸ And no one has undertaken a study of how immigration law uses and shapes marriage in particular.

13. See generally Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 IOWA L. REV. 585 (1994).

14. See generally Naomi Cahn, *Gendered Identities: Women and Household Work*, 44 VILL. L. REV. 525 (1999).

15. See Hasday, *supra* note 1, at 877–78.

16. Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641 (2005).

17. Dozens of articles have been written on each of these topics. See, e.g., Howard F. Chang, *Immigration and the Workplace: Immigration Restrictions as Employment Discrimination*, 78 CHI.-KENT. L. REV. 291 (2003); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1995); Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669 (1997); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992); Leticia M. Saucedo, *The Employer Preference for the Subserving Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961 (2006); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

18. See Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture's Diminishment, but Not Its Demise*, 24 N. ILL. U. L. REV. 153, 174–77 (2004) [hereinafter Calvo, *Decade*] (arguing that despite the passage of the Violence Against Women Act, the INA is still a manifestation of coverture and chastisement principles); Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593, 604 (1991) (arguing that the INA embodies common law principles of coverture and chastisement); Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law's Conflicted Answers*, 32 HOFSTRA L. REV. 273,

But immigration law's regulation of marriage matters. In a federal system in which states have primary authority over family law issues, and in which the political branches of the federal government, through the plenary power doctrine, have exclusive control over immigration, immigration law provides Congress an unusual opportunity to engage in extensive regulation of an area that would normally be off limits. This fact has important implications for family law theory and scholarship because it calls into question state law's primacy in the family law area and exposes the legal regulation of marriage as more pervasive, in some contexts, than the dominant stories about family law regulation would admit. And it has important implications for immigration law and scholarship as well. Congress's plenary power to regulate immigration has generally been characterized as a "power inherent in sovereignty" that is necessary to a self-governing nation.¹⁹ Looking closely at how Congress regulates marriage through immigration law might better help us to articulate where plenary power ends and state regulation of family law begins. In order to begin to answer these questions, we need a much more complete understanding of how, when, and why Congress regulates marriage through immigration law.

This Article takes a first step toward mapping the architecture of marriage regulation in immigration law. It compares immigration law's regulation of marriage with that of tradi-

293–96 (2003) (arguing that the government should place more weight on family ties in immigration policy); Lolita Buckner Inniss, *Dutch Uncle Sam: Immigration Reform and Notions of Family*, 36 BRANDEIS J. FAM. L. 177, 177–200 (1997) (tracing the history of family-based immigration in England, Holland, and the United States); Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens' Rights*, 41 VILL. L. REV. 725, 732 (1996) (proposing a "constitutionally humane approach" that erases distinctions between citizens and residents in family unity immigration); Hiroshi Motomura, *The Family and Immigration: A Roadmap for the Ruritanian Lawmaker*, 43 AM. J. COMP. L. 511, 511–12 (1995) (outlining ten questions any country must ask in determining how to structure family-based immigration); David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 980 (2002) (arguing that immigration law reinforces conceptions of children that limit their recognition as persons and silence their voices); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 405–83 (2005) (tracing the history of laws that divested women of citizenship if they married foreigners).

19. See *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States . . .").

tional family law in each of the four stages of marriage and considers how immigration law might tell us something important about how Americans—or at least lawmakers—envision marriage today. The Article provides a taxonomy of reasons why Congress regulates marriage through immigration law and suggests how courts and scholars might determine the legitimacy of congressional action in this area.

Part I provides a broad overview of how and why immigration law uses marital status as a central organizing principle and explains why Congress's plenary power over immigration is so broad. Parts II, III, IV, and V examine each of the four stages of marriage, demonstrating how immigration law's regulation of marriage in each stage is quite different than state family law. Part VI shows how conceiving of immigration law as a form of family law is important and how this approach could alter the way we understand both immigration law and family law.

I. MARRIAGE AND IMMIGRATION LAW

Family law scholars have long argued that the explicit legal regulation of the family is on the decline.²⁰ This decline is not a decline from a super-regulatory regime, but rather from one where the doctrine of family privacy already made legal intervention into the family relatively rare. As Carl Schneider has explained, "The law not only suspects that intervention will do harm; it doubts that intervention will do good: in family law as in few other areas of the law, the enforcement problems are ubiquitous and severe."²¹

20. See Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 BYU L. REV. 1, 34 ("[M]any perceive the legal system as having become less judgmental of what people should expect of one another."); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1807–08 (1985) (arguing that "the legal tradition of noninterference in family affairs, the ideology of liberal individualism, American society's changing moral beliefs, and the rise of 'psychologic man'" have all contributed to a "diminution of the law's discourse in moral terms about the relations between family members"). *But see* Hasday, *supra* note 1, at 834–54 (arguing that family law scholars overstate the decline of state law regulation).

21. Schneider, *supra* note 20, at 1837; *see also* Judith Hicks Stiehm, *Government and the Family: Justice and Acceptance*, in CHANGING IMAGES OF THE FAMILY 361, 362 (Virginia Tufte & Barbara Myerhoff eds., 1979) ("The government is only too happy to avoid having either to forbid or to require particular interpersonal behavior.").

Family law currently shapes marriage in two limited ways: (1) by defining who can enter the status of marriage and (2) by passing judgment on individual marriages during their dissolution.²² It is usually only at these two transformative moments—entry into and exit from marriage—that state law intervenes. The corollary of this principle, of course, is that state family law does not regulate marriage during its other two stages: courtship and the intact marriage.²³ In contrast to state family law, the federal immigration system passes judgment on and influences decision making in marriages involving immigrants throughout the four stages of marriage: courtship, entry, intact marriage, and exit.

In order to understand the values embedded in the immigration law system and the way in which immigration law shapes immigrant marriages, we must consider how the immigration system functions. This Part explains how marriage functions as a category in U.S. immigration law and why Congress is able to regulate immigration so extensively.

A. MARRIAGE AS A CENTRAL ORGANIZING PRINCIPLE

Perhaps the most obvious way in which immigration law uses formal marital status as a building block is in how it privileges married couples for purposes of obtaining immigrant visas. An immigrant visa grants a foreign national permanent resident or green card status. Permanent resident status is in turn the usual prerequisite for obtaining naturalized citizenship.²⁴ There are several ways that an aspiring immigrant can obtain permanent resident status: (1) as a family member of a U.S. citizen or resident;²⁵ (2) as an employee of a U.S. com-

22. Stiehm, *supra* note 21, at 362 (“The state does establish a legal basis for the family’s existence, but this defining function is exercised principally when families are either being founded, as in marriage and adoption, or dissolved, as in divorce and death.”).

23. Family law arguably does intervene in intact marriages to the extent that it exempts married couples from laws that would otherwise apply to them, such as rape law. *See, e.g.*, Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1375–76 (2000) (describing the marital rape exception); *see also infra* Part IV (examining how family law and immigration law regulate the intact marriage).

24. *See* INA § 316(a), 8 U.S.C. § 1427(a) (2000). The technical term is Lawful Permanent Resident, or LPR. This is a person who has obtained a green card and is therefore entitled to stay in the country indefinitely, but who has not yet become a naturalized citizen. Throughout this Article, I refer to LPRs as “permanent residents.”

25. *Id.* § 201(a)(1), 8 U.S.C. § 1151(a)(1).

pany;²⁶ (3) as a refugee or asylee;²⁷ or (4) through the “diversity lottery,” a (somewhat) random allocation of a small percentage of available immigration slots to residents of “underrepresented” countries.²⁸ Of these four categories, family-based immigration is the largest. For example, in the year 2005, 1,122,373 immigrants were admitted to the United States on immigrant visas.²⁹ Of these, 292,741 were spouses of U.S. citizens or residents and 186,304 were children of U.S. citizens or residents.³⁰ Marriage, in turn, affects the child category because the definition of child depends in part on the marital status of the child’s parents.³¹ Those who entered based on employment status or as a refugee or asylee in the same year numbered 246,878 and 142,962, respectively.³² Family-based immigration accounted for nearly half of all legal immigration in 2005, with spousal immigration accounting for more than one-quarter of all immigration.

Marital status is important not only as an admissions category, but also because it can qualify an immigrant for an exception or waiver if she is being denied entry as ineligible or is facing deportation. Generally, even when a person is otherwise entitled to an immigrant visa (for example, as the wife of a U.S. citizen), that person can be deemed “inadmissible” if she meets one of several criteria, including lying about immigration status,³³ using falsified documents to obtain entry,³⁴ or being convicted of a crime.³⁵ Such persons will not receive immigrant visas even though they meet the other statutory criteria. Spouses of U.S. citizens or residents, however, are eligible for discretionary waivers of many of these inadmissibility provisions. For example, immigrants who engage in fraud or misrepresentation may nevertheless be granted green cards if their citizen or permanent resident spouses will otherwise experi-

26. *Id.* § 201(a)(2).

27. *Id.* § 201(b)(1)(B).

28. *Id.* § 201(a)(3).

29. OFFICE OF IMMIGRATION STATISTICS, *supra* note 4, at 18 tbl.6, 20 tbl.7.

30. *Id.*

31. INA § 101(b), 8 U.S.C. § 1101(b).

32. OFFICE OF IMMIGRATION STATISTICS, *supra* note 4, at 20 tbl.7.

33. INA § 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C).

34. *Id.*

35. *Id.* § 212(a)(2).

ence “extreme hardship.”³⁶ A similar waiver exists for immigrants who have committed certain crimes.³⁷

In addition to privileging marriage as an immigration category, current immigration law is designed in a way that privileges the U.S. citizen or resident spouse’s desires in deciding whether to grant immigration status to a foreign spouse. With very few exceptions, immigrant spouses, children, and siblings cannot self-petition, but instead must wait for a family member with residency or citizenship status to petition on their behalf. In other words, immigration law allows family members with status to define who their families are for immigration purposes, as long as those individuals fall within the designated formal categories.³⁸

Finally, immigration law privileges some marital relationships over others. Spouses of U.S. citizens can achieve green-card status as “immediate relatives” of U.S. citizens. As immediate relatives, they are not subject to any immigration quotas, so the wait for a green card is simply a matter of processing delays.³⁹ Spouses of U.S. residents (green card holders), on the other hand, achieve green-card status through the “family preference” category, which is subject to annual quotas. Accordingly, they must submit to long waits before they can join their U.S. resident spouses.⁴⁰ Currently, the wait is approximately five years.⁴¹

The use of familial relationships as a cornerstone of immigration admissions is a relatively recent phenomenon. Prior to

36. *Id.* § 212(i)(1).

37. *Id.* § 212(h)(1)(B). Exceptions to the default rules are also available in deportation proceedings for spouses of U.S. citizens or permanent residents and for some immigrants seeking cancellation of removal under INA section 240A. *Id.* § 240A(b)(1), 8 U.S.C. § 1229b(b)(1). To obtain this relief, some immigrants must show “exceptional and extremely unusual hardship” to a family member. *Id.* § 240A(b)(1)(D). Even those immigrants who are not required to show hardship to a family member must still convince an immigration judge to exercise favorable discretion; important discretionary factors include the existence of family ties in the United States and hardship to family members. See *In re Marin*, 16 I. & N. Dec. 581, 584–85 (B.I.A. 1978) (listing discretionary factors).

38. For an argument that the “power to petition is a legacy of coverture” that disadvantages female spouses, see Calvo, *Decade, supra* note 18, at 188.

39. INA § 201(b), 8 U.S.C. § 1151(b).

40. *Id.* § 203(a), 8 U.S.C. § 1153(a); *id.* § 201(a), 8 U.S.C. § 1151(a).

41. See U.S. DEP’T OF STATE, BULL. NO. 9514, VISA BULLETIN FOR APRIL 2007 (2007), available at http://travel.state.gov/nsa/frvi/bulletin/bulletin_3169.html.

1965, immigration admissions were allocated based on national origin. Beginning with the Johnson-Reed Act of 1924, Congress restricted immigration so that immigrants would racially replicate the current U.S. population and thus maintain a population that was of primarily northern European descent.⁴² For example, annual immigration quotas were imposed on particular countries as follows: Great Britain and Northern Ireland, 65,721; Germany, 25,957; Turkey, 226; and Liberia, 100.⁴³

By 1965, the overt racism of the immigration quotas had become politically untenable.⁴⁴ Congress abolished the national origins system and put in its place admissions categories based on family relationship and employment potential.⁴⁵ The policy underlying the family relationship categories is usually referred to as “family unification” or “family reunification.”

Family unification has been valued for several reasons. One is a practical reason: as Professor Nora Demleitner has demonstrated, immigrants who have families living with them are more stable and more likely to integrate into society.⁴⁶ This stability, some believe, reduces crime, increases immigrant economic productivity, and prevents the immigrant from sending the money he or she earns to a different economy through remittances to family members who remain in the country of origin.⁴⁷ The belief that family ties promote stability and assimilation is reflected in the fast track to citizenship given to spouses of U.S. citizens, who need to wait only three years after obtaining a green card to apply for citizenship, rather than the usual five.⁴⁸

Support for the policy of family unification also arises from the notion that Americans, as citizens, have an interest in forming families, and that this interest includes the right to form families with people who are not U.S. citizens. Consider, for example, the way in which Congress has repeatedly made it possible for U.S. military personnel living overseas to marry people living in those countries and bring them back to the

42. MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 21–25 (2004).

43. *Id.* at 28 tbl.1.1.

44. *See* SELECT COMM’N ON IMMIGRATION & REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 205–07 (1981).

45. *Id.* at 207.

46. Demleitner, *supra* note 18, at 285.

47. *Id.* at 285–86.

48. INA § 319(a), 8 U.S.C § 1430(a) (2000).

United States as immediate relatives.⁴⁹ Note that these laws are not about “unifying” existing families, but rather about allowing Americans to create new ones. Thus, they are not concerned with the desirability of the potential immigrants so much as with allowing citizens to engage in the pursuit of happiness.⁵⁰

But family unification has limits as a policy goal. Importantly, it competes with other policy goals, such as keeping the total number of immigrants to a lower level than an “open borders” policy would allow and keeping out criminals, the poor, and the diseased. Thus, while family unification policy forms the basis of the admissions categories, competing policies curtail the frequency and speed with which families are united.

B. CONGRESS’S PLENARY POWER TO REGULATE IMMIGRATION

Immigration law uses marriage as a category for assigning immigration status and does this as part of an explicit policy goal of family unification. These laws, by their nature, privilege families over friends and privilege married couples over unmarried cohabiting ones. Sometimes Congress’s regulation of immigration has led to immigration laws that discriminate in other ways, for example, by treating illegitimate children and legitimate children differently,⁵¹ or by divesting a woman of citizenship if she married a foreigner.⁵² The ability of Congress to exercise this power contrasts sharply with constraints on both federal and state governments in regulating marriage.

49. See, e.g., G.I. Fiancées Act, Pub. L. No. 79-471, 60 Stat. 339 (1946) (broadening the scope of the preference for marriage to a U.S. citizen by facilitating admission of armed forces members’ fiancés); War Brides Act, Pub. L. No. 79-271, 59 Stat. 659 (1945) (providing nonquota immigrant status to alien spouses and alien minor children of U.S. citizens serving or having served in the U.S. armed forces during World War II).

50. Todd Stevens has chronicled how some immigrants successfully argued that they were entitled to the company of their wives to overcome racially exclusive immigration laws in the early twentieth century. See Todd Stevens, *Tender Ties: Husbands’ Rights and Racial Exclusion in Chinese Marriage Cases, 1882–1924*, 27 LAW & SOC. INQUIRY 271, 297 (2002) (arguing that the tactic of seeking exemptions from existing immigration laws based on a husband’s right to the company of his wife achieved remarkable success in a series of decisions in the 1890s and early 1900s, and that at least initially, a Chinese woman’s marital status trumped her racial classification).

51. *Fiallo v. Bell*, 430 U.S. 787, 800 (1977) (upholding the constitutionality of INA sections 101(b)(1)(D) and 101(b)(2)).

52. Volpp, *supra* note 18, at 407–08 (reporting how U.S. law divested Chinese citizens of their citizenship if they married foreigners).

Generally, family law has been reserved for the states. When Congress passes a federal statute—usually by invoking its Commerce Clause power—that appears to meddle in state family law matters, courts will strike down the statute as exceeding congressional authority.⁵³ For example, in the famous case of *United States v. Morrison*, the Supreme Court struck down the civil rights remedy for gender-motivated violence in the federal Violence Against Women Act (VAWA).⁵⁴ The prevention and punishment of violence, the Court held, is a part of the state police power, and even if gender-motivated violence did affect interstate commerce in the aggregate, no one individual act of violence was likely to.⁵⁵ In so holding, the Court analogized gender-motivated violence's local character to that of family law, expressing a concern that if the Court were to uphold the civil rights remedy in VAWA, Congress could use the Commerce Clause to justify legislating in the area of "family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant."⁵⁶ Congress can only regulate the family when it crafts federal laws in ways that purport to embody something *other* than family law, such as taxation, social security, pensions, or immigration.⁵⁷

Likewise, federal courts themselves will not hear cases that involve state family law issues such as divorce or child custody, even where federal jurisdiction would exist through diversity jurisdiction.⁵⁸ And while states can make and adjudicate family law, they are normally circumscribed in another

53. See, e.g., *United States v. Morrison*, 529 U.S. 598, 615–16 (2000).

54. *Id.* at 627.

55. *Id.* at 617.

56. *Id.* at 615–16; see also *United States v. Lopez*, 514 U.S. 549, 564 (1995) (striking down the Gun-Free School Zones Act of 1990 as exceeding Congress's commerce power and noting that if Congress's power was not so limited, then it "could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example"). For critiques of *Morrison*, see Collins, *supra* note 8, at 1766–68; Siegel, *supra* note 8, at 1035–44.

57. See Hasday, *supra* note 1, at 875.

58. See *Ankenbrandt v. Richards*, 504 U.S. 689, 702 (1992) (reversing lower court opinions that denied diversity jurisdiction under the domestic relations exception to a plaintiff seeking damages for child abuse). *But see* Hasday, *supra* note 8, at 1372 (arguing that although courts frequently invoke the domestic relations exception to support the idea that family law is inherently local, the exception keeps federal courts out of family law in only a narrow range of cases).

way—the laws they pass must not abridge the constitutional rights of their residents. Thus, the Supreme Court has struck down state laws that violated equal protection or substantive due process principles in a variety of family-related contexts: upholding the right of a grandmother to cohabit with her nonsibling grandsons despite contrary zoning laws,⁵⁹ the right of a man to remarry despite being delinquent on his child support payments,⁶⁰ the right of a prisoner to marry when it would not contradict the goals of incarceration,⁶¹ and the right of people of different races to marry each other.⁶²

In contrast, when Congress regulates immigration, it can pass laws that are overtly discriminatory and that would likely not pass constitutional muster in a nonimmigration context. Under the plenary power doctrine, Congress has near total power to regulate immigration in whatever way it chooses, even if in doing so it abridges what would be considered individual constitutional rights in a nonimmigration context.⁶³ This broad power is unusual in that it is not an enumerated Article I power. Although courts and commentators have justified the plenary power doctrine in part by analogizing the power over immigration to the Article I powers to regulate naturalization,⁶⁴ to declare war,⁶⁵ and to regulate foreign commerce,⁶⁶ even taken together these constitutional provisions do not provide a satisfactory basis for a power over immigration, least of all a plenary power. Thus, the Supreme Court has had to look

59. *Moore v. City of E. Cleveland*, 431 U.S. 494, 506 (1977).

60. *Zablocki v. Redhail*, 434 U.S. 374, 390–91 (1978).

61. *Turner v. Safley*, 482 U.S. 78, 99–100 (1987).

62. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

63. *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) (“[O]ver no conceivable subject is the legislative power of Congress more complete than it is over [the power to exclude aliens].”), *quoted in* *INS v. Chadha*, 462 U.S. 919, 1000 (1983); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972).

64. The law makes a distinction between immigration, which concerns the movement of people across boundaries, and citizenship, which concerns membership within a political community (often regardless of geographic location). See INA §§ 201–204, 8 U.S.C. §§ 1151–1154 (2000) (setting forth categories for immigration); *id.* §§ 301–347, 8 U.S.C. §§ 1401–1458 (setting forth rules for birthright and naturalized citizenship). Congress’s power to “establish a uniform Rule of Naturalization” gives it the authority to set rules for access to citizenship to those not born on U.S. soil. U.S. CONST. art. I, § 8, cl. 4. The Fourteenth Amendment only guarantees citizenship to those who are born on U.S. soil. *Id.* amend. XIV. Neither provision says anything about immigration.

65. U.S. CONST. art. I, § 8, cl. 11.

66. *Id.* cl. 3.

elsewhere for the origins of the power and has explained it as an incident of sovereignty.⁶⁷ Beginning with *Chae Chan Ping v. United States* (the famous “Chinese Exclusion Case”), the Court traced the origins of the immigration power to the United States’ status as an independent, sovereign nation that must be able to protect itself against foreign nations.⁶⁸ Preserving its independence and giving “security against foreign aggression and encroachment,” the Court explained, is every sovereign nation’s duty.⁶⁹ Foreign aggression could come in the form of another country declaring war or instituting a policy intended to hurt the United States, but it could also simply come from “vast hordes of its people crowding in upon us”—from immigration.⁷⁰

Later cases further entrenched the plenary power doctrine, extending the power to cover cases involving the race-based deportation of aliens,⁷¹ the exclusion of aliens with contagious diseases,⁷² and the divestment of citizenship for women who married foreign citizens.⁷³ Significantly, even in this latter case, which explicitly regulated marriage, the Court attempted to tie the marital regulation to an immigration purpose. The marriage of a U.S. citizen to a foreigner, the Court explained, “may involve national complications of like kind” as her physical expatriation. The act of marriage might “bring the Government into embarrassments and, it may be, into controversies.”⁷⁴ Central to each of these cases was the idea that Congress needs the unfettered authority to act in the international arena with-

67. *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889).

68. *Id.*

69. *Id.* at 606.

70. *Id.*; *cf.* *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936) (holding that federal authority over foreign relations operates independently of the Constitution and is inherent in the United States’ existence as a sovereign, independent nation).

71. *See Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) (holding that the powers to exclude and to expel are “but parts of one and the same power”).

