

SPOUSAL IMMIGRATION TO THE UNITED STATES

History and Current Issues in American Immigration Policy

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Introduction

The United States is comprised of immigrants, from those who migrated during the colonial era to those arriving today. Many of these immigrants migrated to the United States through marriage—as the spouses of American citizens or accompanying an immigrant spouse. Marriage’s role in immigration has been central to the lived experience of many immigrants, but it has also been an important legal and regulatory tool for the government in shaping the population of the United States. In particular, immigrants from racial and religious groups outside the current norm do not always resemble the “ideal” American family, and have been denied admission based on family structure or cultural practices. By determining which marriages are valid and under what circumstances marriage can be a means for legal migration, the government can significantly influence which groups can migrate to the country and who is allowed to raise families of American citizen children in the United States.

Family migration is often discussed as if it is separate from labor migration. These two forms of migration, however, are interconnected, often involving the same migrants. Families migrate for economic reasons, and people who migrate alone for work often enter into new family relationships. Understanding the history and current state of marriage migration is therefore critical to understanding immigration law as a whole.

This Report provides an overview of the legal regulation of marriage migration in the United States. It begins with the era of colonization and settlement, when white Christian Europeans first began to settle in the American colonies, through the mid-nineteenth century and the settlement of the frontier. During this period, migration—especially migration from Northern Europe – was actively encouraged in marked contrast to much of the United States’ later immigration history. Because men made up most of the early colonists and settlers, efforts to encourage migration from Europe focused on bringing wives for these men to increase the population of white Christians and to increase the labor force through the birth of a new generation of citizens.

Not all of the early migrants to the colonies were free, and those who were indentured or enslaved were unable to marry legally. For indentured servants, this impediment lasted as long as their servitude. In contrast, the marriages of enslaved people were never legally recognized. Enslaved parents had no rights to their children, and slave owners could break apart families on a whim. White citizens could use marriage to solidify their claims to property and increase their population while denying those same benefits to enslaved people. For the people living in slave states, the decoupling of legal marriage from the migration of slaves bolstered white supremacy.

For Chinese migrants, the link between marriage and migration operated differently. In the late nineteenth century, an increase of Chinese immigrants, particularly in California, motivated Congress to pass the first significant federal restrictions on immigration. Chinese immigration was initially encouraged due to labor needs created by the Gold Rush and construction of the transcontinental railroad. However, when these labor needs dried up, Californians blamed Chinese immigrants for their own inability to

find work, and pressured the federal government to restrict Chinese immigration. Congress passed a series of laws targeting Chinese immigration, beginning with the *Page Law* of 1875, which targeted the immigration of Chinese women. By focusing first on women, and by defining “marriage” in a way that resulted in most Chinese female migrants being classified as “concubines” or “prostitutes” rather than wives, Congress was able to prevent Chinese family formation in the United States and pave the way for more comprehensive exclusionary legislation, such as the *Chinese Exclusion Act* of 1882.

In the early 20th century and the subsequent decades, the federal government began consolidating its power over immigration at the same time that the country grew increasingly hostile towards immigrants. Congress