72. *See Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909).

73. *See Mackenzie v. Hare*, 239 U.S. 299, 311 (1915) (upholding the Expatriation Act of 1907 and explaining that unity of citizenship for a husband and a wife has “purpose if not necessity, in purely domestic policy [but] greater purpose and, it may be, necessity, in international policy”). For more detailed discussions of *Mackenzie* and the Expatriation Act, see CANDICE LEWIS BRED-BENNER, A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP 56–70 (1998); Volpp, *supra* note 18, at 425–31.

74. *Mackenzie*, 239 U.S. at 312.

out foreign countries using the freedoms granted to Americans against the United States' interests.

As a result of the plenary power doctrine, the Supreme Court has upheld immigration laws that discriminate based on race, sex, and illegitimacy—laws that might be unconstitutional in a nonimmigration context.⁷⁵ For example, in *Fiallo v. Bell*, the Supreme Court upheld an immigration provision (no longer in existence) that gave illegitimate children of female citizens immediate relative status, but denied similar status to illegitimate children of male citizens.⁷⁶ The statute clearly discriminated in two ways that normally would have triggered the application of heightened scrutiny: gender (by privileging women over men) and illegitimacy (by making a distinction between legitimate and illegitimate children). Yet in *Fiallo*, the Court applied only the most toothless form of rational basis review.⁷⁷ Ultimately, Congress is free to pass immigration legislation that discriminates based on marriage, that discriminates between types of marriages, or that even refuses to recognize marriage for immigration purposes.⁷⁸

75. See *Fong Yue Ting*, 149 U.S. at 724 (holding that Congress has the power to expel any group of aliens “whenever in its judgment their removal is necessary or expedient for the public interest”); *Chae Chan Ping*, 130 U.S. at 609 (upholding raced-based Chinese exclusion laws as a proper exercise of Congress’s “power of exclusion of foreigners”). More recently, the INS created a National Security Entry-Exit Registration System (NSEERS). As part of NSEERS, male nationals of twenty-five designated countries, most of which are predominantly Muslim, who are at least sixteen years of age and admitted to the United States as nonimmigrants, were given a six-week window to report to be photographed, fingerprinted, and interviewed under oath about their reasons for being in the United States. See Registration of Certain Nonimmigrant Aliens from Designated Countries, Att’y Gen. Order No. 2643-2003, 68 Fed. Reg. 2363 (Jan. 16, 2003); Registration of Certain Nonimmigrant Aliens from Designated Countries, Att’y Gen. Order No. 2638-2002, 67 Fed. Reg. 77,642 (Dec. 18, 2002); Registration of Certain Nonimmigrant Aliens from Designated Countries, Att’y Gen. Order No. 2631-2002, 67 Fed. Reg. 70,526 (Nov. 22, 2002); Registration of Certain Nonimmigrant Aliens from Designated Countries, Att’y Gen. Order No. 2626-2002, 67 Fed. Reg. 67,766 (Nov. 6, 2002).

76. 430 U.S. 787, 797–800 (1977).

77. Courts disagree about whether *Fiallo* used rational basis review or an even lower standard. Compare *Bangura v. Hansen*, 434 F.3d 487, 495 (6th Cir. 2006) (stating that the *Fiallo* standard “may be even lower than rational basis review”), with *Azizi v. Thornburgh*, 908 F.2d 1130, 1133 n.2 (2d Cir. 1990) (stating that the *Fiallo* test is the same as the rational basis test).

78. There is a growing international consensus that families have a right to enter a state to reunify with family members. For example, immigrants in Europe have successfully argued that a state’s refusal to allow for family unification violates Article Eight of the European Convention on Human Rights’

There is good reason to think that *Fiallo*, decided in 1977, would come out similarly today. In 2001, the Court heard *Nguyen v. INS*, which differed from *Fiallo* in that it concerned the constitutionality of requirements that discriminated against illegitimate children born abroad to U.S.-born fathers who sought *citizenship* rather than *immigration* status.⁷⁹ The majority opinion analyzed an equal protection claim lodged against the statute using a conventional intermediate scrutiny standard because it discriminated based on illegitimacy and gender.⁸⁰ The government has a legitimate interest, the Court found, in giving citizenship status to children who have a genuine relationship with their citizen parent, and because women are “present” at the birth of their children, they are more likely than men to develop such a relationship.⁸¹

For our purposes, *Nguyen* is interesting because, after applying traditional equal protection analysis, the majority also mentioned that the plenary power doctrine might have applied had the statute not survived this conventional analysis. Thus, *Nguyen* suggests that the Court would have struck down the statute using the plenary power doctrine had a conventional approach not worked.⁸² Even more suggestive of the fate of cases concerning immigration before the current Court, however, is the dissent by Justice O’Connor (joined by Justices Souter, Ginsberg, and Breyer), which attempted to distinguish *Nguyen* from *Fiallo* on the grounds that *Nguyen* dealt with citizenship, not immigration. Because the statute at issue in *Nguyen* concerned citizenship, Justice O’Connor argued, it was not passed under the plenary immigration power and should therefore be subject to higher scrutiny.⁸³ This dissent implies that in a case squarely about the immigration family categories, even the Justices who would strike down discriminatory

(ECHR) guarantee of family life. See Lori A. Nessel, *Forced to Choose: Torture, Family Reunification, and United States Immigration Policy*, 78 TEMP. L. REV. 897, 909 (2005). These cases are more likely to succeed if the family relationship predates the immigration and the family cannot be reunited in the home country; that is, “reunification” is more important than “unification.” The United States has no analogous law, but there is international pressure for a uniform standard to be applied. However, because recognizing this law would seriously undercut the plenary power doctrine, the United States is unlikely to accede to it.

79. 533 U.S. 53, 96–97 (2001).

80. See *id.* at 60–61.

81. *Id.* at 64.

82. See *id.* at 72–73.

83. See *id.* at 96–97.

citizenship laws would still apply extremely deferential *Fiallo* review to immigration laws.

While the plenary power over immigration is broad, it is not unlimited.⁸⁴ Its origins lie in the right of the sovereign to protect itself from the invasion of outsiders and the right to expel outsiders once they have gained physical access to the United States.⁸⁵ The Supreme Court has made a sharp distinction between immigration law, which regulates the exclusion and deportation of aliens, and alienage law, which regulates their presence here. Thus, in the famous case of *Yick Wo v. Hopkins*, the Supreme Court struck down a California statute discriminating against Chinese laundry operators on the grounds that the law discriminated against aliens as a class.⁸⁶

84. Recently, several scholars have argued that the plenary power doctrine is slowly being eroded by the courts through the narrow interpretation of statutes, the use of the canon of constitutional avoidance, and the granting of procedural due process rights. See, e.g., Legomsky, *supra* note 17, at 930–37; Motomura, *supra* note 18, at 1631 (“The plenary power doctrine has eroded significantly in the past few decades, and the evolution of procedural due process as an exception to plenary power has been a critical part of this trend.”); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549–50 (1990) (arguing that plenary power is declining not through direct attack, but rather through the courts’ narrow interpretation of statutes); Brian G. Slocum, *Canons, the Plenary Power Doctrine and Immigration Law*, 34 FLA. ST. U. L. REV. (forthcoming Winter 2007) (manuscript at 32–37), available at <http://ssrn.com/abstract=933372> (arguing that because the plenary power doctrine has been weakened, there is more room for courts to use the canon of constitutional avoidance to protect immigrants’ rights). There is considerable merit to these arguments. In *Zadvydas v. Davis*, for example, the Supreme Court read a congressional statute as imposing an implied six-month time limit on detention in order to avoid deciding whether indefinite detention of a deportable, but stateless alien would violate his constitutional rights. 533 U.S. 678, 699–702 (2001). Similarly, in *INS v. St. Cyr*, the Court read a provision that appeared on its face to strip federal courts of habeas jurisdiction to apply only to appeals, leaving habeas untouched. 533 U.S. 289, 298–99, 314 (2001). In both cases, the plenary power doctrine was officially left untouched, but the Court forced an outcome that was protective of immigrants’ rights. But techniques such as narrow statutory interpretation have limited effect against such a sweeping power as plenary power. For instance, Congress’s response after *St. Cyr* was to pass legislation that explicitly used the words “habeas corpus” to strip federal courts of their habeas jurisdiction. See REAL ID Act of 2005, Pub. L. No. 109-13, § 106, 119 Stat. 231, 301–11 (amending INA § 242, 8 U.S.C. § 252 (2000)).

85. See *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581, 606–07 (1889).

86. 118 U.S. 356, 374 (1886); see also *Graham v. Richardson*, 403 U.S. 365, 366, 397 (1971) (holding that state laws conditioning welfare benefits on citizenship or length of residency violate equal protection).

When Congress has denied benefits to aliens that it grants to citizens, it has had to justify its denial by articulating an immigration purpose in order to avoid heightened scrutiny on an equal protection challenge. For example, in *Mathews v. Diaz*, the Supreme Court upheld a statute that conditioned Medicare eligibility for aliens on a five-year continuous residence and green card status.⁸⁷ In upholding the statute, the Court applied a deferential standard of review by framing the case as one about immigration.⁸⁸ If Congress could not restrict public welfare and medical benefits, the Court reasoned, its obligation to provide benefits to aliens would hamper its ability to respond to international economic and political crises in ways that might affect the number of refugees coming to the United States.⁸⁹ The issue of providing welfare benefits to aliens was therefore an immigration issue, because it could affect Congress's ability to provide for the admission of certain categories of immigrants.

Although the Court has applied the plenary power doctrine in cases where the government has successfully argued that a law fell within the broad category of immigration-related regulation, the Court has never given Congress *carte blanche* to characterize just any law as an immigration law.⁹⁰ Indeed, in determining whether a congressional action falls under the immigration power, courts look to the connection between the action and the United States' relation to foreign powers, since sovereignty is at the core of the plenary power doctrine. For example, in *Gebin v. Mineta*, a court held that strict scrutiny would apply to a challenge brought by a U.S. national to a post-September 11 law that made U.S. citizenship a requirement to be an airport screener.⁹¹ Distinguishing *Diaz*, the court held that the restriction could not be considered an immigration law, because it could have no implication in relations with for-

87. 426 U.S. 67, 69, 87 (1976).

88. *See id.* at 77–84.

89. *See id.* at 81.

90. In other contexts, Congress's powers have been limited to actions that are tied to the substance of the power in question. For instance, in *United States v. Morrison* and *United States v. Lopez*, the Supreme Court struck down laws not related to interstate commerce. *See Morrison*, 529 U.S. 598, 607–20 (2000); *Lopez*, 514 U.S. 549, 567–68 (1995); cf. Michael S. Kirsch, *The Tax Code as Nationality Law*, 43 HARV. J. ON LEGIS. 375, 407–23 (2006) (arguing that a federal law making noncitizens pay federal taxes under nationality law on their worldwide income is beyond Congress's tax power).

91. 231 F. Supp. 2d 971, 976 (C.D. Cal. 2002).

eign powers, nor could it be justified as encouraging aliens to naturalize.⁹² The reasons behind the plenary power doctrine matter in determining whether a law falls within it.

The Supreme Court has also found limits to the plenary power doctrine when Congress exceeds its structural constitutional authority. For example, in *INS v. Chadha*, the Court invalidated a law that allowed a single house of Congress to veto the Attorney General's decision to allow an alien to remain in the United States.⁹³ The Court invalidated the statute despite the existence of the plenary power doctrine because the exercise of the power offended another constitutional restriction—in that case, separation of powers.⁹⁴ Family law, of course, presents a different structural issue, one of federalism, but one that could result in the same class of exceptions to the plenary power doctrine.

Immigration law thus places Congress and those it regulates in an unusual position. Congress has atypically broad power to regulate in the immigration area, and even if that regulation happens to regulate marriage, the usual prohibition against congressional involvement in family law does not apply. At the same time, family law—the law that says who may marry, what spousal obligations exist, and sets the terms for divorce—is one area that is clearly beyond any of Congress's enumerated powers and lies, rather, within the powers traditionally granted to the states. And, as discussed below in Part II.A, Congress has a special interest in using its power over immigration to unify families because it believes that family members of U.S. citizens and residents make for especially desirable immigrants. The question that needs to be answered about congressional regulation of marriage through immigration law is whether the regulation is actually tied to a legitimate immigration purpose. If it is, the regulation may be within Congress's power to effect, even if it does have the unintended or unavoidable side effect of regulating marriage. But if it does not—if the law in question has nothing to do with the

92. *See id.* Consider also Justice O'Connor's dissent in *Nguyen v. INS*, discussed above: "[A] predicate for application of the deference commanded by *Fiallo* is that the individuals concerned be aliens." 533 U.S. 53, 96 (2001) (O'Connor, J., dissenting). In other words, plenary power deference applies only where immigration is the subject in question; if the question is instead one of citizenship, then the normal constitutional standards would apply.

93. 462 U.S. 919, 923, 959 (1983).

94. *See id.* at 944–51.

exclusion of immigrants or the deportation of immigrants, but instead regulates the lives of citizens—then the plenary power doctrine may not apply at all, and Congress may be overstepping its bounds.⁹⁵

The next several parts of this Article delve more deeply into specific immigration laws that affect marriage to show that federal intervention in this area is often more extensive than, and different from, state family law. To show this contrast, I work through each of the four stages of marriage, considering at each stage how immigration law differs from the default rules of family law as it regulates marriage. In doing so, I also consider how well the immigration laws are fulfilling their ostensible purpose of regulating immigration, including the policy of family unification. As I consider each of the four stages, three types of laws emerge. Some immigration laws regulate marriage only inadvertently: like the admissions categories described above, they are primarily intended to regulate immigration, but in the process they sometimes explicitly deviate from state law definitions of family. Others more explicitly regulate marriage, but do so because of problems that are created by immigration law itself. Still others serve no immigration purpose, or serve one only tangentially, and instead aim to intervene substantively in marriage. Given these differences, in assessing whether an immigration law regulation of marriage is legitimate, we need to consider whether the exercise of power serves an immigration purpose.

II. REGULATING COURTSHIP

A. FAMILY LAW AND COURTSHIP

Of the four stages of marriage, courtship is currently the least regulated. If Joe meets Susanna on the Internet, or at a bar, or through friends, the state has nothing to say about the substance of their relationship until they seek a marriage license.

95. Courts have been quite unfriendly to claims by citizens that they are harmed by immigration law. For example, the claim that citizens are harmed when their undocumented parents are deported has not received constitutional protection. But it would be another case if a law targeted citizens, as do some of the laws this Article explores. *See, e.g., infra* Part II.B.2 (discussing the International Marriage Broker Regulation Act); *infra* Part V.B (discussing the affidavit of support requirement).

This was not always so. Nineteenth-century common law was quite concerned with courtship. It regulated courtship through several means: the tort of seduction,⁹⁶ claims for breach of promise to marry,⁹⁷ and statutes criminalizing fornication.⁹⁸ Each of these rules had a moral valence: sex and reproduction were supposed to occur during marriage, and engaging in sexual activity outside of marriage or reducing a woman's chances of marriage by "ruining" her were both offenses against her and her father.

Since puritan times, states have made fornication (sex outside of marriage) a crime. These laws were rarely enforced with vigor, but they were available as leverage to force marriages between couples who had engaged in premarital sex that resulted in a pregnancy.⁹⁹

In the twentieth century, claims for breach of promise to marry, the tort of seduction, and fornication decreased and were eventually invalidated by courts. As women became more economically self-sufficient and a woman's loss of virginity before marriage became less stigmatized, there was no longer any reason in market terms to compensate women for what increasingly came to be viewed as merely "personal" losses.¹⁰⁰ The final death knell on fornication bans occurred with the Supreme Court's 2003 *Lawrence v. Texas* decision.¹⁰¹ Under *Lawrence*, the state cannot criminalize private, consensual, homosexual behavior.¹⁰² As a result, courts have held that the state cannot criminalize private, consensual heterosexual behavior either.¹⁰³

96. For a discussion of the tort of seduction, see Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit': A Feminist Rethinking of Seduction," 93 COLUM. L. REV. 374, 381-401 (1993).

97. These lawsuits were almost always brought by women. LAWRENCE M. FRIEDMAN, PRIVATE LIVES 61 (2004) (noting that women constituted ninety-seven percent of the plaintiffs in English cases, and that the few men who sued usually lost). The underlying theory was that a woman had given up her virginity or her chances in the marriage market and was therefore entitled to money damages. *Id.*

98. See *Martin v. Zihlerl*, 607 S.E.2d 367, 368 (Va. 2005).

99. See *id.*

100. See Margaret F. Brinig, *Rings and Promises*, 6 J.L. ECON. & ORG. 203, 211-13 (1990).

101. 539 U.S. 558 (2003).

102. See *id.* at 578.

103. See *Martin*, 607 S.E.2d at 368, 371 (striking down Virginia's fornication law where a man asserted an "unclean hands" defense to a claim by his girlfriend that he knowingly gave her herpes).

States, then, have ceased to directly regulate courtship by permitting money damages for seduction or breach of promise to marry or criminalizing extramarital sex. Of course, there are still legal incentives to marry: access to a spouse's insurance policy or other employee benefits, the desire to legitimate children, and the benefits of economies of scale can all induce people to marry who otherwise would not. Furthermore, several scholars have shown that states encourage the poor and people of color to enter into marriage to prevent dependency on welfare, despite the negative effects marriage can have in certain cases.¹⁰⁴ But the high rates of extramarital cohabitation occurring today indicate that these pressures, while real, no longer make marriage the only game in town.¹⁰⁵

The one way in which states continue to regulate courtship is through time limits associated with marriage licenses. Some states impose waiting periods from the date a license is obtained until the date the marriage ceremony can occur. Nevada is notorious as a state where one can marry on a whim,¹⁰⁶ but some other states require couples to wait up to five days after obtaining a license.¹⁰⁷ These laws prevent couples from marrying suddenly and with little forethought, essentially forcing couples to have a courtship—even if it lasts only a few days.

Another feature of state licensure law that affects courtship is the time limit that a license is valid. Most state marriage licenses become invalid after a certain amount of time if the couple does not marry. This time limit varies from as little

104. See, e.g., DOROTHY ROBERTS, *KILLING THE BLACK BODY* 222–26 (1996); Onwuachi-Willig, *supra* note 12, at 1673–82.

105. See, e.g., Anne Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1387 (2001) (describing the increasing prevalence of nonmarital cohabitation); Sharon Jayson, *Divorce Declining, but So Is Marriage*, USA TODAY, July 18, 2005, at A3.

106. See Michael E. Solimine, *Competitive Federalism and Interstate Recognition of Marriage*, 32 CREIGHTON L. REV. 83, 88 (1998).

107. Minnesota and Wisconsin both have five-day waiting periods. MINN. STAT. § 517.08, subdiv. 1b(a) (2006); WIS. STAT. § 765.08 (2007). Alaska, the District of Columbia, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, Oregon, Pennsylvania, Texas, and Washington all have three-day waiting periods. ALASKA STAT. § 25.05.091 (2006); D.C. CODE ANN. § 46-409 (LexisNexis 2005); IOWA CODE ANN. § 595.4 (West 2001); LA. REV. STAT. ANN. § 9:241 (2000); MASS. ANN. LAWS ch. 207, § 19 (LexisNexis 2003); MICH. COMP. LAWS ANN. § 551.103a (West 2005); MISS. CODE ANN. § 93-1-5(b) (2004); MO. ANN. STAT. § 451.040 (West 2003); OR. REV. STAT. ANN. § 106.077 (West 2003); 23 PA. CONS. STAT. ANN. § 1303 (West 2001); TEX. FAM. CODE ANN. § 2.204 (Vernon 2006); WASH. REV. CODE ANN. § 26.04.180 (West 2005).

at ten days in Oklahoma to one year in Arizona;¹⁰⁸ Mississippi, New Mexico, and Wisconsin issue licenses that last indefinitely.¹⁰⁹ A major reason for the time limit may be that states get valuable license fees each time a person applies for a new license.¹¹⁰ But an effect of the law may be that couples think carefully about when to apply for a license, because failing to time the acquisition of the license properly might lead to paying for the license twice. The effect of these state license laws on courtship, however, is fairly insignificant.

B. IMMIGRATION LAW AND COURTSHIP

In contrast to the laissez-faire attitude of state family law, immigration law intervenes substantially in courtship in two ways: by creating a special category of “fiancé visas” and by mandating disclosures of criminal and marital background for some couples.

1. Fiancé Visas

Immigration law regulates courtship through the use of so-called fiancé or K-1 visas.¹¹¹ A fiancé visa allows an immigrant to enter the United States for up to ninety days for the purpose of marrying a U.S. citizen.¹¹² Fiancé visas allow cross-national couples to marry within the United States and also provide a means for couples who intend to marry but need more courtship time in the same geographic location together. Interestingly, the annual number of fiancé visa applications has risen sharply in the past few years. In 1995, 7,793 visa petitions were approved for fiancés, with an additional 768 approved for their children.¹¹³ By 2004, Department of Homeland Security (DHS) approvals nearly quadrupled to 28,546 fiancé visa petitions annually, with an additional 4,515 children.¹¹⁴ Part of the

108. ARIZ. REV. STAT. ANN. § 25-121(B) (2006); OKLA. STAT. tit. 43, § 36 (2005).

109. MISS. CODE ANN. §§ 93-1-5, -13, -15, -18; N.M. STAT. §§ 40-1-10, -14 (2006); WIS. STAT. § 765.06, .08.

110. See, e.g., *County Looks to Newlyweds, Cat Owners as Fund Sources*, L.A. TIMES (Ventura County ed.), June 18, 1996, at B1 (noting that an increase in marriage license fees from \$50 to \$66 would increase revenues for Ventura County, California by \$50,000 per year).

111. INA § 101(a)(15)(K)(i), 8 U.S.C. § 1101(a)(15)(K)(i) (2000).

112. *Id.*

113. OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., 2004 YEARBOOK OF IMMIGRATION STATISTICS 102 (2006).

114. *Id.* at 104.

reason for this upswing may be the increased popularity of international Internet dating.¹¹⁵

Fiancé visas are only approved if the parties can show that they have “previously met in person within 2 years before the date of filing the petition, have a bona fide intention to marry, and are legally able and actually willing to conclude a valid marriage in the United States within a period of ninety days after the alien’s arrival.”¹¹⁶ The immigration rationales behind these provisions are easy to imagine. Congress could reasonably believe that a person who has never met his or her fiancé (because the marriage was arranged by a matchmaker or over the Internet), or who has not seen his or her intended in several years, is less likely to agree to marry the U.S. citizen once he or she arrives on the K-1 visa. Congress might not want to waste scarce resources on issuing fiancé visas to couples who are less likely to marry. Congress might also be concerned that those couples who have never met or have not met recently are more likely to use the K-1 visa as a means of entry into the country with an intention to overstay the visa and remain in the country illegally, or to otherwise commit immigration fraud of some kind. It might also believe that, even if a K-1 visa holder *does* marry after arrival in the United States, marriages based on relationships that involved little personal contact before the engagement might be less likely to survive and thus would provide less economic and social stability for the immigrant.¹¹⁷

The requirement that a fiancé visa-holder marry his or her U.S. citizen sponsor within ninety days or depart the country

115. See Robert J. Scholes, *The “Mail-Order Bride” Industry and Its Impact on U.S. Immigration*, in INTERNATIONAL MATCHMAKING ORGANIZATIONS: A REPORT TO CONGRESS app. A, at 1–6 (1999), available at http://www.uscis.gov/files/article/Mobrept_full.pdf (attributing the growth of marriages facilitated through international marriage brokers to the growth of e-mail “pen-pal” clubs and Internet-based services).

116. INA § 214(d)(1), 8 U.S.C. § 1184(d)(1).

117. See H.R. REP. NO. 99-906, at 11 (1986), reprinted in 1986 U.S.C.C.A.N. 5978, 5983 (calling the personal meeting requirement a “reasonable limitation”); H.R. REP. NO. 91-851 (1970), reprinted in 1970 U.S.C.C.A.N. 2750, 2757 (“[The amendment] provides safeguards against abuse of the nonimmigrant fiancée section by requiring . . . the alien fiancé [to] be the subject of a petition approved by the Attorney General after he is satisfied as to the bona fides of the parties and their ability legally to conclude the marriage.”); S. REP. NO. 81-210 (1949), reprinted in 1949 U.S.C.C.A.N. 1220, 1221 (declaring that the parties must “actually have met” and permitting adjustment of status only for an alien who marries the “fiancé or fiancée to whom the alien was destined at the time of entry” within ninety days).

also serves an immigration law function by preventing immigrants from using the K-1 visa as a substitute for long-term permanent resident status. At times, this requirement may result in unintended consequences for courtship. In some cases, fiancé visas are issued to a member of a couple that has known each other for years and the ninety-day trip to the United States before the wedding is the culmination of a much longer courtship. But in many cases (where, for example, the couple meets over the Internet or while an American is abroad on business or vacation), the fiancé visa is sought after very few meetings (or even only one meeting) between potential spouses. And in some cases, partners may have known each other for a long time, but may still be uncertain after ninety days of living in the same place that they are ready to marry. In these latter examples, the ninety-day rule provides very little time for the couple to make an important life decision. For couples who do not know each other well at the beginning of the process, three months may give them far too little information to make an educated choice about marriage.¹¹⁸

Through the fiancé visa restrictions, immigration law provides different incentives during courtship than state family law does. Under state family law, marriage licenses generally have time limits, but the penalty for failing to marry within the allotted time is standing in line for another marriage license, not being sent halfway around the world away from one's future spouse. Where state law focuses on access to marriage as an institution and has crafted rules that encourage some modicum of forethought (varying by state), immigration law is focused not on regulating access to marriage for marriage's sake but instead on fraud prevention and the allocation of scarce resources. These different focuses result in markedly different rules regulating the timing of marriage.

118. Since a K-1 visa is technically only for fiancés—people who have already made the decision to marry but have not yet married—and not *potential* fiancés, the proper course of action for someone who is just getting to know someone better would be to have the person come in on a B-1 tourist visa and then return on a K-1 visa once the couple has made the decision to marry. This strategy, however, is not one advocated by international matchmaking organizations, most likely because the back and forth travel might be prohibitively expensive.

2. The International Marriage Broker Regulation Act

So far this Article has discussed laws that indirectly affect courtship by making marital status a prerequisite to immigration status and by allowing fiancés only a short time to benefit from a fiancé visa before a marriage is required to occur. But one immigration law actually regulates some citizen-immigrant courtships directly. The International Marriage Broker Regulation Act of 2005 (IMBRA) regulates courtships that occur between U.S. citizens or residents and foreigners over the Internet.¹¹⁹

Congress passed IMBRA several years after two “mail-order brides” were murdered by their U.S. citizen husbands in Washington State.¹²⁰ In one of the cases, the husband had previously been married to another Russian woman whom he met through an international matchmaking organization and was looking for a third “mail-order bride” when he murdered his second wife.¹²¹ The murders received extensive media attention and led to legislation in Washington State as well as the push for IMBRA. Advocates for the legislation pointed to the marketing techniques used by international matchmaking websites as evidence that the relationships resulting from these services were more likely than others to result in violence. As Leslye Or-

119. Pub. L. No. 109-162, 199 Stat. 3066 (2006) (to be codified at 8 U.S.C. § 1375a).

120. See Press Release, Rep. Rick Larsen, Bipartisan Legislators Restart Clock to Protect “Mail-Order Brides” (Sept. 6, 2005), http://www.house.gov/list/press/wa02_larsen/pr_09062005_mailorder.html. I use quotation marks around the phrase “mail-order brides” because it is misleading, but it is the term most people use to describe foreign women who advertise themselves in catalogues or on websites as interested in marriage to U.S. citizens. The term is misleading because it is impossible under U.S. law to actually get a spouse through the mail. Couples generally must meet in person in order to obtain immigration status through marriage. The only function websites and catalogues serve is providing contact information, photographs, and biographical information about potential mates. The couple must meet on their own to determine whether they are compatible. The phrase “mail-order bride” is also misleading because it implies that the husband buys his wife. Although men who use these services must pay for access to phone numbers or e-mail addresses (which is also true of any Internet dating site, such as Match.com and J-date), and although making a trip to a potential wife’s home country to meet her may be expensive, he makes no actual payment to a third party in exchange for a wife.

121. See David Fisher, *Indle King Found Guilty of Killing Mail-Order Bride*, SEATTLE POST INTELLIGENCER, Feb. 22, 2002, http://seattlepi.nwsource.com/local/59387_king22.shtml; *Mail Order Bride Bill in Works*, CBS NEWS, July 5, 2003, <http://www.cbsnews.com/stories/2003/07/05/politics/main561828.shtml>.

loff, director of the NOW Legal Defense Fund Immigrant Women's Project¹²² stated, "They market to the women the image of wealthy American men and a better life. They market to the American men the image of docile women they can control."¹²³ While the data are still scant, some studies have shown that men who use international matchmaking websites tend to be middle-aged, divorced, seeking marriage to a much younger woman, and hostile to feminism.¹²⁴

IMBRA was sponsored by a bipartisan coalition including Senator Maria Cantwell, a Democrat from Washington, and Senator Sam Brownback, a Republican from Kansas. The resulting legislation intervenes in the international matchmaking process and also intervenes in the courtships of *all* U.S. citizens who sponsor their fiancés using a K-1 visa. First, it requires U.S. citizens or residents who use international matchmaking organizations to disclose information about themselves before any contact with the foreign person in question can occur. Second, it requires all sponsors of K-1 visa-holders to disclose their own criminal history on their visa petitions. Finally, the legislation imposes limitations on the number of fiancé visas for which an American may petition.

a. Disclosures to International Matchmaking Organizations

The first disclosure provision of IMBRA is a requirement that international matchmaking companies gather and disseminate information about the U.S. citizen or resident to DHS and the potential foreign fiancé before any contact occurs between the potential mates. This information is quite extensive. First, the company must, on its own, conduct a search of sex offender public registries.¹²⁵ Then, it must obtain a signed certification from the U.S. client accompanied by documentation of his criminal history, including any arrests related to controlled substances or alcohol.¹²⁶ Additionally, the U.S. client must pro-

122. In 2004, NOW was renamed Legal Momentum. Legal Momentum: About Us, http://legalmomentum.org/legalmomentum/aboutus/legal_momentums_history (last visited Apr. 23, 2007).

123. See *Mail Order Bride Bill in Works*, *supra* note 121.

124. Cf. Scholes, *supra* note 115, at 4 (describing the demographics of men who are interested in "mail-order brides").

125. 8 U.S.C.A. § 1375a(d)(2)(A)(i) (West Supp. 2006).

126. *Id.* § 1375a(d)(2)(B). I use the pronoun *he* here because Internet-based international matchmaking organizations are almost exclusively marketed to men in wealthy countries like the United States and to women in poorer countries, so the likelihood of a U.S. citizen woman finding a husband using an in-

vide information about his personal history, including how many previous marriages were terminated and the dates of the terminations, whether the client has previously sponsored an alien to whom he was engaged or married, the ages of his minor children, and all states and countries in which he has resided since he was eighteen years old.¹²⁷

Under IMBRA, international matchmaking companies are now prohibited from giving their foreign clients' contact information to U.S. clients until after they have performed the sexual offender registry search, collected the information described above, given the information to the foreign client, and obtained the foreign client's written consent to release her contact information.¹²⁸ Violation of the law carries substantial civil and criminal penalties.¹²⁹ And if a couple proceeds with a courtship through an international matchmaking organization without following the rules, the foreign fiancé may subsequently be denied a visa.¹³⁰

international matchmaking website is exceedingly small. There appear to be no "mail-order husband" websites geared to American women. The only one that comes up in a search on the Internet is a joke: mailorderhusbands.net has pictures and descriptions of "losers" who cannot understand why they have not been able to find a woman who will take them. MailOrderHusbands.Net: Internet Matrimony—Propose Today!, <http://mailorderhusbands.net> (last visited Apr. 23, 2007). Moreover, although IMBRA itself is gender neutral, it is clear from its legislative history that Congress was concerned with abuse of foreign women by U.S. men, not the converse.

127. 8 U.S.C.A. § 1375a(d)(2)(B). The law also requires DHS to provide an informational pamphlet to fiancé visa-holders on the legal rights of and resources available for immigrant victims of domestic violence. The pamphlet must include information about domestic violence and sexual assault hotlines; the illegality of domestic violence, sexual assault, and child abuse in the United States; the visa application process and marriage-based immigration process, including information about the consequences of marriage fraud; and a warning "concerning the potential use of [fiancé visas] by U.S. citizens who have a history of committing domestic violence, sexual assault, child abuse, or other crimes and an explanation that such acts may not have resulted in a criminal record for a citizen." *Id.* § 1375a(a).

128. *Id.* § 1375a(d)(3).

129. *Id.* § 1375a(d)(5)(A) (subjecting violators to civil penalties of \$5,000 to \$25,000 for each violation); *id.* § 1375a(d)(5)(B) (providing a criminal fine and imprisonment for no more than five years).

130. *See id.* § 1375a(b)(1)(c) (requiring consular officers to ask all K-1 applicants whether an international marriage broker has facilitated the relationship between the applicant and the U.S. petitioner, and, if so, to obtain the identity of the international marriage broker from the applicant and confirm that the international marriage broker provided to the applicant the information obtained through sex offender registry searches, criminal background checks, and other background information). The requirement that consular

This disclosure provision attempts to ensure that the female party in a long-distance courtship will have a substantial amount of information about her potential American spouse at the very first stage of the courtship—when she is deciding whether to make his acquaintance over e-mail. The underlying assumption appears to be that, armed with the proper information, women can make more educated choices about whom to date and will be less likely to find themselves in abusive relationships.¹³¹

The disclosure requirement is limited to only those organizations that explicitly target foreign women for marriage with American men. IMBRA limits the definition of “International Marriage Broker” to prevent the application of the law to two subgroups: domestic matchmaking organizations and nonprofit “cultural or religious” organizations.¹³² This definition is worth exploring, because it can help to illuminate the immigration law purpose that Congress may have had in mind in passing IMBRA.

The first exemption, what I call the “Match.com exemption,” applies to any

entity that provides dating services if its principal business is not to provide international dating services between United States citizens or United States residents and foreign nationals and it charges comparable rates and offers comparable services to all individuals it serves regardless of the individual’s gender or country of citizenship.¹³³

This exemption essentially requires two showings: that the business’s principal purpose is not facilitating international dating and that it charges comparable rates to men and women.¹³⁴ The first requirement, that the entity’s principal

officers ask K-1 applicants about their use of marriage brokers may be a way of sidestepping the problem of regulating non-U.S.-based matchmaking organizations by denying visas to the organizations’ clients on the basis of non-compliance.

131. See 151 CONG. REC. S13,752 (daily ed. Dec. 16, 2005) (statement of Sen. Brownback) (“A simple but incredibly powerful premise drives these provisions: that this information can help a woman help herself, help her save herself or her child from becoming the next victim of a predatory abuser. Through this information and other safeguards, this important legislation will help prevent those intent on doing women harm from perverting and subverting both the institution of marriage and the immigration process to find new victims overseas.”).

132. 8 U.S.C.A. § 1375a(e)(4)(B).

133. *Id.* § 1375a(e)(4)(B)(ii).

134. See *id.*

business is not to provide international dating services, may seek to exclude activity that is likely to have no or only a tangential immigration effect. Congress may have believed that regulating international matchmaking organizations fell within its immigration power, while regulating domestic matchmaking organizations did not. The second requirement, that the entity charge comparable rates to men and women, appears to be a means of directly targeting “mail-order bride” websites. Although “mail-order bride” websites typically charge men subscription fees for access to contact information, they do not charge the women who advertise on them (who often come from impoverished countries where a subscription fee would be prohibitive).¹³⁵ Internet dating sites like Match.com, on the other hand, charge users based on the access privileges they want to have: it is often free to post a profile and look at other people’s profiles, but it costs a certain amount of money per month to have access to the e-mail addresses of other subscribers.¹³⁶ If Congress believed that men seek out wives from poorer countries to target them for abuse or subjugation and that a wealth disparity between husband and wife would be likely to lead to that abuse, it might have wanted to target only those companies that encourage use by wealthy men and poor women.¹³⁷

The second exclusion, the one that I call the “cultural exclusion,” applies to “a traditional matchmaking organization of a cultural or religious nature that operates on a nonprofit ba-

135. See, e.g., Elena’s Models, Frequently Asked Questions, <http://www.elenasmodels.com/faq/index.htm> (last visited Apr. 23, 2007) (noting that placing ads is free for both men and women—the only charges are for accessing a woman’s contact information and for receiving a weekly catalog featuring the women who joined within the previous month); Elena’s Models, Membership Plans, <http://www.elenasmodels.com/services/membership.htm> (last visited Apr. 23, 2007).

136. See, e.g., Eharmony.com, Membership Options, <http://www.eharmony.com/singles/servlet/about/membership> (last visited Apr. 23, 2007); Match.com, Terms of Use Agreement, <http://www.match.com/registration/membagr.aspx?lid=108> (last visited Apr. 23, 2007).

137. An immediate result of IMBRA appears to be the rechanneling of the “mail-order bride” business to websites that meet the requirements of the Match.com exception. For instance, one anti-IMBRA website, InternationalMarriageBrokers.org, encourages users to “Meet Latin Girls and Asian Women Exempt From the International Marriage Broker Act!” InternationalMarriageBrokers.org, Victory Against IMBRA, <http://www.internationalmarriagebrokers.org/index29.html> (last visited Apr. 23, 2007). The links take users to AsianFriendFinder.com and Amigos.com, which are essentially ethnically-oriented websites without an explicit “mail-order bride” focus. See *id.*

sis.”¹³⁸ For example, a white U.S. citizen in search of a South Asian wife on a “mail-order bride” website would have to make the required disclosures in order to obtain her e-mail address, but a U.S. citizen of South Asian descent who seeks a South Asian wife for cultural or religious reasons and uses an Internet matchmaking company that specializes in these relationships and is set up as a nonprofit organization would not have to make these disclosures.

Here, it is difficult to ascertain why Congress created an exception. There are two distinctions operating: a cultural one and an economic one. It is unclear what Congress meant by “cultural”; perhaps it is using culture as a euphemistic proxy for race or national origin because those categories would be constitutionally problematic. There are several Internet websites that specialize in helping people to meet friends, lovers, or potential spouses of the same race or national origin.¹³⁹ But if Congress’s purpose is to prevent violent relationships, one might ask whether a South Asian-American man who seeks a South Asian woman because he wants a “traditional” wife is potentially less violent than a white American who does the same thing.¹⁴⁰ The economic distinction is a bit easier to understand. In one lawsuit challenging IMBRA, a federal district court found that the government’s argument that “men who pay for access to a foreign bride harbor a heightened sense of ownership that leads to potentially higher rates of abuse” had merit.¹⁴¹

Read in light of the Match.com exemption and the cultural exemption, the regulation of international matchmaking or-

138. 8 U.S.C.A. § 1375a(e)(4)(B)(i).

139. See, e.g., Indiamatch.com, <http://www.indiamatch.com> (last visited Apr. 23, 2007); Indya.com, Dating—Online Dating for Indian Singles, <http://dating.indya.com/index.asp> (last visited Apr. 23, 2007); NA Media, Filipinofriend.com, <http://www.filipinofriend.com> (last visited Apr. 23, 2007).

140. Indeed, some scholars have argued that marriages between naturalized citizen men and women from the men’s countries of origin result in the same kinds of power imbalances and misunderstandings as experienced by couples who meet on “mail-order bride” websites. See, e.g., Hung Cam Thai, *Clashing Dreams: Highly Educated Overseas Brides and Low-Wage U.S. Husbands*, in GLOBAL WOMAN: NANNIES, MAIDS, AND SEX WORKERS IN THE NEW ECONOMY 230, 230–53 (Barbara Ehrenreich & Arlie Hochschild eds., 2002).

141. *European Connections & Tours v. Gonzales*, No. No. 1:06-cv-00426-CC, 2007 WL 949750, at *25 (N.D. Ga. Mar. 23, 2007) (denying the plaintiff’s request for a restraining order against the enforcement of IMBRA); *Am. Online Dating Ass’n v. Gonzales*, No. 3:06-cv-123 (S.D. Ohio May 25, 2006) (order denying the plaintiff’s motion for a temporary restraining order).

ganizations undertaken in IMBRA appears to have a more tenuous link to immigration regulation than the other laws discussed so far. Immigration law usually regulates the immigrant, not the citizen-sponsor. Family members of U.S. citizens are particularly favored because we care about citizens' freedom to marry and to be united with their family members and because we believe that immigrants with family here are more likely to become stable and productive citizens. And the requirement that the U.S. citizen spouse choose to sponsor the immigrant further supports the goal of giving citizens the freedom to order their private lives.

IMBRA, however, turns the usual structure of immigration regulation on its head. Rather than regulating the immigrant, IMBRA regulates the citizen-sponsor. Granted, this regulation has an impact on the immigrant. Requiring citizens to disclose their criminal background history and marital history to potential immigrants before they initiate contact might result in some people not immigrating to the United States as spouses of those particular citizens. If the relationship was likely to be unsuccessful, then the policy justifications underlying family unification have been successfully met: this particular immigrant, married to this particular person, was unlikely to become a stable member of society because the marriage upon which the immigrant's entrée into U.S. society was premised was faulty from the start.

Still, even if one could divine an immigration purpose from the law, in good part the law appears to be attempting to regulate something other than immigration itself, namely violence within the family. IMBRA was passed as part of the Violence against Women Act of 2005.¹⁴² The act's main goal appears to be the prevention of family violence by reducing the likelihood of marriages between men likely to commit acts of family violence and women who may be vulnerable to that violence.¹⁴³

142. Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), Pub. L. No. 109-162, 119 Stat. 2960 (2006) (to be codified in scattered sections of 8 U.S.C.).

143. Indeed, the press releases issued by the House bill's cosponsor, Representative Rick Larsen, framed it not as immigration legislation, but as a prophylactic measure against a "growing nationwide trend of abuse" and a regulation of international human trafficking. Press Release, Rick Larsen, House Passes Major Provisions of Larsen's Mail-Order Bride Bill (Sept. 28, 2005), http://www.house.gov/list/press/wa02_larsen/pr_09282005_mailorderbill.html; *see also* Press Release, Rick Larsen, Rep. Larsen Takes Part in Briefing for Congress on "Mail-Order Bride" Bill (Oct. 5, 2005), <http://www.house.gov/>

The women's immigrant status may make them particularly vulnerable: they may lack language skills, cultural knowledge, and social networks that could enable them to get help once violence begins.¹⁴⁴ But ultimately, Congress's target appears to have been regulation of courtship dynamics and prevention of family violence, not immigration.

b. Visa Application Disclosures

IMBRA's second disclosure requirement applies not only to those U.S. citizens who use international matchmaking organizations to find spouses, but also to *any* U.S. citizen who seeks to sponsor a fiancé using a K-1 fiancé visa. Before IMBRA was passed, the Immigration and Nationality Act (INA) required a petition for a fiancé visa to include "such information as the Attorney General shall prescribe."¹⁴⁵ Now, Congress has further specified what this information must include: "information on any criminal convictions of the petitioner for any specified crime."¹⁴⁶ The list of "specified crimes" is fairly broad: it includes, for example "domestic violence," "abusive sexual contact," "stalking," and "any Federal, state, or local arrest or conviction" for "offenses relating to controlled substances or alcohol."¹⁴⁷ Congress appears to have specifically designed the list of crimes to get at individuals who have a history of domestic violence or activities, such as alcohol abuse, that the law's drafters believed to be correlated with domestic violence.

Despite its passage as part of a bill targeting "mail-order bride" websites, the criminal background disclosure portion of the law applies to all U.S. citizens who sponsor fiancés for K-1

list/press/wa02_larsen/pr_10052005_mailorderbridebill.html. Senator Maria Cantwell, cosponsor of the Senate bill, identified a domestic violence problem, not an immigration problem: "Many of these matches result in happy, long unions, but there is a growing epidemic of domestic abuse among couples who meet through a broker." Press Release, Maria Cantwell, Cantwell Bill to Protect Mail Order Brides Clears Important Hurdle (Sept. 9, 2005), <http://cantwell.senate.gov/news/record.cfm?id=245436&>. She further argued for a regulation of courtship: "Unfortunately, women meeting their husbands through brokers frequently have little opportunity to get to know their prospective spouses or assess their potential for violence." Press Release, Maria Cantwell, Cantwell to Senate Committee Today: End Mail Order Bride Abuse (July 13, 2004), <http://cantwell.senate.gov/news/record.cfm?id=242451&> [hereinafter Cantwell Testimony].

144. See Cantwell Testimony, *supra* note 143.

145. INA § 214(c), 8 U.S.C. § 1184(c) (2000).

146. VAWA 2005 § 832(a)(2), 119 Stat. at 3066–67.

147. *Id.*

visas, including women and the many men who did not use these websites to meet their mates. The law's most substantial effect since its implementation in March 2006 has been to put a hold on thousands of fiancé visa applications that do not involve international matchmaking organizations at all, but which were prepared before the law was passed and do not include the required criminal background disclosures.¹⁴⁸ Here, the (possibly unintentional) effect of IMBRA is to intervene in any transnational courtship that culminates in the application for a fiancé visa by making certain that the foreign fiancé is aware of the American's criminal background before the foreign fiancé travels to the United States.

Like the required disclosures to international matchmaking organizations discussed above, this provision is striking because it requires a U.S. citizen to disclose extensive information in the immigration process for the benefit of the immigrant fiancé. Usually, the person the government is most interested in is the immigrant: Does she have a record of criminal convictions that would make her inadmissible? Are her papers fraudulent? Has she been vaccinated, and does she have any communicable diseases?¹⁴⁹ Even when the government asks for information about the citizen sponsor, it has generally done so to help the government assess the desirability of the immigrant. For example, the citizen spouse must sometimes undergo an interview with DHS to demonstrate that a marriage to an immigrant spouse is bona fide and the immigrant is not using the marriage solely to gain immigration status.¹⁵⁰ Similarly, citizen sponsors must demonstrate their ability to support their immigrant spouses so that the immigrants do not become a burden to the state.¹⁵¹ In contrast, the IMBRA provisions are explicitly designed to protect the immigrant from a potentially abusive citizen spouse. If we were to consider this IMBRA provision on a spectrum of laws that clearly regulate immigration versus those that clearly regulate the family, this provision would be further away from the immigration end of the spectrum than most of what constitutes immigration law.

148. Lara Jakes Jordan, *Marital Bliss on Hold for Red Tape; Foreign Grooms, Brides Await Visas*, CHI. TRIB., June 14, 2006, § 1, at 3.

149. See INA § 212(a)(1)–(2), (a)(6)(C), 8 U.S.C. § 1182(a)(1)–(2), (a)(6)(C).

150. See *infra* Part IV.B.

151. See *infra* Part V.B.

c. *Limits on Fiancé Visas*

There is one final aspect of IMBRA that is worth considering here: the provision that does away with what has been called the “wife lottery.”¹⁵² Prior to the enactment of IMBRA, there was no official limit to the number of fiancé visas an individual citizen could apply for during any particular period of time. The new law creates a limit, although since the law is rather poorly drafted, it is difficult to tell what the limit actually is. IMBRA states that a consular officer cannot approve a petition for a K-1 fiancé visa unless he or she has verified that: “(1) the petitioner has not, previous to the pending petition, petitioned [for a fiancé visa] with respect to two or more applying aliens and (2) if the petitioner has had such a petition previously approved, 2 years have elapsed since the filing of such previously approved petition.”¹⁵³ This could be read as a “three strikes, you’re out” type of law, where clause 1 imposes a lifetime limit of two fiancé visas per American and clause 2 imposes an additional two-year waiting period between each one. Alternatively, it could be read in a way that uses clause 2 to modify clause 1, so that a petitioner must wait two years after the filing of “such previous approved petition” before filing another, and “such previous approved petition” refers to a *second* petition as defined in clause 1.¹⁵⁴

The law further attempts to regulate the frequency of fiancé visa applications even in cases where substantial time has elapsed since the last application. If a citizen has filed for two fiancé visas in the past and they were both filed in the past ten years, then the immigrant fiancé will be notified of that fact when the third petition is filed.¹⁵⁵ This provision may bolster

152. See *infra* note 157 and accompanying text.

153. VAWA 2005, Pub. L. No. 109-162, § 832(a)(1), 119 Stat. 2960, 3066–67 (2006) (to be codified at 8 U.S.C. § 1184).

154. According to a press release from the office of Representative Rick Larsen, the bill’s co-sponsor, the final law

[p]revents men from becoming serial petitioners for foreign fiancées (i.e., a U.S. client can only apply for one foreign fiancée visa (K visa) at a time; [l]imits the U.S. client to a total of three fiancée visas [sic].

Upon application for a fourth fiancée visa, the Department of Homeland Security must take a closer look at the U.S. applicant).

Press Release, Rick Larsen, Larsen’s Mail-Order Bride Bill Becomes Law (Jan. 5, 2006), http://www.house.gov/list/press/wa02_larsen/PR_01052006_Mail_Order_Brides.html. This reading does not appear to accord with either of the readings I offer above, nor does it seem defensible given the actual text of the law.

155. VAWA 2005 § 832(a)(2)(B).

the second reading of clause 1 discussed above. If there is a lifetime limit of only two fiancé visas, why would a potential spouse need to be alerted that a U.S. citizen's application was for a third visa? The answer to this might be that the law includes a discretionary waiver of the two-petition limitation, so that in many cases a third petition might actually be granted.¹⁵⁶

The reason IMBRA's sponsors gave for the inclusion of a limit on the frequency and number of fiancé visas was what they termed the "wife lottery."¹⁵⁷ Under the previous system, an American man could conceivably apply for several fiancé visas at once, and then marry the woman whose visa was approved first.¹⁵⁸ But the law as actually passed does much more than restrict the number of fiancé visas that can be petitioned for simultaneously. It, even on the more generous second reading, also restricts the frequency with which someone can apply for a fiancé visa.

Where this provision of IMBRA falls on the immigration law-family law spectrum depends in large part on which interpretation of the statute courts eventually endorse. If they endorse the second reading, then the law seems to be serving an immigration purpose. Quotas are frequently applied in immigration law, although they are usually annual quotas for particular categories of immigrant and nonimmigrant visas, not quotas on the number of immigrants a citizen can sponsor. Even if the method of applying the quota seems unusual, the purpose behind the method might serve a rational immigration purpose. Congress could be concerned, for example, with fraud.¹⁵⁹ It might suspect that citizens who sponsor multiple fiancés in a short period of time are defrauding the system by sponsoring immigrants based on intended marriages that are not bona fide.

If, on the other hand, courts read the statute more restrictively as a lifetime limit of two fiancé visas, the provision is

156. See *id.* § 832(a)(1) (stating that DHS may waive the two-petition limitation or the two-year waiting period provision if a "justification exist[s]"). Except in "extraordinary circumstances," however, justification does not exist if the petitioner "has a record of violent criminal offenses against a person or persons." *Id.*

157. 151 CONG. REC. H8425 (daily ed. Sept. 28, 2005) (statement of Rep. Larson).

158. *Id.*

159. For a more extensive discussion of legislation targeting marriage fraud, see *infra* Part IV.

much more difficult to justify as an immigration regulation. While it is possible that citizens who sponsor more than two fiancés in their lifetime are more likely to be engaging in immigration fraud, it is also highly likely that large numbers of these citizens are simply unlucky in love. Plenty of people marry multiple times, and, especially for those who have substantial ties to another country, it would be unsurprising that many of these relationships are international in scope. Consider, for example, naturalized citizens and permanent residents who want to marry someone from their home countries and seek spouses through family members, matchmakers, or Internet companies. It would be unsurprising if some of these relationships, based on a single meeting, did not survive the ninety-day engagement period and that a prospective spouse might try again with someone new.

In short, because of immigration policy's family unification goals, immigration law intrudes much more extensively into courtship than does state family law. Much of this intrusion results directly from the fact that marriage is one of our society's fundamental organizing principles, and we use it to test whether a couple is a "family." But some of these laws go far beyond effecting a policy of family unification, attempting instead to change the balance of power, based on gender, race, or citizenship, in relationships involving citizens and immigrants. When federal immigration law does this, it may be regulating the family much more than it is regulating immigration.

III. REGULATING ENTRY INTO MARRIAGE

A. FAMILY LAW AND ENTRY

1. Formal and Functional Relationships

State family law regulates entry to marriage more heavily than courtship. States have long been the sole arbiter of what counts as marriage and who can get married. In the nineteenth century, many states permitted more than one type of marriage: marriage could be entered into by obtaining a license and having the marriage solemnized in a court or church, or by cohabitating for a number of years and holding oneself out as "husband and wife" to the community (i.e., common law mar-

riage).¹⁶⁰ Today, most states have abolished common law marriage, but many states recognize other forms of adult, romantic relationships that have legal import.¹⁶¹ For example, some states have introduced other formal statuses in addition to marriage, such as state-sanctioned civil unions and domestic partnerships, which give participants some of the benefits of marriage without requiring marriage itself.¹⁶² And some state courts honor functional family relationships by enforcing property agreements between nonmarried partners. This recognition entitles one of the partners to continued support upon dissolution of the relationship, even though no marriage ever occurred. The most famous case on this theme is *Marvin v. Marvin*, where the court held that actor Lee Marvin's former girlfriend could maintain a suit to recover the value of house-keeping services she rendered during their relationship.¹⁶³ Cases like *Marvin* essentially give some of the benefits of marriage—the guarantee of property distribution and the possibility of alimony—to the unmarried, and may therefore remove some of the incentives of marriage for those who are on the fence.¹⁶⁴ Marriage, however, continues to provide broader remedies upon dissolution than cohabitation.¹⁶⁵

2. Who May Marry

In addition to setting procedural marriage requirements, states also limit the types of people who may marry each other. Every state has a minimum age of consent to marry.¹⁶⁶ Every state also prohibits marriages between parents and children, brothers and sisters, and uncles and nieces or aunt and neph-

160. See MICHAEL GROSSBERG, GOVERNING THE HEARTH 79 (1985). See generally Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957 (2000).

161. LESLIE HARRIS ET AL., FAMILY LAW 238 (3d ed. 2005) (listing nine states that still recognize common law marriage and five states that have abolished it since 1991).

162. E.g., CAL. FAM. CODE § 297.5 (West 2004); VT. STAT. ANN. tit. 15, § 1204 (2002).

163. 557 P.2d 106, 122–23 (Cal. 1976).

164. See *Hobbs v. Bates*, 122 Wash. App. 1010, 2004 WL 1465949, at *9 (Ct. App. June 28, 2004) (“We observe that many couples are deciding to have children outside traditional marriage relationships.”).

165. See *Estin*, *supra* note 105, at 1402–03.

166. JUDITH AREEN & MILTON C. REGAN, JR., FAMILY LAW 98 (5th ed. 2006) (noting that although most states designate eighteen as the age of consent unless the parties obtain parental consent or a judicial override, some states have differing ages of consent for boys and girls).

ews, and thirty states also prohibit marriage between first cousins.¹⁶⁷ Polygamy is also prohibited everywhere, although there are large polygamous compounds in Utah and Arizona that have gone relatively unregulated by the local authorities.¹⁶⁸

Currently, the most controversial marriage restrictions are those concerning same-sex marriage. States other than Massachusetts, which allows same-sex marriage, vary in their treatment of same-sex partnership. The treatment ranges from judicially mandated civil unions in Vermont,¹⁶⁹ to legislatively enacted civil unions in Connecticut¹⁷⁰ and New Jersey,¹⁷¹ to statutory or constitutional bans on same-sex unions in many states.¹⁷²

Of course, because state rules vary, and because citizens are free to move to any other state, deciding whether to recognize a marriage entered into in a state with a different marriage policy is a challenging legal issue. Generally, the validity of a marriage is judged by the law of the place where it was celebrated.¹⁷³ For example, imagine that a couple marries in a state with no blood test requirement and later moves to another state and seeks to have the marriage recognized. Since the marriage was valid in the state where it was celebrated, it is valid in the new state despite that state's blood test requirement. Determinations of validity most commonly arise when a person seeks an annulment, a divorce, or to inherit his or her spouse's estate.

The "valid if valid where celebrated" rule has one important exception. In cases where the marriage violates the deeply held public policy of a given state, then that state can invoke a "public policy exception" to the rule of recognition.¹⁷⁴ Traditionally, this exception was most often invoked in cases of polyg-

167. *Id.* at 94.

168. See JON KRAKAUER, *UNDER THE BANNER OF HEAVEN* 5 (2003).

169. *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999). The Vermont legislature later codified the decision at VT. STAT. ANN. tit. 15, §§ 1201–1207 (2002).

170. CONN. GEN. STAT. ANN. § 46b-38aa (West Supp. 2006).

171. New Jersey Domestic Partnership Act, N.J. STAT. ANN. §§ 26:8A-1 to -13 (West Supp. 2006).

172. See Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61 AM. PSYCHOLOGIST 607, 608–09 (2006).

173. 52 AM. JUR. 2D *Marriage* § 63 (2000).

174. See *New York v. Ezeonu*, 588 N.Y.S.2d 116, 117 (Sup. Ct. 1992) (refusing to recognize a polygamous marriage contracted in Nigeria).

amy or incest. In some cases, however, particular forms of incestuous marriage were not found to violate a deeply held public policy, even if such marriages were not permitted under the laws of the state where they were challenged.¹⁷⁵ The most recent invocations of the public policy exception have been in the handful of cases refusing to recognize Massachusetts same-sex marriages and Vermont civil unions. For example, in *Lane v. Albanese*, a Connecticut court refused to recognize a Massachusetts same-sex marriage on the grounds that same-sex marriage violated Connecticut public policy.¹⁷⁶ As a consequence, the couple who married in Massachusetts could not get divorced in Connecticut.

Thus, state family law has traditionally defined the ways in which residents can enter marriage and courts have sometimes enforced these limitations by declaring marriages from other states void for public policy reasons. Meanwhile, the federal government has avoided establishing national criteria for entrance into marriage. Because licensing requirements have been universally considered the province of the states, those who would regulate marriage on the federal level have often resorted to proposing amendments to the U.S. Constitution. These amendments have universally failed.¹⁷⁷

The passage in 1996 of the federal Defense of Marriage Act (DOMA) is an important exception to the general rule that Congress does not legislate in the marriage arena. But even DOMA does not purport to second guess states' control over marriage requirements. DOMA merely makes the public policy exception to the "valid-where-celebrated" rule explicit in cases of same-sex marriage, stating that no state shall be required to recognize "a relationship between persons of the same sex that is treated as a marriage under the laws of [an]other State."¹⁷⁸ While ostensibly preserving state autonomy by strengthening the public policy exception, DOMA also defined "spouse," and

175. See, e.g., *Mason v. Mason*, 775 N.E.2d 706, 709 (Ind. Ct. App. 2002) (rejecting a claim that a Tennessee marriage between cousins violated Indiana public policy).

176. 39 Conn. L. Rptr. 3, 2005 WL 896129, at *4 (Super. Ct. Mar. 18, 2005). In contrast, a Massachusetts court agreed to recognize and dissolve a Vermont civil union. *Salucco v. Alldredge*, 17 Mass. L. Rptr. 498, 501, 2004 WL 864459, at *4 (Super. Ct. Mar. 19, 2004).

177. See generally Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U. L.Q. 611, 625-41 (2004) (giving a detailed history of the proposed amendments).

178. Defense of Marriage Act, 28 U.S.C. § 1738C (2000).

“marriage” under *federal* law as referring to “a legal union between one man and one woman as husband and wife.”¹⁷⁹ Therefore, DOMA both encouraged states to adopt their own policies regarding marriage (thus promoting the proliferation of contradictory marriage definitions that will not transfer neatly across state lines) and simultaneously created a uniform, federal definition that applies where the words *marriage* or *spouse* are used in the *United States Code*, including in the area of immigration law.

B. IMMIGRATION LAW AND ENTRY

State family law generally excludes from entry into marriage those who violate very minimal requirements regarding age, number of spouses, consanguinity, or sex of the spouse. Immigration law, on the other hand, does not directly regulate who may marry. A U.S. citizen can marry anyone she chooses, so long as she comports with state licensure requirements: it is only when she desires to bring her spouse to the United States that U.S. immigration law comes into play. Immigration law labels some marriages as fraudulent for immigration purposes, even if the marriage is perfectly legal under the law of the state or country in which it was performed. Thus, immigration law has the power to prevent spouses from living in the same country. For many people, being able to cohabit is of paramount importance to a successful marriage. The knowledge that contact with a prospective spouse will be difficult presents a serious impediment to marriage.

1. Formal Versus Functional Recognition of Couples

Like state family law, immigration law uses formal definitions of marriage in determining who can take advantage of the “immediate relative” and “family preference” immigration categories that enable an immigrant to obtain permanent resident status.¹⁸⁰ In the “immediate family” and “family preference” categories, the law makes no exception for couples who are cohabitating, or coparenting, but not married.¹⁸¹

179. 1 U.S.C. § 7 (2000).

180. See *supra* Part I.A.

181. See INA §§ 201(b), 203(a), 8 U.S.C. §§ 1151(b), 1153(a) (2000) (providing immigration status only to legal spouses). Some countries use functional definitions of family in deciding whether a couple counts as “married” for immigration purposes. See, e.g., Philip Britton, *Gay and Lesbian Rights in the United Kingdom: The Story Continued*, 10 IND. INT’L & COMP. L. REV. 207, 226

In choosing a formal definition over a functional one, Congress privileges clarity and administrability over accuracy. However, it could just as easily have taken another approach. One can imagine, for example, cases in which the purpose of reuniting families would be more accurately served by reuniting some couples who are not married but are nevertheless in a committed relationship and denying immigration status to spouses who are married but whose relationships are dysfunctional or unlikely to succeed. This approach, however, would require immigration officials to spend much more time screening couples and intrude on their privacy more extensively.¹⁸² The decision to adopt a formal rather than a functional definition of marriage, therefore, serves a straightforward immigration law purpose: if we want to admit people quickly, without unnecessary and intrusive delay, then requiring a marriage certificate for those who would use marriage as a basis for immigration makes good administrative sense.¹⁸³ The decision to adopt a formal definition might also serve to limit the numbers of immigrants seeking to use the immediate relative category: if every person who was involved in a romantic relationship with a U.S. citizen could claim immigration status based on their relationships, we might no longer be able to provide this status to an unlimited number of partners.

(2000) (stating that in 1997 U.K. immigration policies were changed so as to apply equally to unmarried cohabitating same-sex and opposite-sex couples); Sara A. Shubert, Comment, *Immigration Rights for Same-Sex Partners Under the Permanent Partners Immigration Act*, 74 TEMP. L. REV. 541, 541 (2001) (noting that the United States does not treat unmarried cohabitating same-sex and opposite-sex couples in the same way as the United Kingdom).

182. For an analysis of how state recognition of functional same-sex relationships imposes additional requirements on couples, see Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1772–74 (2005). Cf. Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL'Y & L. 307, 368 (2004) (arguing that the expressive, companionate, sexual, and reproductive functions of marriage do not merit state intrusion).

183. In 2000, Congress rejected a proposal for a functional definition of *spouse* for immigration purposes. The proposed bill, the Permanent Partners Immigration Act, would have added the phrase “and permanent partners” after the word *spouse* in many sections of the INA. H.R. 3650, 106th Cong. §§ 3–18 (2000). The proposed act would have defined a “permanent partner” as an individual “in a committed, intimate relationship” that both partners intended to be lifelong; who was eighteen years of age or older; financially interdependent; not already in a similar relationship or marriage; unable to contract a marriage recognized under the INA; and not third degree or closer blood relation of the partner. *Id.* § 2.

2. Who May Marry . . . for Immigration Purposes

Immigration law has its own prerequisites for who may enter a valid marriage, which in some ways track state law and in others supersede it. Before same-sex marriage was on the horizon, issues of validity most commonly arose in cases involving polygamy, incest, and miscegenation. In the cases involving incest and miscegenation, the issue was generally whether the public policy of the state where the couple would be domiciled prohibited recognition of the marriage; in the polygamy cases, the issue was whether the marriage violated *federal* public policy.

In re Da Silva is a prototypical incest case. In that case, the Board of Immigration Appeals (BIA) considered whether the marriage of a Portuguese man and his niece, entered into in Georgia, was invalid because such a marriage could not be entered into in New York, the couple's state of domicile.¹⁸⁴ The BIA found the marriage valid, because although the couple could not have legally married in New York, the state did not have a public policy of refusing to recognize uncle-niece marriages validly entered into out of state.¹⁸⁵ In incest cases, immigration judges often determine that the couple would be prosecuted for illegal cohabitation in the state of domicile in order to demonstrate a "strong public policy" against the marriage. For example, in one case the BIA stated that "[i]t is well established that the marriage of an uncle and his niece is considered lawful for immigration purposes if valid where performed and if the State in which they intend to reside does not regard the cohabitation of such persons therein as criminal."¹⁸⁶

Similarly, in cases of miscegenation, courts looked to whether the state of domicile would criminalize mixed cohabi-

184. 15 I. & N. Dec. 778, 778-79 (1976).

185. *Id.* at 780.

186. *In re C-*, 4 I. & N. Dec. 632, 633 (B.I.A. 1952); *see also In re Lieberman*, 50 F. Supp. 121, 122-23 (D.C.N.Y. 1943) (granting a petition for naturalization to a Russian woman who was invalidly married in New York to her maternal uncle and later validly remarried in Rhode Island because under New York law marriages validly entered into in another state are valid in New York); *In re Zappia*, 12 I. & N. Dec. 439, 441 (B.I.A. 1967) (finding that a marriage between first cousins domiciled in Wisconsin but entered into in South Carolina was invalid for immigration purposes because such marriages are void and subject to criminal sanction in Wisconsin); *In re Hirabayashi*, 10 I. & N. Dec. 722, 724 (B.I.A. 1964) (holding that a marriage between first cousins was valid where entered into under Colorado law, in part because first-cousin marriages were not criminal under Illinois law).

tation by married couples who had validly married in a different state. *In re C-*, the BIA held valid a marriage between a Filipino man and a white woman entered into in Washington, D.C., when the couple was domiciled in Maryland.¹⁸⁷ Maryland would not have allowed the marriage to take place, and indeed it would have been a crime for the couple to marry there, but Maryland's laws did not include any language making it criminal to marry elsewhere and then return to live as husband and wife in Maryland.¹⁸⁸

The inquiry has been slightly different in polygamy cases. Rather than looking to state law for a "strong public policy" against polygamy, courts have instead looked to federal law. For example, in *In re H-*, the BIA refused to grant resident status to the husband of a U.S. citizen.¹⁸⁹ The citizen wife was the beneficiary husband's second wife through a marriage legally entered into in Jordan.¹⁹⁰ After marrying the U.S. citizen wife, the Jordanian husband divorced his first wife and was thus only married to the U.S. citizen wife at the time she petitioned for him.¹⁹¹ The court deciding this petition bypassed the question of whether a polygamous marriage would be recognized in the state in which the couple planned to reside. Instead, it held that the federal government had a strong public policy against polygamous marriage because Congress had made practicing polygamists excludable under the immigration law since 1891.¹⁹² The court gave no explanation for why it bypassed the state law inquiry.¹⁹³ Rather, it cited Anglo-American sources holding that a polygamous marriage "is not a marriage as understood among the Christian nations" and emphasized

187. 7 I. & N. Dec. 108, 110–13 (B.I.A. 1956).

188. *Id.* at 110–11.

189. 9 I. & N. Dec. 640, 640 (B.I.A. 1962).

190. *Id.*

191. *Id.* at 640–41.

192. *Id.* at 642.

193. Other courts have not recognized polygamous marriage in the immigration context. *See, e.g.*, *United States v. Sacco*, 428 F.2d 264, 266–68 (9th Cir. 1970) (finding a marriage void for immigration purposes under Massachusetts law where the husband was married to another woman at the time the marriage was celebrated); *Ng Suey Hi v. Weedin*, 21 F.2d 801 (9th Cir. 1927) (holding that the daughter of a U.S. citizen, born in China of a polygamous marriage, was not entitled to enter as a citizen because of federal policy against polygamy); *In re Darwish*, 14 I. & N. Dec. 307, 307 (B.I.A. 1973) (stating that a polygamous marriage between two Jordanians validly entered into in Israel was not valid for immigration purposes on public policy grounds).

that the couple had been married under Muslim law in Jordan.¹⁹⁴

These two approaches to public policy—looking to state law and looking to federal law, respectively—come together in the context of same-sex marriage. This issue has recently become particularly fraught, as more and more countries legalize same-sex marriage and create a circumstance in which an aspiring immigrant could be formally married and yet not meet DOMA's definition of marriage.¹⁹⁵ The issue first arose over twenty-five years ago, before any U.S. states or foreign countries officially allowed same-sex marriages or civil unions, in *Adams v. Howerton*, a case deciding whether a resident of Boulder, Colorado could get his partner admitted as a “spouse” under the “immediate relative” admissions category.¹⁹⁶

The *Adams* court applied a two-part test: it first asked whether the marriage was valid under state law, and then asked “whether that state-approved marriage qualifies” under the INA.¹⁹⁷ The court purported to derive this test from *United States v. Sacco*, a case considering whether a bigamous marriage was valid for immigration purposes. The court in that case, however, did not ask whether a bigamous marriage was valid under federal law. Rather, it asked whether the marriage was valid under state law, and then whether the parties “intended that the marriage be one falling within the [Supreme] Court's definition of the common understanding of marriage,”¹⁹⁸ or in other words, whether the couple married for love or in a “sham, phony, empty ceremony” intended only to facilitate immigration status for one of the spouses.¹⁹⁹ The *Adams* court took this “additional, federal, requirement”²⁰⁰ and trans-

194. *In re H-*, 9 I. & N. Dec. at 641; *id.* at 640 (describing marriage as being performed by “the legal mazoun of the Amman Sharia Court at Jabal el-Nasr, Amman, Jordan” and noting that “multiple or polygamous marriages are permitted among persons of the Moslem faith according to the laws of the Hashemite Kingdom of Jordan”).

195. Same-sex marriage is currently available in Belgium, Canada, the Netherlands, South Africa, and Spain. Jonathan Clayton, *Same-Sex Marriages Given Blessing by South Africa*, TIMES (London), Dec. 2, 2005, at 47.

196. 673 F.2d 1036, 1038 (9th Cir. 1982).

197. *Id.*

198. *Sacco*, 428 F.2d at 270.

199. *Id.* at 271 (quoting *Lutwak v. United States*, 344 U.S. 604, 615 (1953)).

200. *Id.*

formed it into a test of whether a marriage conforms to federal marriage policy.²⁰¹

In the *Adams* case, the new test played out as follows. Colorado's position on same-sex marriage was unclear.²⁰² The couple had acquired a license in Boulder, so one local actor had deemed the marriage valid.²⁰³ But Colorado law did not define marriage as either including or excluding same-sex couples,²⁰⁴ and the Colorado Attorney General had written "an informal, unpublished opinion addressed to a member of the Colorado legislature three days after the alleged marriage in question occurred, [which] stated that purported marriages between persons of the same sex are of no legal effect in Colorado."²⁰⁵ The ambiguity of the state law was irrelevant, however, because the court was convinced that same-sex marriage violated federal public policy.²⁰⁶ The INA did not define *spouse*, but the court determined that same-sex marriage was not consistent with the INA because "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."²⁰⁷ Even if Colorado had redefined marriage for its residents, state law definitions of marriage would have no place in determining whether these residents could use immigration law to be with their spouses.²⁰⁸

Of course, now that DOMA has been enacted, the federal stance on same-sex marriage is perfectly clear.²⁰⁹ But the same curiosity present in *Adams* still exists—although states may define the requirements for entry into marriage for their residents, when determining the validity of a marriage for immigration purposes, federal definitions can supersede a state's entry requirements with respect to residents with foreign spouses. Immigration law functions to alter the states' family law definitions of marriage for purposes of who may be admitted.

201. See *Adams*, 673 F.2d at 1038–40.

202. *Id.* at 1039.

203. *Id.* at 1038.

204. See *id.* at 1039.

205. *Id.*

206. *Id.*

207. *Id.* at 1040 (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

208. *Id.* at 1039.

209. See 1 U.S.C. § 7 (2000) (defining the word *marriage* to mean "only a legal union between one man and one woman as husband and wife").

DHS's policy of superseding state law in matters of same-sex marriage took an interesting turn when it was faced with the question of the validity of transsexuals' marriages. Individual states vary in whether they recognize a marriage where one party to the marriage has had gender reassignment surgery.²¹⁰ The statutes of twenty-two states and the District of Columbia allow postoperative transsexuals to change the sex listed on their birth certificates, and another twenty states have general provisions for amending birth certificates that contain no specific references to transsexuals.²¹¹ Some states, either by statute or through case law, forbid any change in birth certificates arising from sex reassignment.²¹² As early as the 1970s, some state courts recognized marriages between postoperative transsexuals and a person of the (now) opposite sex.²¹³

Under immigration rules for determining the validity of a marriage, a marriage where one of the spouses is a transsexual would be considered valid for immigration purposes if the parties intended to be domiciled in a state recognizing such mar-

210. See, e.g., *Littleton v. Prange*, 9 S.W.3d 223, 225–29 (Tex. App. 1999) (reviewing the varying conclusions reached by states addressing the issue of the validity of marriages in which one partner is a transsexual).

211. *In re Oren*, No. A79 761 848, 2004 WL 1167318 (B.I.A. Jan. 21, 2004); *In re Heilig*, 816 A.2d 68, 83–84 (Md. 2003). But see Katie D. Fletcher & Lola Maddox, *In re Marriage of Simmons: A Case for Transsexual Marriage Recognition*, 37 LOY. U. CHI. L.J. 533, 555 (2006) (noting that the courts of Illinois, a state listed among the twenty-two allowing changes to birth certificates, subsequently determined that Illinois law did not permit such a change).

212. See, e.g., Lambda Legal, *Sources of Authority to Amend Sex Designation on Birth Certificates Following Corrective Surgery*, <http://www.lambdalegal.org/our-work/issues/rights-of-transgender-people/sources-of-authority-to-amend.html> (last visited Apr. 23, 2007) (noting that although prior to *Littleton*, Texas issued new birth certificates, since *Littleton* “clerks [have been] refusing to correct the birth certificates of individuals who have changed their sex by surgical procedure”); cf. *In re Gardiner*, 42 P.3d 120, 137 (Kan. 2002) (concluding that the relevant Kansas statute’s plain meaning voided a marriage between a postoperative female and a male and that Kansas courts were not required to give full faith and credit to a Wisconsin court’s change of the postoperative female’s birth certificate for purposes of determining the validity of marriage).

213. See, e.g., *M.T. v. J.T.*, 355 A.2d 204, 205, 210–11 (N.J. Super. Ct. App. Div. 1976) (holding valid a marriage between a male and a transsexual where the transsexual, though born with male sex organs, after sex reassignment surgery was “fully capable of sexual activity consistent with her [female] gender”). But see *Kantaras v. Kantaras*, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004) (holding void a marriage between a female and postoperative female-to-male transsexual); *In re Gardiner*, 42 P.3d at 137 (concluding that the Kansas legislature intended to void a marriage between a male and a postoperative male-to-female transsexual).

riages unless this conclusion was contradicted by federal law.²¹⁴ DHS, however, expressed concern that the application of the general rule might lead to the federal recognition of same-sex marriage.²¹⁵ The normal federal immigration policy classified a person based on his or her claimed sex at the time immigration documentation was used, so long as the gender was not relevant to the petition.²¹⁶ For example, a postoperative male-to-female transsexual would be described as female on her green card.²¹⁷ In 2004, U.S. Citizenship and Immigration Services (USCIS), a division of DHS, issued a memorandum regarding petitions filed by transsexual individuals.²¹⁸ Recognizing the need to clarify its policies with respect to marriage petitions by transsexuals to “ensure consistency with the legislative intent reflected in the DOMA,” USCIS set forth a policy of recognizing only the petitioner and beneficiary’s sex at birth in determining whether a marriage is valid for immigration purposes,²¹⁹ thus directly contradicting the usual federal practice that gender was relevant only at the time of documentation.

Paradoxically, DHS’s attempt to implement DOMA’s ban on same-sex marriage could have resulted in federal recognition of same-sex marriages. If a female-to-male postoperative transsexual and a male married in Massachusetts, the marriage would be a valid marriage regardless of whether the transsexual individual was considered female or male. First, the marriage would be a valid under state law,²²⁰ one condition DHS evaluates in determining a marriage’s validity for immi-

214. See, e.g., *In re Lovo-Lara*, 23 I. & N. Dec. 746, 751 (B.I.A. 2005) (“[L]ong-standing case law hold[s] that there is no Federal definition of marriage and that the validity of a particular marriage [for immigration purposes] is determined by the law of the State where the marriage was celebrated.”).

215. See SARAH B. IGNATIUS & ELIZABETH S. STICKNEY, IMMIGRATION LAW AND THE FAMILY § 4:17 (2006) (stating that U.S. Citizenship and Immigration Services (USCIS) has taken the position that DOMA requires that USCIS “not recognize a marriage or intended marriage where one or both of the individuals claims to be a transsexual”).

216. *USCIS Instructs on Petitions, Applications Filed by or on Behalf of Transsexuals*, 81 INTERPRETER RELEASES 929, 930 (2004).

217. *Id.*

218. *Id.* at 929.

219. See Memorandum from William R. Yates, Assoc. Dir. for Operations, U.S. Citizenship & Immigration Servs., to Reg’l Dirs. (Apr. 16, 2004), in 81 INTERPRETER RELEASES 952, 954 (2004) [hereinafter Yates Memorandum].

220. Massachusetts has recognized same-sex marriages as valid. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969–70 (Mass. 2003).

gration purposes.²²¹ Second, because the transsexual individual was a female at birth, the marriage between the transsexual individual and the male would be recognized as valid by DHS because the two were of the opposite sex at birth.²²² Noting this potential for “anomalous results if we refuse to recognize a postoperative transsexual’s change of sex and instead consider the person to be of the sex determined at birth,” the BIA invalidated the policy in 2005.²²³ Since the legislative history of DOMA does not indicate that Congress intended to supersede the BIA’s long-standing policy of determining marriages’ validity according to the “law of the state in which they were celebrated,”²²⁴ the BIA determined that DOMA did not preclude recognition of postoperative transsexual marriages.²²⁵

In sum, because of its requirement that a marriage is valid only if consistent with the INA, immigration law departs from the default entry rules of state family law. In some cases, this departure makes little substantive difference: the federal requirement that a sponsoring family member be at least eighteen years of age, for example, comports with the age of consent laws of most of the states. But as same-sex marriage, civil unions, and domestic partnerships become increasingly available around the globe and in some parts of the United States, the special rules imposed by immigration law will have a more significant impact.

As discussed previously, Congress’s rationale for recognizing formal rather than functional relationships has a clear immigration purpose.²²⁶ But Congress’s decision not to recognize same-sex marriage and civil unions is more difficult to tie to a legitimate immigration purpose under the plenary power doctrine.²²⁷ Since relationships such as same-sex marriages, civil unions, and domestic partnerships are formal, they might predict commitment or longevity of a relationship as effectively as marriage. If Congress’s purpose in reunifying families is based on its belief that family ties provide immigrants with increased

221. *In re Lovo-Lara*, 23 I. & N. Dec. 746, 751 (B.I.A. 2005).

222. *See* Yates Memorandum, *supra* note 219, at 953.

223. *In re Lovo-Lara*, 23 I. & N. Dec. at 753 n.5.

224. *Id.* at 751.

225. *Id.* at 753. In *In re Lovo-Lara*, North Carolina considered a male-to-female transsexual a female and her marriage to a male valid, leading the BIA to also conclude that the marriage was valid for immigration purposes. *Id.*

226. *See supra* Part III.B.1.

227. *See supra* text accompanying note 95.

stability and likelihood of assimilation, and on its desire to give U.S. citizens and residents the opportunity to live with their loved ones, recognizing same-sex marriages, civil unions, and domestic partnerships would seem to advance this purpose. While there may be concern that some domestic partnership statutes do not require the same degree of commitment or confer the same level of social benefits as marriage,²²⁸ this would not account for why same-sex marriages and civil unions, which have identical requirements to marriage,²²⁹ would not be recognized as valid for immigration purposes.

Congress's purpose here seems to be less one of encouraging assimilation or stability than one of national self-definition. Further, this self-definition is accomplished through regulating the family, making it a tenuous fit within its power over immigration. Unlike the "vast hordes [of Chinese nationals] . . . crowding in upon us" in *Chae Chan Ping v. United States* who, at the time, could not become naturalized U.S. citizens,²³⁰ the current "vast hordes" excluded by congressional policy are individuals whose life choices are indistinguishable from individuals who marry in Massachusetts²³¹ or enter into civil unions in Connecticut or Vermont. Granted, recent state amendments banning same-sex marriage and civil unions are evidence that the majority of Americans (at least those who come out to vote on this issue) are not supportive of same-sex marriage.²³² But that does not answer the question of whether preventing part-

228. For example, while the French *Pacté Civil de Solidarité* (PACS) "offers legal status to all unmarried, heterosexual and homosexual married couples," it does not confer all the benefits of marriage. Frédéric Martel, The PACS—A Civil Solidarity Pact (July 2001), <http://www.ambafrance-us.org/atoz/pacs.asp>. PACS, among other things, does not allow signatories to jointly adopt a child. *Id.*

229. See Civil Union Act 2004, 2004 S.N.Z. No. 102; Civil Partnership Act, 2004, c. 33 (Eng.) (providing civil unions with essentially the same benefits as those given to married couples).

230. *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889); see also *supra* text accompanying notes 68–70 (discussing *Chae Chan Ping*).

231. *Goodridge v. Department of Public Health* extended the right to marry to same-sex couples in Massachusetts when it ruled that denying gay couples the right to marry violated the state's constitution. 798 N.E.2d 941, 969–70 (Mass. 2003).

232. In 2006, seven states—Colorado, Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin—voted to amend their constitutions to ban same-sex marriage, joining nineteen other states that had already approved such bans. Christine Vestal, *Gay Marriage Ripe for Decision in 3 Courts*, STATELINE, Mar. 1, 2007, <http://www.stateline.org/live/details/story?contentId=20695>.

ners in same-sex marriage or civil unions from achieving immigration status lies squarely within Congress's plenary power over immigration.

One possible reason for Congress's decision to exclude partners in same-sex marriages and civil unions from immigration status recognition is its desire for uniformity in enforcing immigration laws—inconsistent enforcement could result if the question of whether a citizen could obtain immigration status for her same-sex spouse hinged on the couple's intended domicile. However, this potential lack of uniformity has not influenced Congress's approach regarding other marriage entry restrictions, such as those relating to incest.²³³

Congressional acceptance of nonuniformity is also apparent in its failure to alter the current judicial approach to marriage. When a marriage does not offend federal public policy under the *Adams* test,²³⁴ courts will look to the underlying state law to determine the result.²³⁵ Thus, the idea that laws regulating marriage must be uniform has been rebuffed consistently in case law, at least in cases not involving same-sex marriage. Finally, Congress's rationale in enacting DOMA had much less to do with bringing uniformity to immigration law than with preventing the proliferation of same-sex marriage within the United States.²³⁶ Both the *Adams* test and DOMA's definition of the federal public policy on same-sex marriage appear to have very little to do with regulating immigration and everything to do with the definition and regulation of marriage itself.

233. See *supra* Part III.B.2.

234. *Adams v. Howerton*, 673 F.2d 1036, 1038–39 (9th Cir. 1982) (“A two-step analysis is necessary to determine whether a marriage will be recognized for immigration purposes. The first is whether the marriage is valid under state law. The second is whether that state-approved marriage qualifies under the [Immigration and Nationality] Act. . . . Congress did not intend the mere validity of a marriage under state law to be controlling.”).

235. In cases involving incest laws, courts have long been comfortable granting immigration status to members of couples whose marriages, though violative of the laws of some states, are recognized in the state in which they intend to live. See *supra* note 186 and accompanying text.

236. See H.R. REP. NO. 104-664, at 2 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2906 (“[DOMA] has two primary purposes. The first is to defend the institution of traditional heterosexual marriage. The second is to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses.”).

IV. REGULATING THE INTACT MARRIAGE

A. FAMILY LAW AND THE INTACT MARRIAGE

Most family law students read the famous case of *McGuire v. McGuire*, in which a wife sued her husband for support during their marriage.²³⁷ The facts of the case were compelling: Mr. McGuire was a wealthy man, and yet there was no toilet, bathing facilities, or kitchen sink in the house.²³⁸ Mr. McGuire refused to give Mrs. McGuire access to the household finances or even any spending money, and Mrs. McGuire had gone without new clothes for four years.²³⁹ The court recognized that the “husband’s attitude toward his wife, according to his wealth and circumstances, leaves little to be said in his behalf.”²⁴⁰ And yet the court refused to intervene, for it held that the living standards of a family are concerns of the household, “and not for the courts to determine.” The court determined that “[p]ublic policy requires such a holding.”²⁴¹ *McGuire* has therefore come to stand for the idea that courts should not intervene in intact marriages, an idea known as the doctrine of marital privacy.²⁴²

The result of the continued existence of the doctrine of marital privacy is that modern married couples are free to structure their marriages in almost any way they desire: they can live together or apart, they can use the same surname or different names, they can have sexual relations or abstain, they can be monogamous or adulterous, they can pool their finances or keep separate bank accounts, and they can be supportive or destructive of each other’s aspirations.²⁴³ It is not until divorce,

237. 59 N.W.2d 336, 337 (Neb. 1953).

238. *Id.* at 337–38.

239. *Id.* at 337.

240. *Id.* at 342.

241. *Id.*; see also Lee E. Teitelbaum, *The Family as a System: A Preliminary Sketch*, 1996 UTAH L. REV. 537, 542 (noting that *McGuire* and similar cases involving spousal relations regard the family as a “freestanding thing, . . . distinct from the state” that “must be given some decisional space”).

242. See, e.g., Brian H. Bix, *The Public and Private Ordering of Marriage*, 2004 U. CHI. LEGAL F. 295, 298 n.13.

243. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (establishing a broad right to privacy within marital relationships and finding the idea of controlling contraception and similar relationship-oriented decisions by married persons “repulsive to the notions of privacy surrounding the marriage relationship”).

if then, that any of these choices become fodder for judgment or intervention by the law.

One way in which state law treats intact marriages as private is in its refusal to deem marriages fraudulent, even where fraud seems to have occurred. This refusal most often occurs in cases where one party to a marriage is seeking annulment.²⁴⁴ Most state courts have restricted annulment for fraud to cases involving misrepresentations that go to the “essentials” of the marriage, defined as the capacity or willingness to procreate or have sexual intercourse.²⁴⁵ Other kinds of fraud, such as concealing a serious drinking problem, lying about one’s income or prospects, or concealing a lack of concern with physical appearance or manners, have been judged insufficient to demonstrate fraud because they do not go to the “essentials” of the marriage—procreation and sex.²⁴⁶ If a party to a business contract committed these types of fraud, a court would hear the case, but marital “privacy” prevents courts from granting a remedy in cases where the fraud resulted in marriage. States can declare marriages that lack the potential for procreation to be nonmarriage.²⁴⁷ But notably, they can do this only when one of

244. See, e.g., *Blair v. Blair*, 147 S.W.3d 882, 886–87 (Mo. Ct. App. 2004) (holding that a wife’s misrepresentation that her husband was the father of her child did not constitute grounds for an annulment).

245. See, e.g., DEL. CODE ANN. tit. 13, § 1506(a)(4) (1999) (requiring a court to enter a decree of annulment when “[o]ne party entered into the marriage in reliance upon a fraudulent act or representation of the other party, which fraudulent act or representation goes to the essence of the marriage”); *Wolfe v. Wolfe*, 389 N.E.2d 1143, 1144–45 (Ill. 1979) (granting an annulment after finding that a wife’s misrepresentation to her Roman Catholic husband that her former husband was dead went to the “essentials” of the marriage relationship, rendering it impossible for the husband “to continue to perform the duties and obligations of his marriage”); *Lyon v. Lyon*, 82 N.E. 850, 852 (Ill. 1907) (defining “*essentials*” as those things that make “impossible the performance of the duties and obligations of that relation, or render[] its assumption and continuance dangerous to health or life”). Some courts have adopted a rule that if a wife is a virgin at marriage and remains so after five years of marriage, her husband will be presumed impotent. See, e.g., *Tompkins v. Tompkins*, 111 A. 599, 601 (N.J. Ch. 1920) (finding that a presumption of impotency arose when a husband did not have sexual intercourse with his wife of five years, and declaring the marriage null as a result).

246. See, e.g., *Johnston v. Johnston*, 22 Cal. Rptr. 2d 253, 254–55 (Ct. App. 1993) (finding no fraud where a wife claimed that her husband had “turned from a prince into a frog”); *Bielby v. Bielby*, 165 N.E. 231, 233 (Ill. 1929) (“False representations as to fortune, character, and social standing are not essential elements of the marriage, and it is contrary to public policy to annul a marriage for fraud . . . as to personal qualities.”).

247. See *Wolfe*, 389 N.E.2d at 1145 (finding a marriage void because a Roman Catholic husband was “unable to continue marital cohabitation” with his

the parties brings an action to annul the marriage; state courts (or police, or social workers) do not routinely inquire whether parties to a marriage are impotent or infertile.

Despite courts' reluctance to interfere in internal family matters, state law affects the substance of intact marriages in many ways. For instance, most states treat rape within a marriage as a less serious crime than rape that occurs outside of marriage.²⁴⁸ In addition, state law prescribes the various benefits and burdens of marriage, including evidentiary privileges,²⁴⁹ the ability to make medical decisions for one's spouse,²⁵⁰ and the treatment of assets as marital or community property.²⁵¹ The rationale behind some of these regulations is the preservation of marital privacy and harmony.²⁵²

Significantly, there is one way in which state law regulation of intact marriages is increasing: intensified interest in and prosecution of domestic violence within marriage.²⁵³ Rising awareness of intimate violence as a social and criminal problem has made law enforcement officials more willing to intervene in cases that were once considered private, family matters.²⁵⁴

wife upon discovering that his wife had misrepresented that her former husband had died).

248. See Hasday, *supra* note 23, at 1374, 1484 (noting that a majority of states retain some form of the common law rule exempting husbands from prosecution for raping their wives).

249. See, e.g., *Brown v. State*, 753 A.2d 84, 89–96 (Md. 2000) (detailing the history and meaning of Maryland's marital communications privilege).

250. See, e.g., LA. REV. STAT. ANN. § 40:1299.58.5(2)(c) (2001) (authorizing a "patient's spouse not judicially separated" to make medical decisions for an incompetent patient); VA. CODE ANN. § 54.1-2896 (2005) (giving a patient's spouse authorization to make decisions about medical treatment on behalf of the patient when the patient is "incapable of making an informed decision").

251. Cf. *Sawada v. Endo*, 561 P.2d 1291, 1294–95 (Haw. 1977) (describing various states' treatment of joint tenancies held by married couples).

252. The exemption from prosecution for husbands who rape their wives, for example, is thought to "remove a substantial obstacle to the resumption of normal marital relations." Hasday, *supra* note 23, at 1488 (quoting *People v. Brown*, 632 P.2d 1025, 1027 (Colo. 1981) (en banc)).

253. See Barbara Fedders, *Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Women's Movement*, 23 N.Y.U. REV. L. & SOC. CHANGE 281, 289 (1997).

254. See Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 11 (1999); Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 9 (2006).

Mandatory arrest²⁵⁵ and “no drop”²⁵⁶ policies are effectively regulations of intact marriages, for these policies remove the veil of family privacy by refusing to allow an individual to decide whether his or her spouse will be charged with a crime that occurred within the “private sphere.”²⁵⁷ These laws form part of the body of family law to the extent that their goal is to intervene in intact marriages by changing the power dynamic and disallowing certain kinds of physical contact.²⁵⁸

B. IMMIGRATION LAW AND THE INTACT MARRIAGE

In contrast, immigration law requires the government to intrude into intact marriages much more extensively. This wide-ranging intrusion is most evident in DHS’s screening of immigrant marriages in search of immigration fraud and in the heightened protection afforded to battered immigrant spouses.

1. The Immigration Marriage Fraud Amendments

As explained above, “marriage fraud” is narrowly defined in state family law.²⁵⁹ Generally, in order to have committed fraud a spouse must have lied about his or her ability or willingness to procreate or engage in sexual intercourse.²⁶⁰ But in the context of immigration law, “marriage fraud” means something very different. Rather than concentrating on the procreative and sexual “essentials” of the marriage, immigration law is concerned with the couple’s matrimonial intention at the time they married.²⁶¹ Because immigration status is a scarce benefit, the law attempts to ferret out those people who are using marriage in an instrumental way to achieve immigration status.²⁶²

255. See, e.g., Fedders, *supra* note 253, at 289 (noting that by the mid-1990s, almost half of the states had adopted mandatory arrest statutes, requiring police officers to make arrests in domestic violence cases, rather than allowing police officers to use their discretion).

256. See Epstein, *supra* note 254, at 15 (explaining that prosecutors in domestic violence cases often “have adopted no-drop policies—once charges are brought, a case proceeds regardless of the victim’s wishes”).

257. See *id.*

258. See Suk, *supra* note 254, at 7 (arguing that the home has become a space “in which criminal law deliberately and coercively *reorders* and *controls* private rights and relationships in property and marriage—not as an incident of prosecution, but as its goal”).

259. See *supra* notes 244–46 and accompanying text.

260. See *supra* notes 245–46 and accompanying text.

261. INA § 237(a)(1)(G), 8 U.S.C. § 1227(a)(1)(G) (2000).

262. See 132 CONG. REC. 27,012, 27,015 (1986) (statement of Rep.

Married people must therefore prove that they are married and that their marriage is “bona fide”—that is, not entered into solely for immigration purposes.²⁶³ Proving bona fides can be difficult, for a marriage certificate may show that a couple was legally married, but it does not show the reason they married. Thus, in combating fraud, immigration officials frequently look for more—they seek to determine whether the couple is *acting* married, even though they have the legal documentation to prove that they actually *are* married.²⁶⁴

Although all applicants for immigration benefits based on marriage must demonstrate the bona fides of their relationships, this pressure to “act” married is particularly acute for couples who have recently married. It makes good sense to think that immigration marriage fraud is more likely to occur in marriages commenced shortly before immigration. After all, if people have been married for a long time, it is unlikely that their long-past decision to marry was motivated by a desire to facilitate immigration benefits at some future time. Immigration law reflects this idea in the Immigration Marriage Fraud Amendments (IMFA) of 1986, which subject couples married for less than twenty-four months to a more searching scrutiny than other couples experience.²⁶⁵ Unlike other spouses who gain admission under the “immediate relative” category, spouses in marriages less than twenty-four months old must wait an additional two years before obtaining permanent residency.²⁶⁶ During that time, the spouse has only “conditional” permanent residency and is subject to deportation if DHS determines during that two-year period that the marriage is not bona fide.²⁶⁷

McCollum) (promoting the Immigration Marriage Fraud Amendments of 1986).

263. 8 C.F.R. § 116.4 (2006).

264. *See id.*

265. Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, § 216(g), 100 Stat. 3537, 3541 (codified at 8 U.S.C. § 1186a(g) (2000)) (defining the category of marriages subject to the conditional residence requirement of section 216 of the INA).

266. INA § 216(c)–(d), 8 U.S.C. § 1186a(c)–(d) (2000).

267. *Id.* § 216(b). Immigration law seeks to curb two species of marriage fraud: bilateral fraud and unilateral fraud. The first, bilateral fraud, typically involves direct payments by foreigners to U.S. citizens or permanent residents in return for permanent residency through marriage. 132 CONG. REC. at 27,015 (statement of Rep. McCollum). The second, unilateral fraud, is a “more invidious” kind, where a foreign man or woman tricks a citizen into marriage, “intentionally duping this person into believing that they are really in love,

In order to remove the “conditional” portion of her permanent residency status, an individual must petition jointly with her spouse for removal of the condition within a ninety-day period before the second anniversary of the grant of conditional status.²⁶⁸ Even at this point, immigration authorities could still decide that the marriage is a sham and institute deportation proceedings against the immigrant spouse.²⁶⁹ Unsurprisingly, the joint petition requirement has created problems in cases where the U.S. citizen spouse refuses to sign the joint petition.²⁷⁰ However, waivers are available in several instances, including when the parties have divorced and the immigrant was not at fault in failing to submit the joint petition or when the immigrant spouse was “battered by or was the subject of extreme cruelty perpetrated by his or her spouse.”²⁷¹

With the passage of IMFA, the INS promulgated regulations illustrating how a couple could demonstrate that their marriage was bona fide when entered. Under the regulations, the couple must attach evidence to its joint petition that demonstrates that the marriage was not “entered into for the purpose of evading the immigration laws of the United States.”²⁷² This standard is related to but distinct from the standard that had developed through existing case law prior to the passage of IMFA. The leading case on marriage fraud before IMFA, *Bark v. INS*, had established the principle that a “marriage is a sham if the bride and groom did not intend to establish a life

that there is true matrimonial intent here,” only to divorce the unlucky spouse once permanent residency has been obtained. *Id.* at 27,015–16. No one has established with certainty how severe the marriage fraud problem was before the passage of IMFA. Congress’s preoccupation with fraud in passing the IMFA has been traced to an erroneous INS report that estimated that thirty percent of marriages bringing immigrant spouses to the United States were fraudulent. Joan Fitzpatrick, *The Gender Dimension of U.S. Immigration Policy*, 9 YALE J.L. & FEMINISM 23, 33 (1997). The INS later estimated that the number was closer to eight percent—still a significant number. *Id.* The consequences of a finding of marriage fraud are harsh, for not only is the immigrant spouse deportable, but he is also permanently ineligible for legal immigrant status. INA § 204(c), 8 U.S.C. § 1154(c) (2000).

268. INA § 216(d)(2), 8 U.S.C. § 1186a(d)(2).

269. *Id.* § 237(a)(1)(G), 8 U.S.C. § 1227(a)(1)(G) (2000) (listing marriage fraud as grounds for deportation).

270. See, e.g., Sandra D. Pressman, *The Legal Issues Confronting Conditional Resident Aliens Who Are Victims of Domestic Violence: Past, Present, and Future Perspectives*, 6 MD. J. CONTEMP. LEGAL ISSUES 129, 149–50 (1995).

271. INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4).

272. 8 C.F.R. § 216.4(a)(5) (2006).

together at the time they were married.”²⁷³ Notice that this standard is different from the IMFA standard: a couple could fail the *Bark* test (because the spouses did not “intend to establish a life together”) yet pass the IMFA test because they did not enter into marriage “for the purpose of evading the immigration laws.” For example, a couple might marry to legitimate a child, to please a parent, or to hide one spouse’s sexual orientation—all cases where the purpose of marriage was not to establish a life together yet cases where the parties did not intend to evade immigration laws. Nevertheless, the regulations encourage petitioners to produce evidence in support of their petitions that is responsive to both the *Bark* standard and IMFA. This evidence includes: (1) “[d]ocumentation showing joint ownership of property,” (2) a “[l]ease showing joint tenancy of a common residence,” (3) “[d]ocumentation showing commingling of financial resources,” (4) “[b]irth certificates of children born to the marriage,” (5) “[a]ffidavits of third parties having knowledge of the bona fides of the marital relationship,” and (6) “[o]ther documentation establishing that the marriage was not entered into in order to evade the immigration laws of the United States.”²⁷⁴

Cohabitation, commingling of finances, and reproduction are the three primary ways of proving the bona fides of a marriage.²⁷⁵ All three of these factors, though, involve events that happen *after* the marriage takes place, and courts use these events to try to determine what the couple intended at the moment of marrying.²⁷⁶ This inquiry requires immigration judges

273. 511 F.2d 1200, 1201 (9th Cir. 1975).

274. 8 C.F.R. § 216.4(a)(5)(i)–(vi).

275. One court found that an apartment lease in both spouses’ names, without other evidence, was not enough to demonstrate a bona fide marriage. *Maina v. United States*, 179 F. App’x 577, 582 (11th Cir. 2006). Another court found that evidence of a joint bank account, joint federal tax returns, a residential lease in both names, and a utility bill in both names was insufficient where the husband fathered two children with another woman. *Oddo v. Reno*, 17 F. Supp. 2d 529, 532–33 (E.D. Va. 1998), *aff’d*, 175 F.3d 1015 (4th Cir. 1999); Brief for Appellee at 4, 7, *Oddo*, 175 F.3d 1015 (No. 98-2411), 1998 WL 34094282. In another case, joint tax returns and a joint bank account were not enough to demonstrate a bona fide marriage where cohabitation only lasted three months, the marriage was never consummated, and the husband had sexual relations with another woman. *United States v. Darif*, 446 F.3d 701, 704 (7th Cir. 2006). Yet another court found marriage fraud where the husband was twenty-three, the wife was fifty-nine, and the couple never had a common address before separating. *Roos v. United States*, 167 F. App’x 752, 753 (11th Cir. 2006).

276. *Bark*, 511 F.2d at 1202 (holding that conduct occurring after the wed-

to walk a tricky tightrope. One step too far in one direction will mean that immigrants who commit marriage fraud will achieve immigration status because they go through the pro forma requirements for a valid marriage even if postwedding evidence clearly shows that they had no intent to marry for any reason other than immigration purposes. One step too far in the other direction, however, and the court is passing judgment on the marriage as a marriage, essentially deciding that if it does not look like the kind of marriage most people would have, it must be fraudulent. Thus, the *Bark* court insisted that “[a]liens cannot be required to have more conventional or more successful marriages than citizens.”²⁷⁷ Other courts have emphasized that evidence of separation following the wedding, standing alone, does not establish that a marriage was a sham. As the *Bark* court explained, “Couples separate, temporarily and permanently, for all kinds of reasons that have nothing to do with any preconceived intent not to share their lives, such as calls to military service, educational needs, employment opportunities, illness, poverty, and domestic difficulties.”²⁷⁸

It is difficult to evaluate how effective IMFA has been in practice. Although reliable statistics do not exist, there is evidence that even with what appears to be a fairly stringent process, fraudulent marriages still frequently occur. Marriage fraud rings are occasionally discovered and prosecuted. For example, in 2006 federal immigration officials indicted twenty-four people for engaging in marriage fraud.²⁷⁹ The scheme involved soliciting U.S. citizens to travel to Vietnam to enter into fictitious engagements and marriages with Vietnamese citizens to facilitate their immigration to the United States.²⁸⁰ Numerous other schemes have been prosecuted in the past three

ding may be considered to the extent that it “bears upon their subjective state of mind” at the time of the wedding).

277. *Id.* at 1201–02; *see also* Cho v. Gonzales, 404 F.3d 96, 102–03 (1st Cir. 2005) (emphasizing that marriages can be unconventional or can have various motivations without being sham marriages); United States v. Orellana-Blanco, 294 F.3d 1143, 1151 (9th Cir. 2002); United States v. Tagalicud, 84 F.3d 1180, 1185 (9th Cir. 1996). *But see* Darif, 446 F.3d at 710 (affirming the district court’s refusal to give a jury instruction including the language from *Bark* and calling the requested instruction “simply irrelevant”).

278. *Bark*, 511 F.2d at 1202.

279. Press Release, U.S. Immigration & Customs Enforcement, 24 Indicted in ICE-Led Probe into Largest Marriage Fraud Scheme in Utah History (Aug. 8, 2006), *available at* <http://www.ice.gov/pi/news/newsreleases/articles/060808saltlakecity.htm>.

280. *Id.*

years.²⁸¹ The frequency of the prosecutions and the number of people involved suggest that even with the procedures set forth in IMFA and its implementing regulations, immigration officials miss substantial instances of fraud. At the same time, though, there is a limit to the amount of time immigration officials can spend investigating marriages and, for couples who are legitimately married, there is a cost associated with repeated interviews and a fear of “failing” the IMFA test. More importantly, reported cases indicate that some immigration officials have difficulty telling a “real” marriage from a “fraudulent” one, and that just as many fraudulent marriages slip through the cracks, some genuine marriages are not recognized as such.

Take, for example, the case of Agnes Cho, a Chinese citizen of Burmese descent.²⁸² Cho’s case first came to the INS’s attention when she sought to petition to have the condition removed from her conditional permanent residency.²⁸³ Because she was divorced from her husband, she needed a waiver from the normal joint petition requirement,²⁸⁴ and she had the burden to prove that she had married in good faith.²⁸⁵ Cho appeared to have everything going for her: a two-year long courtship preceding the marriage; visits by each spouse to meet the families of the other; plans for a formal reception in Taiwan; cohabitation at the home of the husband’s parents; a joint health insurance policy; and joint tax returns, bank accounts, credit cards, and automobile financing agreements.²⁸⁶ She had the additional good luck to have married a naturalized U.S. citizen of

281. See, e.g., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT FACT SHEET: DOCUMENT AND BENEFIT FRAUD INVESTIGATIONS (2006), available at <http://www.ice.gov/pi/news/factsheets/dbf061211.htm> (describing the arrest of twenty-six individuals living in New York for involvement in a marriage fraud ring bringing in immigrants from Grenada, Guyana, India, Jamaica, Pakistan, St. Vincent, and Trinidad); Press Release, U.S. Dep’t of Justice, South Florida Marriage Fraud Ring Dismantled (Sept. 30, 2005), available at <http://www.usdoj.gov/usao/fls/PressReleases/050930-01.html> (announcing indictments of a marriage fraud ring which brought in at least 112 immigrants from numerous South American countries, the Dominican Republic, Germany, and Israel); Press Release, U.S. Dep’t of State, California Man Sentenced in Marriage and Visa Fraud Scheme (Oct. 25, 2004), available at <http://www.state.gov/m/ds/rls/37403.htm> (describing the prosecution of an immigration fraud ring bringing immigrants from Cambodia).

282. *Cho*, 404 F.3d at 98.

283. *Id.*

284. *Id.*

285. See INA § 216(c)(4)(B), 8 U.S.C. § 1186a(c)(4)(B) (2000).

286. *Cho*, 404 F.3d at 103.

Burmese descent who had immigrated from China²⁸⁷ (immigration officials might be more likely to suspect fraud where members of a couple are racially or ethnically distinct from one another). Finally, she had a good excuse for getting divorced: her husband had cheated on her and subjected her to domestic violence.²⁸⁸ Despite this extensive evidence showing many indicia of “intent to establish a life together,”²⁸⁹ the INS, the immigration judge, and the BIA all found that Cho’s marriage was fraudulent.²⁹⁰

The BIA found Cho’s marriage to be fraudulent for several reasons. First, her husband had an affair, and the court construed the affair as evidence that the marriage was a sham from the start.²⁹¹ In addition, Cho came to her INS conditional residency interview with counsel representation and documentation of her husband’s violent abuse, and her husband kicked her out of the house following the interview.²⁹² The BIA interpreted her moving out immediately after the interview as evidence that Cho had married to get permanent residency.²⁹³ In this case, despite the standard set forth in IMFA, a marriage that had broken down was misconstrued as a marriage that was fraudulent from the start. The Court of Appeals for the First Circuit reversed the BIA, finding that Cho satisfied the good faith marriage requirement.²⁹⁴

An immigrant who was less lucky (and perhaps less deserving) was Mohamed Jamal Krazoun. An immigrant from Syria, he was married at various times to three different U.S. citizens. He married the first, Magnolia Arungo-Garcia, in 1983.²⁹⁵ Although she petitioned for his permanent residency, she withdrew the petition after he began to subject her to verbal abuse, harassment, and threats.²⁹⁶ She also obtained a restraining order against him.²⁹⁷ Krazoun and Arungo-Garcia were divorced by 1984.²⁹⁸ In 1989, Krazoun married again, this

287. *Id.* at 98.

288. *Id.* at 103.

289. *Id.* at 100.

290. *Id.* at 98.

291. *Id.* at 103.

292. *Id.* at 104.

293. *Id.* at 103–04.

294. *Id.* at 104.

295. *Krazoun v. Ashcroft*, 350 F.3d 208, 209 (1st Cir. 2003).

296. *Id.*

297. *Id.*

298. *Id.*

time to Georgia Balesteri.²⁹⁹ In January 1990, Balesteri had also obtained a restraining order and the couple ceased cohabiting.³⁰⁰

Krazoun's troubles with the INS began in March 1991 when he used his marriage to Balesteri to apply for conditional permanent residency.³⁰¹ In 1993, he appears to have forged Balesteri's name in filing a joint petition to convert his status to that of permanent resident.³⁰² On the petition, Krazoun lied: he claimed that he and Balesteri had continued to cohabit when they had not.³⁰³ He also appears to have lied to the INS in person, claiming that Balesteri would continue to attend INS interviews, which she had no intention of doing.³⁰⁴ In May 1994, Balesteri filed for divorce, at which point the INS initiated deportation proceedings against Krazoun.³⁰⁵

In November 1994, an immigration judge found that Krazoun was deportable.³⁰⁶ At this point, Krazoun applied for a waiver of the joint petition requirement, claiming that he had married Balesteri in "good faith," that it was not a sham marriage, and that the marriage had terminated.³⁰⁷ Nonetheless, the immigration judge ordered Krazoun deported, specifically finding that "Krazoun had married *both* Arungo-Garcia and Balesteri for the purpose of evading the United States immigration laws."³⁰⁸ The evidence supporting this conclusion, however, was thin. According to the immigration judge, the conclusion that the marriages were both shams was based on three pieces of evidence: (1) that Krazoun misled the INS by stating that Balesteri would attend a 1993 INS interview, (2) that Krazoun lied about continuing to cohabit with Balesteri, and (3) that both Balesteri and Arungo-Garcia had obtained restraining orders against Krazoun shortly after their marriages.³⁰⁹ There was no evidence other than the restraining order to sug-

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.* at 210 (emphasis added).

309. *Id.*

gest that the marriage to Arungo-Garcia was fraudulent. Verbal abuse and mendacity appear to have constituted fraud.

The last chapter in the Krazoun story (and the one that led to his First Circuit appeal) occurred after he married Janice Gittino in September 2001, seven years after his divorce from Balesteri. In June 2002, Krazoun petitioned the BIA to reopen his case, claiming that his third marriage was bona fide, and that Gittino was expecting a child in October.³¹⁰ Because deportation proceedings were underway, Krazoun had to present “clear and convincing evidence” that his marriage to Gittino was bona fide.³¹¹ The court found his evidence lacking, but held in the alternative that even if he had presented “clear and convincing” evidence of a bona fide marriage, the immigration judge could have denied Krazoun a discretionary adjustment of status “based exclusively upon his history of recurrent immigration fraud.”³¹²

Thus, Krazoun lost the right to remain with his wife and child not because his marriage was necessarily fraudulent but because a previous court, apparently offended by his misrepresentations to the court and violence towards his previous wives, decided, without much evidence, that his first two marriages were fraudulent. This case is illustrative of the problem inherent in marriage fraud cases: it is impossible to tell from the record whether the marriage was a sham or not. In Krazoun’s case, the judges appear to have tested his marriages against certain standards—nonviolence, permanence, openness, truthfulness—and found them lacking. But they never identified a fact proving that any of his marriages were fraudulent.

The point here, of course, is not that Krazoun did not deserve to be deported—the INS might have had a case against him based solely on the misrepresentations he had made, or based on visa overstays.³¹³ The case is striking, however, when

310. *Id.*

311. *Id.*

312. *Id.* at 212.

313. Technically, Krazoun was probably ineligible for adjustment to permanent resident status because he had lied to the INS. *Id.* Under INA § 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C) (2000), misrepresentations or fraud render an immigrant inadmissible and therefore ineligible for adjustment of status. *See id.* § 245(a), 8 U.S.C. § 1255(a) (2000), *amended by* Act of Aug. 12, 2006, Pub. L. No. 109-271, § 6(f)(1), 120 Stat. 750, 763. In addition, Krazoun may have been deportable for overstaying his visa. *See id.* § 237(a)(1)(C), 8 U.S.C. § 1227(a)(1)(C) (2000). What is curious is that the immigration officials felt the need to charge marriage fraud rather than one of these more mundane

one considers that bad behavior during a marriage can be used, in the immigration context, as evidence that the marriage is a sham, despite courts' purported standard of *not* requiring immigrants' marriages to be more successful than anyone else's marriages.³¹⁴ By making *spouse* a category for gaining immigration status, Congress has necessarily embroiled DHS in the difficult business of passing judgment on individual marriages.

One inevitable result of an immigration policy that uses marriage as a category for admission is that immigrants are required to self-police their marriages, crafting the kind of marriages that they think will pass muster in immigration service interviews even where the marriages they had anticipated having would have looked much different.³¹⁵ As the previous examples illustrate, some couples make misrepresentations to immigration authorities about details that they (rightly) believe will raise eyebrows. As in *Krazoun*, it is difficult to ascertain why the misrepresentations were made: Was it because they knew they were committing fraud and wanted to cover it up?³¹⁶ Or did they know that their marriage was unusual, and so they told the immigration authorities what they thought the authorities wanted to hear?³¹⁷ In one case, an immigrant failed to state that he was living separately from his wife, presumably because he believed that this information would raise the suspicions of immigration officials.³¹⁸ As often happens, DHS discovered the omission and found that it was material to the merits of his case and thus constituted a misrepresentation, leading to a denial of his petition.³¹⁹ Regardless of whether the petitioner's marriage was a sham, his belief that DHS would

offenses.

314. See *Cho v. Gonzales*, 404 F.3d 96, 102–03 (1st Cir. 2005); *Bark v. INS*, 511 F.2d 1200, 1201–02 (9th Cir. 1975).

315. See Kikuyo Matsumoto-Power, Comment, *Aliens, Resident Aliens, and U.S. Citizens in the Never-Never Land of the Immigration and Nationality Act*, 15 U. HAW. L. REV. 61, 62–80 (1993) (discussing the potential conflict between cultural marital practices and IMFA requirements).

316. *Krazoun*, 350 F.3d at 209.

317. See, e.g., *Monter v. Gonzales*, 430 F.3d 546, 557–58 (2d Cir. 2005) (finding marriage fraud where a husband's credibility was diminished because he lied about being separated from his wife); *Oropeza-Wong v. Gonzales*, 406 F.3d 1135, 1148 (9th Cir. 2005) (holding that the petitioner's filling out a form without listing children from prior relationships "enhanced [the petitioner's] claim that his marriage to [his wife] was in good faith and therefore went to the heart of the matter").

318. *Monter*, 430 F.3d at 557–58.

319. *Id.*

think it was and his subsequent cover-up led to his deportation.³²⁰ Other provisions provide similar dilemmas for couples. For example, the birth of children during the two-year conditional period while an immigrant spouse is waiting to become eligible for permanent residency will not provide equitable grounds to defer deportation if the marriage is later found to be fraudulent.³²¹ Yet birth of children is evidence of a bona fide marriage.³²² So what should a couple do? Forgo a family for the moment to prevent a possible separation down the line should the marriage be found a sham, or begin a family to bolster the claim that the marriage is valid?

Another participant in the immigration process assists in policing the behavior of spousal immigrants: lawyers groom their immigrant clients to pass their immigration interviews. Many practitioners weed out clients who are engaging in sham marriages by questioning each client carefully about his or her partner's personal habits and the couple's daily routine together.³²³ In determining whether to further represent an immigrant couple, practitioners, just like DHS officials, use evidence that a couple is living together to determine whether the couple has a bona fide marriage.³²⁴ Lawyers report asking for items such as a joint lease, vacation photographs, joint utility bills, tax returns, insurance documents, credit card bills, and evidence that the wife has adopted the husband's name.³²⁵ Still others make surprise visits, dropping by couples' houses with the excuse of needing to pick up their passports, or calling late in the evening to ask them further questions.³²⁶ One lawyer

320. *Id.* (“[The petitioner’s] failure to state that he was living separately from his wife ‘was predictably capable of affecting, i.e., had a natural tendency to affect, the official decision.’ . . . [T]he fact of Monter’s separation was clearly linked to a statutory ground for removability: The knowledge that Monter and his wife lived in separate residences would lead investigators to question the bona fides of their marriage.” (quoting *Kungys v. United States*, 485 U.S. 759, 771 (1988))).

321. Joe A. Tucker, *Assimilation to the United States: A Study of the Adjustment of Status and the Immigration Marriage Fraud Statutes*, 7 YALE L. & POL’Y REV. 20, 22 (1989).

322. 8 C.F.R. § 216.4(5)(iv) (2006).

323. Hilary Sheard, *Ethical Issues in Immigration Proceedings*, 9 GEO. IMMIGR. L.J. 719, 736 (1995).

324. *Id.* at 737.

325. *Id.*

326. *Id.* Lawyers have an incentive to investigate their clients’ cases carefully—if they assist their clients in making false claims of marriage for immigration purposes, they may face criminal charges or state bar disciplinary ac-

who engaged in this behavior admitted that it is difficult to judge a marriage based on paper documentation, declaring, "I've almost always been wrong about those I suspected of fraud."³²⁷

Ultimately, IMFA is an example of a law that directly regulates immigration and has unintentional but substantial effects on marriage itself. In attempting to deter immigration fraud, Congress is exercising its core immigration power. Congress's plenary power over immigration gives it the right to decide who will be admitted or excluded from the country, and Congress has made a decision that family ties are a good proxy for successful immigration. It thus falls to Congress (and DHS) to find a way of implementing this policy that allows those people who meet the requirements to gain admission, while preventing those who do not from abusing the system. As this section has shown, there are some difficult policy choices endemic to spousal immigration: if the government imposes too little scrutiny, many fraudulent marriages will slip by, but if it imposes too much scrutiny, immigration officials will be interfering in very private relationships. Taken as a whole, IMFA is a successful middle road, for although the cases show that it can be difficult to implement in some circumstances, the reported cases are by definition the particularly difficult ones. The two-year conditional status for some marriages allows DHS to concentrate its efforts on those marriages which seem most likely to be fraudulent while providing immigrants who have been married longer with a less intrusive path to residency. Although Congress's choices certainly could be (and have been) extensively critiqued,³²⁸ its power to make these choices is on firmer footing than some of the other regulations of marriage through immigration law, such as IMBRA or DOMA. Once it extends the benefit of immigration status to the spouses of citi-

tion. *Id.* at 735.

327. *Id.* at 737.

328. Judges, legislators, and commentators have criticized IMFA. *See* Azizi v. Thornburgh, 719 F. Supp. 86, 96 n.11 (D. Conn. 1989) ("[I]n trying to ferret out those who abuse our marriage-related immigration laws, recent news indicates we may have gone too far." (quoting Sen. Paul Simon)); Fitzpatrick, *supra* note 267, at 31–33; Charles Gordon, *The Marriage Fraud Act of 1986*, 4 GEO. IMMIGR. L.J. 183, 187 (1990) (citing a district judge who said that the law was analogous to the situation "of a fellow who burns his house down to get at a few rats"); Lisa C. Ikemoto, *Male Fraud*, 3 J. GENDER RACE & JUST. 511, 533–43 (2000) (arguing that IMFA promotes harmful stereotypes of immigrant women); Medina, *supra* note 17, at 696–717 (arguing that the prohibition on "marriages of convenience" is misguided because they harm no one).

zens and residents, Congress must find a way to determine what counts as marriage for immigration purposes, and the substance of what counts as marriage fraud for immigration purposes unsurprisingly looks very different from what counts as marriage fraud under state law.

2. The Violence Against Women Act(s)

A very different example of how immigration law regulates the intact marriage is the immigration-related provisions of the Violence Against Women Act of 1994 (VAWA),³²⁹ as well as subsequent VAWAs passed in 2000 and 2005.³³⁰ VAWA is most famous for its inclusion of a civil rights remedy for gender-motivated violence, which the Supreme Court struck down in *United States v. Morrison* as beyond the scope of Congress's commerce power.³³¹ However, several other less controversial provisions of VAWA are alive and well. VAWA provisions are sprinkled throughout the INA, generally as default rule exceptions for battered spouses or children. For example, some foreign nationals who would otherwise be subject to deportation are eligible for relief from deportation if they meet certain statutory requirements, such as ten years of continuous physical presence in the United States.³³² If, however, the potential deportee is the battered spouse or child of a U.S. citizen or resident, she need only show three years of continuous physical presence in the United States.³³³

The two most important VAWA provisions for our purposes involve the procedures through which battered spouses may petition for green cards. The first is an exception to the usual green card requirements. Normally, to obtain admission as an immediate relative or family preference immigrant, an individual must convince her U.S. citizen or resident spouse to file a

329. Pub. L. No. 103-323, tit. IV, 108 Stat. 1902 (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.).

330. VAWA 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006); Battered Immigrant Women Protection Act of 2000 (VAWA 2000), Pub. L. No. 106-386, §§ 1501-1513, 114 Stat. 1464, 1518-37 (codified as amended in scattered sections of 18 and 42 U.S.C.).

331. *United States v. Morrison*, 529 U.S. 598, 607-19, 627 (2000). For a critique of *Morrison*, see Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 *FORDHAM L. REV.* 57, 109-24 (2002).

332. INA § 240A(b)(1)(A), 8 U.S.C. § 1229b(b)(1)(A) (2000).

333. *Id.* § 240A(b)(2), 8 U.S.C.A. § 1229b(b)(2) (West 2005 & Supp. 2006).

petition sponsoring the immigrant.³³⁴ This rule gives the citizen or permanent resident spouse total control over the immigration process.³³⁵ In doing so, immigration law allows U.S. citizens and residents to define who their families are for immigration purposes, as long as those individuals otherwise fall within the designated formal categories. Conversely, if an immigrant is a battered spouse or the victim of “extreme cruelty” perpetrated by her spouse, she can self-petition for immigration status.³³⁶ Because of her status as a battered spouse, her husband loses control over her immigration process.³³⁷ VAWA thus creates an exception the usual rule that the U.S. citizen or resident family member must petition on behalf of the immigrant.

The second relevant provision makes an exception to the IMFA default rules that govern recent marriages. Recall that normally, both spouses must petition after a two-year probationary period to have the “conditional” aspect of an immigrant spouse’s conditional permanent residency removed.³³⁸ VAWA creates an exception to this general rule for cases involving battering or extreme cruelty.³³⁹ Thus, where a conditional permanent resident spouse is being battered or psychologically abused, she can avoid the problem of needing to get a controlling and abusive spouse to join the petition.

VAWA is unique to the immigration laws discussed so far. Unlike the family preference and immediate relative categories and the fiancé visa provisions, VAWA does not appear to di-

334. *Id.* § 204(a), 8 U.S.C.A. § 1154(a), amended by Act of Aug. 12, 2006, Pub. L. No. 109-271, § 6(a), 120 Stat. 750, 762; Act of July 27, 2006, Pub. L. No. 109-248, § 402, 120 Stat. 587, 622–23.

335. For a criticism of the citizen or resident spouse having total control over the immigration process, see Calvo, *Decade*, *supra* note 18.

336. INA § 204(a)(1)(A)(iii).

337. I use the pronoun *she* here to refer to the immigrant spouse, for although the VAWA provisions are gender-neutral, the vast majority of immigrants asserting rights under the provisions are women. See Skaidra Blanford, *Ayuda Means HELP for Area Latinas*, D.C. N., Mar. 2003, at 28, 28, <http://www.consejo.org/pdf/Mar%202003%20Domestic%20Violence.pdf>. This use of VAWA remedies may not reflect reality: some studies show high rates of domestic abuse of men by women. See Melody M. Crick, Comment, *Access Denied: The Problem of Abused Men in Washington*, 27 SEATTLE U. L. REV. 1035, 1043–47 (2004). But it does indicate that women are more likely than men to perceive that they are entitled to VAWA exceptions and to take advantage of them.

338. INA § 216(c)(1)(A), 8 U.S.C. § 1186a(c)(1)(A) (2000).

339. *Id.* § 216(c)(4). Technically, these are not exceptions but “hardship waivers,” which means that they are discretionary waivers, not statutory entitlements. *Id.*

rectly aid Congress in its goal of providing family reunification for citizens. There is nothing particularly desirable about having spouses who have been battered as potential citizens; if anything, Congress might think that battered spouses would be just as likely to be a drain on the public fisc as it does people with communicable diseases or those without financial means.³⁴⁰

Instead, VAWA ameliorates some of the harsher effects of immigration law *itself* on the day-to-day experiences of immigrants in abusive families. The spousal-petition requirement, for example, made battered immigrants vulnerable to spousal manipulation.³⁴¹ Studies show that a significantly higher number of immigrant women are battered by their spouses than women in the general population,³⁴² and although causation is difficult to establish, scholars have argued that this higher rate is the result of Congress's decision to give U.S. citizen spouses control over the immigration process.³⁴³ VAWA seeks to prevent abusive spouses from using immigration status to wield control in their marriages, and it does this by putting control over immigration status into the hands of the battered spouse; in short, VAWA seeks to regulate power dynamics in an intact marriage. To the extent that VAWA is a regulation of the family and not immigration per se, it has more in common with the disclosure requirements in IMBRA and the prohibition against same-sex marriage in DOMA than it does with the IMFA's attempt to ferret out immigration fraud. But VAWA is distinguishable from the DOMA mandates, too, for it seeks to regulate the family to reduce the harm caused by immigration law itself.

The immigration provisions of VAWA provide an example of how categorizing something as immigration law masks the

340. See *id.* § 212(a)(1), 8 U.S.C. § 1182(a)(1) (2000) (stating that persons with certain communicable diseases are inadmissible); *id.* § 212(a)(4), 8 U.S.C. § 1182(a)(4) (2000 & Supp. II 2002), amended by Act of Aug. 12, 2006, Pub. L. No. 109-271, § 6(b)(1)(A), 120 Stat. 750, 762 (stating that persons likely to become public charges are inadmissible).

341. Pressman, *supra* note 270, at 149–50.

342. *Battered Immigrant Women Protection Act of 1999: Hearing on H.R. 3083 Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 106th Cong. 58, 60 (2000) (statement of Leslye Orloff, Director, Immigrant Women Program, NOW Legal Defense and Education Fund).

343. See Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1200 (2001) (noting that VAWA's immigration provisions resulted from documentation by activists of the "traps created by IMFA").

family law aspects of the provision—no one recognizes the provisions as relating to family law. Compare the VAWA provision that was struck down by the Court in *Morrison* (civil damages for gender-motivated violence)³⁴⁴ with the immigration provisions that went unchallenged (giving married immigrants who are battered legal benefits for which other immigrants are ineligible).³⁴⁵ Which law does more to “determine[] the legal rights and responsibilities of family members”:³⁴⁶ the one that happens to apply equally to married and unmarried victims of violence, or the one that singles out married victims for special treatment? Both Congress and the Supreme Court were troubled by a VAWA provision that was explicitly a criminal law on its face and “exposed” as family law,³⁴⁷ but VAWA provisions that facially concern immigration but also regulate marriage pass by unnoticed.

V. REGULATING EXIT FROM MARRIAGE

A. STATE FAMILY LAW AND EXIT

States used to pass judgment on a marriage by determining which party was responsible for its destruction.³⁴⁸ Only the “innocent and injured spouse” was entitled to a divorce.³⁴⁹ Thus, marriage was conceived to be a permanent status that could only be exited by a material breach by one party and the desire of the other party to end the relationship.³⁵⁰ Fault grounds varied from state to state, but they often included adultery, extreme cruelty, and desertion.³⁵¹

In 1969, California led the “no-fault revolution” by eliminating the statutory fault grounds.³⁵² California replaced its

344. *United States v. Morrison*, 529 U.S. 598, 605–27 (2000).

345. *See supra* notes 334–39 and accompanying text.

346. Hasday, *supra* note 1, at 871.

347. *See Morrison*, 529 U.S. at 615–17.

348. *See, e.g., Ayers v. Ayers*, 290 S.W.2d 24, 25–26 (Ark. 1956) (denying a divorce to the party with greater fault).

349. *See Rankin v. Rankin*, 124 A.2d 639, 644–45 (Pa. Super. Ct. 1956) (refusing to grant a divorce where both spouses were “equally at fault” and neither could “clearly be said to be the innocent and injured spouse”).

350. *See HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* 4 (1988) (discussing general changes in marriage law).

351. *Id.* at 5.

352. Alicia Brokars Kelly, *Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life*, 19 WIS.

myriad fault grounds with only two: “[i]rreconcilable differences, which have caused the irremediable breakdown of the marriage” and “[i]ncurable insanity.”³⁵³ The idea behind this change was that a married couple is made up of two separate people who may not want to be permanently tied to one another. Since California’s move, most states have adopted some form of no-fault divorce.³⁵⁴ Even if states retain fault grounds, they usually also give the option of a no-fault divorce, sometimes after a waiting period of anywhere from sixty days to three years.³⁵⁵ Even so-called covenant marriage includes the possibility of a no-fault divorce with a longer-than-normal waiting period.³⁵⁶ The only states where one cannot currently get a unilateral no-fault divorce are Mississippi, New York, and Tennessee.³⁵⁷ Marriage, then, has gone from a permanent status to one that an individual can usually exit, even without the other spouse’s consent. The State adjudicates the terms of the exit, but in all but a handful of states, does not deny individuals the right to exit.

The decline of fault grounds and other changes in family structure have affected the way in which property is allocated upon divorce. At common law in most states, the husband controlled and owned all of the marital assets. Under the law of coverture, married women could not own property.³⁵⁸ Because of the imbalance of power in these relationships, alimony developed as a way to ensure that divorced women were not impoverished.³⁵⁹ Alimony awards were supported by a theory of

WOMEN’S L.J. 141, 153 (2004).

353. CAL. FAM. CODE § 2310 (West 2004).

354. As of 2004, fourteen states and the District of Columbia have only no-fault grounds for divorce, and thirty-three states have a combination of no-fault and fault grounds. AREEN & REGAN, *supra* note 166, at 374.

355. *Charts*, 38 FAM. L.Q. 809, 812 (2005).

356. *E.g.*, LA. REV. STAT. ANN. § 9:307(A)(5) (2000) (setting forth a two-year waiting period for a no-fault divorce in a covenant marriage); LA. CIV. CODE ANN. art. 103(1) (1999) (setting forth a six-month waiting period for a no-fault divorce in a standard marriage).

357. MISS. CODE ANN. § 93-5-2 (2004) (prohibiting divorce on grounds of irreconcilable differences if the grounds are contested or denied by the other party); N.Y. DOM. REL. LAW § 170 (McKinney 2007) (allowing no-fault divorce only upon consent of both parties); TENN. CODE ANN. § 36-4-103 (2005) (prohibiting divorce on grounds of irreconcilable differences if the grounds are contested or denied by the other party).

358. *See* WILLIAM BLACKSTONE, 1 COMMENTARIES *442–45 (discussing women’s legal rights during marriage).

359. *See* SANFORD N. KATZ, FAMILY LAW IN AMERICA 95 (2003) (arguing that alimony originally functioned as a kind of pension or social security to

status: a wife obtained the social status of her husband and was entitled to continue living in the style to which she had become accustomed,³⁶⁰ provided that she had not been the one to destroy the marriage.³⁶¹

Today, the theory that women are in danger of becoming public charges no longer has the same resonance that it did in the nineteenth century. Now that women are able to work in livable-wage jobs, courts are reluctant to award alimony based purely on status considerations.³⁶² Today, temporary alimony to help a dependent spouse “rehabilitat[e]” herself in the world of employment is the more common approach.³⁶³ Together, the no-fault revolution and courts’ reluctance to award permanent alimony are evidence that we have largely discarded the assumption that, once married, individuals should be forever tied to one another, regardless of whether any feelings of commitment remain.³⁶⁴

prevent divorced women from becoming public charges); June Carbone, *The Futility of Coherence: The ALI’s Principles of the Law of Family Dissolution, Compensatory Spousal Payments*, 4 J.L. & FAM. STUD. 43, 46–47 (2002) (arguing that the principle of alimony was derived from the wife’s right to dower—one-third of her husband’s estate—for her continuing support at his death); Chester G. Vernier & John B. Hurlbut, *The Historical Background of Alimony Law and Its Present Statutory Structure*, 6 LAW & CONTEMP. PROBS. 197, 198 (1939) (arguing that with the “discriminatory common law scheme of marital property rights . . . in full bloom” and fault-based divorce difficult to acquire, it was not surprising that a woman’s “application for permanent alimony was treated with sympathy, and with liberality when the circumstances permitted liberality”).

360. See KATZ, *supra* note 359, at 94 (stating that the amount of an alimony award used to be determined by a woman’s station of life during her marriage). Despite the theory behind alimony awards, it appears that courts did not grant them very often. Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1106 (1989).

361. See, e.g., *Lagars v. Lagars*, 491 So. 2d 5, 8 (La. 1986).

362. Vivian A. Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 41–42 (2006).

363. *Id.*; see also LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 149 (1985) (“While traditional alimony sought to deliver *moral* justice based on *past* behavior of the parties, the new alimony was to deliver *economic* justice based on the financial *needs* of the parties.”).

364. Children, of course, are another matter entirely. All states have now passed child support laws that require noncustodial parents to continue to support their children after divorce. See Child Support Enforcement Amendments of 1984, 42 U.S.C.A. §§ 666–667 (West Supp. 2006), amended by Deficit Reduction Act of 2005, Pub. L. No. 109-171, §§ 7301(g), 7307(a)(1), 7307(a)(2)(A)(ii), 120 Stat. 4, 145–46 (2006).

B. IMMIGRATION LAW AND EXIT

Just as immigration law regulates the first three stages of marriage, it also regulates the last stage, exit. All immigrants—and their U.S. citizen or resident spouses—who use the immediate family or family preferences to achieve status are required to make a financial commitment to each other that in many cases may endure beyond the commitment required under state law. Qualifying for an immigrant visa is not the last step in legal immigration for a foreign spouse. As discussed earlier, even if a spouse qualifies under the immediate relative or family preference categories as the spouse of a U.S. citizen or permanent resident, the spouse could still be considered inadmissible for a variety of reasons, such as communicable diseases, criminal history, or prior deportations.³⁶⁵ For our purposes, the most important of these restrictions is the public charge provision. Under the INA, an immigrant is inadmissible if he is “likely at any time to become a public charge.”³⁶⁶ Since December of 1997, an immigrant entering under the immediate relative or family preference categories will be deemed a “likely public charge” unless the sponsoring relative has executed an affidavit of support.³⁶⁷

The affidavit of support must demonstrate that the sponsoring relative can support the immigrant at an annual income that is not less than 125% of the federal poverty line.³⁶⁸ This number is calculated by adding the immigrant (and any relatives immigrating with her) to the number of people already in the sponsor’s household and looking up the federally published salary necessary for that year.³⁶⁹ For example, imagine that in 2005, a U.S. citizen petitions for a visa for her German husband under the immediate relative category. The citizen is a nursing assistant with three children who makes \$30,000 a year. The German husband has a daughter from a previous marriage who

365. INA § 212(a)(1)–(2), (9), 8 U.S.C.A. § 1182(a)(1)–(2), (9) (West 2005 & Supp. 2006), *amended by* Act of Aug. 12, 2006, Pub. L. No. 109-271, § 6(b)(1)(C), 120 Stat. 750, 762.

366. *Id.* § 212(a)(4)(A).

367. *Id.* § 212(a)(4)(C)(ii). The Act contains an exception for battered spouses and children. *See id.* § 212(a)(6)(A)(ii), *amended by* Act of Aug. 12, 2006, Pub. L. No. 109-271, § 6(b)(1)(B), 120 Stat. 750, 762.

368. *Id.* § 213A(1)(A), 8 U.S.C. § 1183(a)(1)(A) (2000).

369. U.S. CITIZENSHIP & IMMIGRATION SERVS., DEPT OF HOMELAND SEC., FORM I-864P (2006), *available at* <http://www.uscis.gov/files/form/I-864p.pdf> [hereinafter FORM I-864P].

will be accompanying him.³⁷⁰ The U.S. resident must therefore show that she can support a family of six (herself, her three children, her husband, and her new stepchild) at 125% of the federal poverty line. In this example, the German husband will be considered inadmissible as a likely public charge because his wife does not make 125% of the poverty line, which for a family of six is \$33,500.³⁷¹ It will be considered irrelevant that the German husband is skilled in a trade and will be likely to find work.³⁷²

The affidavit of support requirement regulates marriage by making the financial obligation to support a spouse potentially permanent. There are only five ways that a sponsor's obligation of support may be terminated: (1) the sponsored immigrant becomes a naturalized citizen, (2) the sponsored immigrant works for forty social security quarters (or, in the case of a married immigrant, his or her spouse works for forty social security quarters while they are married), (3) the sponsored immigrant relinquishes permanent resident status and leaves the country, (4) the sponsored immigrant obtains new status in a removal proceeding, or (5) the sponsored immigrant dies.³⁷³ None of these exigencies is in the control of the citizen or resident sponsor. To return to our previous example, assuming that the American wife was able to meet the \$33,500 minimum and sponsor her German husband, if they divorced and she refused to support him or his child, he could sue her for support as long as he is alive, has not yet naturalized or worked for forty social

370. See INA § 203(d), 8 U.S.C. § 1153(d) (2000) (entitling a child to the same status as the parent).

371. FORM I-864P, *supra* note 369.

372. See *id.* Both the sponsor and the beneficiary's assets are relevant to the calculation, but only in cases where the sponsor's income is not sufficient. See U.S. CITIZENSHIP & IMMIGRATION SERVS., DEPT OF HOMELAND SEC., FORM I-864 INSTRUCTIONS 8 (2006), available at <http://www.uscis.gov/files/form/I-864.pdf> [hereinafter FORM I-864 INSTRUCTIONS]. To qualify for admission, the sponsor and beneficiary must show that they own assets equal to three times the difference in income and threshold level on a petition for a spouse. Affidavits of Support on Behalf of Immigrants, 71 Fed. Reg. 35,732, 35,753 (June 21, 2006) (to be codified at 8 C.F.R. pt. 213a). The beneficiary's income does become relevant to the calculation under one scenario: where he can show by a preponderance of the evidence that his income will continue from the same source after the petition is approved. *Id.* at 35,749.

373. INA § 213A(a)(3), 8 U.S.C. § 1183a(a)(3); Affidavits of Support on Behalf of Immigrants, 71 Fed. Reg. at 35,754–55. Just as an immigrant spouse gets credit for “work” if his or her spouse works, a sponsored child gets credit for “work” if one of his or her parents works while the child is under eighteen. INA § 203(d), 8 U.S.C. § 1153(d).

security quarters, and remains in the country. Since the decision to naturalize and the decision to work are in his power, not hers, she is bound to support him regardless of his proclivities for work or citizenship.³⁷⁴ She would no longer have to support him if he both lost his permanent residency (i.e., by committing a deportable crime) and left the country. Yet even losing the permanent resident status *or* leaving the country, standing alone, will not terminate the contract.³⁷⁵ And, crucially, even divorce will not terminate the obligation of support.³⁷⁶ The affidavit of support creates a tangible and potentially permanent economic tie.

The actual affidavit of support, as set forth in Form I-864, consists of a set of instructions,³⁷⁷ a questionnaire that requires biographical information about the sponsored immigrant and financial information about the sponsor's income, and a space for the sponsor to certify under penalty of perjury that the information is accurate.³⁷⁸ Prior to 2006, Form I-864 gave very little indication that it involved a commitment that was potentially lifelong and could result in a private lawsuit brought by the immigrant against the sponsoring spouse. The form was recently amended and makes each of these facts clearer than it did before.³⁷⁹ But there are still good reasons to think that citizen sponsors executing Form I-864 are unlikely to understand

374. See *Cheshire v. Cheshire*, No. 3:05-cv-00453-TJC-MCR, 2006 WL 1208010, at *6-7 & n.12 (M.D. Fla. May 4, 2006) (holding that the husband in a divorce action is liable for payments based on an affidavit of support, that it is immaterial whether the defendant can afford the judgment, and that the wife is not required to work). For a criticism of the affidavit of support requirement, see Charles Wheeler, *Alien vs. Sponsor: Legal Enforceability of the Affidavit of Support*, 10 BENDER'S IMMIGR. BULL. 1791, 1791-92 (2005).

375. The sponsor's obligation to support the immigrant also terminates if the sponsor dies. Affidavits of Support on Behalf of Immigrants, 71 Fed. Reg. at 35,755. But if the deceased sponsor failed to support the immigrant while alive, the immigrant may sue the deceased's estate. *Id.* (stating that termination of the marriage does not relieve the sponsor's estate from any reimbursement obligation that accrued before termination); see also *In re Wenninger's Estate*, 1 N.W.2d 880, 882 (Wis. 1942) (holding that an affidavit filed with the U.S. Department of Immigration is a valid contract).

376. Affidavits of Support on Behalf of Immigrants, 71 Fed. Reg. at 35,740 (declining to add divorce to the circumstances that end the support obligation); FORM I-864 INSTRUCTIONS, *supra* note 372, at 3.

377. FORM I-864 INSTRUCTIONS, *supra* note 372, at 1-11.

378. U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., FORM I-864, at 1-8 (2006), available at <http://www.uscis.gov/files/form/I-864.pdf>.

379. *Id.* at 7 (outlining the conditions that terminate a sponsor's obligation).

that, by sponsoring an immigrant relative, they are potentially making themselves financially responsible for that relative in perpetuity. First, even with the recent amendments to the form, the emphasis in the affidavit is on checklists and worksheets on which the sponsor sets forth his or her income and tries to establish eligibility. It is not until page seven of the form, just before the sponsor's signature block, that the potential consequences are spelled out.³⁸⁰ Second, even if a sponsor actually understood the long-term implications of the affidavit of support, he would be unlikely to refuse to sign it. By the time he signs the affidavit of support, the sponsor has presumably waited for months, or perhaps years, to sponsor his relative for immigration. If the sponsors are married to each other, the immigration of one may be the only legal way in which they can be together. In this context, refusing to sponsor an immigrant would be tantamount to refusing to participate in the relationship, and would be subject to much of the same social disapproval as might occur with insistence on a prenuptial agreement. In fact, unlike a prenuptial agreement, the affidavit of support cannot be altered in any way, so a refusal to sign is not just a refusal to give the same level of support normally available under state law, but a refusal to sponsor the spouse for immigration status at all.³⁸¹ Thus, both the context in which the form is signed and its alleged purpose center not on the long-term relationship between the sponsor and immigrant, but on the relationship between the immigrant and the state.

Unlike alimony awards, which can create a permanent tie between divorced partners, the affidavit of support has the potential to create long-term and even permanent ties between an immigrant, his or her ex-spouse, and people who have no relationship to the marriage whatsoever. In cases where a spouse cannot meet the 125% of the federal poverty line requirement, he or she can have another person sign the affidavit of support as a joint sponsor. An individual family may have up to two joint sponsors in addition to the sponsoring spouse; e.g., one

380. *Id.*

381. We already know that most people do not sign prenuptial agreements because they are overly optimistic about their chances for a successful marriage or because signing a prenuptial agreement is considered "unromantic." See Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 445-49 (1993). There is no reason to think that these psychological dynamics are not also in play in the context of affidavits of support, especially given that the consequences of not signing are much higher.

main sponsor for the whole family, one joint sponsor for one half of the family, and another joint sponsor for the other half of the family.³⁸² To return to our German immigrant example, since his American wife does not make the requisite \$33,500 per year to qualify, she could enlist the help of joint sponsors. Perhaps she has a friend and an aunt, each of whom has two children, and each of whom makes \$30,000 per year. Her friend could be the joint sponsor for the husband, and her aunt could be the joint sponsor for the husband's daughter. Each makes more than 125% of the poverty line for their own household size including the sponsored immigrant, which in each of these cases is four. Because \$25,000 per year is 125% of the federal poverty level for a family of four, each is eligible to be the joint sponsor of one of the immigrants.³⁸³

The affidavit of support thus further affects marriages involving immigrants by creating the possibility of an outsider to the marriage gaining a proprietary interest in ensuring that the sponsor-immigrant relationship remains intact, because the joint sponsor is much more likely to be sued for support if the marriage disintegrates than if it continues. While under state family law there may be interested third parties affected by divorce (children, for example, or creditors who may lose access to marital property once it is divided), the affidavit of support creates a unique financial bond between a married couple and third parties, who may or may not be related to either of the spouses. Though normally the death of the sponsoring spouse would end the obligation, if a joint sponsor is involved, she remains liable even after the death of the primary sponsor.³⁸⁴

When Congress instituted the affidavits of support, it appears to have been mostly concerned with ensuring that immigrants would not wind up using means-tested benefits, such as welfare, Medicare, or Medicaid. The affidavits ensured that the government could sue a sponsoring family member for reimbursement if an immigrant received federal, state, or local means-tested aid. But section 213A of the INA went further than merely providing government the opportunity to sue for reimbursement. It also made affidavits of support enforceable through private lawsuits by the sponsored immigrant.³⁸⁵ Immi-

382. Affidavits of Support on Behalf of Immigrants, 71 Fed. Reg. 35,732, 35,753 (June 21, 2006) (to be codified at 8 C.F.R. pt. 213a).

383. For the 2006 poverty guidelines, see FORM I-864P, *supra* note 369.

384. Affidavits of Support on Behalf of Immigrants, 71 Fed. Reg. at 35,755.

385. INA § 213A(1)(B), 8 U.S.C. § 1183(a)(1)(B) (2000).

grants have recently brought enforcement actions on affidavits of support in the context of divorce proceedings, and most of these actions have been successful.³⁸⁶ Although the law has been in effect for less than a decade, instances of these enforcement cases appear to be proliferating. In these cases, courts have held that the affidavit of support is a contract between the sponsor and the federal government for the benefit of the sponsored immigrant.³⁸⁷

So far, no one has successfully challenged the enforceability of affidavits of support. In only two cases have defendants managed to get around the requirement, in one case by arguing that the obligation was taken on before the current law came into effect,³⁸⁸ and in the other by demonstrating that the plaintiff made substantially more money than he did.³⁸⁹ Even in the latter case, however, the affidavit was held to be technically enforceable: the court simply made the wealthier spouse liable to indemnify the poorer spouse for his obligation under the affidavit as part of an alimony award.³⁹⁰

In these cases and others, the defendants made many other arguments that the Form I-864 affidavit of support is not an enforceable contract, including ambiguity, vagueness (on the ground that the contract's term is too indefinite and potential liability is incalculable), insufficient consideration, adhesion,

386. See *Cheshire v. Cheshire*, No. 3:05-cv-00453-TJC-MCR, 2006 WL 1208010, at *5 (M.D. Fla. May 4, 2006) (holding that an affidavit of support is enforceable until one of five statutory conditions for termination is met); *Stump v. Stump*, No. 1:04-CV-253-TS, 2005 WL 1290658, at *5 (N.D. Ind. May 27, 2005) (holding that an ex-wife has standing to enforce the affidavit of support in either state or federal court); *Schwartz v. Schwartz*, No. CIV-04-770-M, 2005 WL 1242171, at *2 (W.D. Okla. May 10, 2005) (holding that the affidavit of support is enforceable and that the obligation survives dissolution of marriage); *Ainsworth v. Ainsworth*, No. Civ.A. 02-1137-A-M2, 2004 WL 5219036, at *3 (M.D. La. May 27, 2004) (enforcing an affidavit of support as part of a divorce case); *Davis v. Davis*, No. WD-04-020, 2004 WL 2924344, at *3 (Ohio Ct. App. Dec. 17, 2004) (holding that an affidavit of support is enforceable in either state or federal court).

387. See, e.g., *Stump*, 2005 WL 1290658, at *5.

388. *Tornheim v. Kohn*, No. 00 CV 5084(SJ), 2002 WL 482534, at *4 (E.D.N.Y. Mar. 26, 2002) (holding that a son-in-law could not enforce an affidavit of support because it was signed before the Attorney General published the revised Form I-864).

389. *Shahabudin v. Montford*, No. FA010451723S, 2002 WL 442257, at *1-3 (Conn. Super. Ct. Feb. 22, 2002) (holding that a plaintiff wife, an emergency room physician earning \$200,000 per year, must reimburse her husband, a police officer on disability leave, for liabilities that the husband incurs while meeting his affidavit of support obligations).

390. *Id.* at *2.

and that jurisdiction is limited to reimbursement actions.³⁹¹ Indeed, it is hard to believe that a prenuptial agreement with terms identical to the affidavit of support but omitting the U.S. government as a party to the contract would be enforceable in many jurisdictions. This is because the unconscionability rules governing prenuptial agreements are significantly looser than general contract law, and courts frequently strike provisions that seemed reasonable on the eve of the wedding and turn out to be unfair at the time of divorce.³⁹² Moreover, courts are especially sensitive to duress in cases involving premarital contracts, suspecting that a person presented with a contract on the eve of her wedding may not be in a position to refuse to sign.³⁹³

In creating the affidavit of support requirement, Congress appears to have been acting within its core immigration power by establishing a requirement for the admission of immigrants—that they not be potential public charges—and creating a system for implementing that requirement. The enforcement procedures whereby federal and state welfare agencies may seek reimbursement from the sponsoring spouse seek to ensure that the immigrant will not become a public charge in a very real sense—they prevent him from keeping money taken directly from the public fisc for his support and require his spouse to support him instead. But the inclusion of a private right of action against the citizen spouse intrudes further into state family law. The affidavit of support poses the most difficult case of where to draw the line between federal immigration law and state family law. Compared to IMFA, where Congress seems to be clearly acting within its plenary power over immigration,³⁹⁴ and to IMBRA, where portions of the law seem likely

391. Wheeler, *supra* note 374, at 1794–95.

392. See AM. LAW INS., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.05 (2003) [hereinafter ALI PRINCIPLES] (stating that a court should not enforce a term in a premarital agreement that would “work a substantial injustice” in certain circumstances).

393. See UNIFORM PREMARITAL AGREEMENT ACT § 6(a)(1) (1983) (stating that premarital agreements are not enforceable if not entered into voluntarily); ALI PRINCIPLES, *supra* note 392, § 7.04 (stating that a rebuttable presumption of informed consent and no duress exists only where (1) a contract was executed at least thirty days before the parties’ marriage, (2) both parties were advised to obtain legal counsel, and (3) if one party did not obtain legal counsel, the agreement stated in understandable language the nature of any rights or claims otherwise arising at dissolution that are altered by the contract).

394. See *supra* Part IV.B.1.

to have exceeded Congress's plenary power,³⁹⁵ the affidavit of support is less clearly categorized. On one hand, it is easy to create a reasonable-sounding immigration purpose. It is one thing, one might argue, to get married, but another thing entirely to use your marriage to effectuate someone else's immigration. If you want to do *that*, then you must make a potentially lifelong commitment, even though the laws of marriage and divorce in your state would not require such a commitment. On the other hand, when states have had exclusive jurisdiction over making the laws of marriage and divorce, passing a law that in some cases might effectively negate them (by, for example, requiring a court to order someone to pay the equivalent of permanent alimony to someone who would normally never be awarded it) seems to tread on states' rights.

CONCLUSION

In each of the four stages, immigration law regulates marriage very differently than family law does. In the first and third—courtship and the intact marriage—it regulates even where state family law has an explicitly hands-off attitude toward regulation. In the second and fourth stages—entry and exit—it regulates more intrusively and extensively than does state family law.

Sometimes this regulation of marriage, as with IMFA, appears to be an unintentional side effect of implementing immigration policy. In the case of IMFA, Congress was attempting to police the fraud that was the inevitable by-product of an immigration system that privileges spouses of citizens over other potential immigrants. Congress's goal of fraud prevention necessarily required it to spell out what kinds of marriages would qualify as legitimate. In other cases, Congress is engaged in a kind of backpedaling, attempting to intervene in marriage because of problems caused by immigration law itself. The provisions of VAWA that exempt battered spouses from the joint petition requirement, for example, make sense as an attempt to mitigate the harshness of the usual immigration rules. Finally, a third type of regulation intervenes in marriage because of congressional disapproval of certain relationships. IMBRA makes exceptions for "cultural" or "religious" matchmaking organizations not because matchmaking through these organizations has been proven to result in a better, smarter, or wealth-

395. See *supra* Part II.B.2.

ier immigrant population, but rather because it believes the marriages emerging from these entities are exempt from the unacceptable power dynamics it believes most “mail-order bride” marriages possess. In each case, regardless of Congress’s intent, immigration law is functioning as a form of family law for those who are regulated by it.

The most significant change that might occur in immigration jurisprudence if we were to think about immigration law as functional family law would be in how scholars and courts theorize about and construct the plenary power doctrine. Courts might consider, as this Article has done, whether the immigration provision in question is advancing core immigration policy goals or instead has ventured outside these goals into an area that has traditionally been within the province of the states. The plenary power doctrine has been chipped away at, modified, criticized, and debated by courts, scholars, and lawyers for over a hundred years, but its tension with state control over family law has never before been explored. Lawmakers might decide that principles of federalism mandate that laws be drafted in a way that will least intrude on state family law’s policy objectives while still fulfilling the goals of federal immigration policy. Courts interpreting these laws might construe them narrowly, so that minimal damage would be done to state law understandings of marriage.

Even in cases where Congress is clearly regulating immigration, and the impact on marriage is an incidental or unintended by-product of its immigration goals, Congress might do well to acknowledge the effect that immigration law has on marriage and consider the wealth of experience and information that state family law might provide. Family law offers organizing principles and theoretical models that would help us to understand the effects immigration law has on families. Immigration scholars and lawmakers should examine state family law to see how and why various doctrines have developed. They would then be in a better position to calibrate the effects of immigration law on the family. Even in cases where there is no question that Congress is acting within its plenary immigration power, an explicit recognition that immigration legislation functions as family legislation would force a conversation about the implications of particular laws for the family and would prevent immigration law from regulating the family unintentionally. All Americans have an interest in how immigration

2007] *REGULATION OF MARRIAGE* 1709

law shapes the marriages of the immigrants who will make up the next generation of American citizens.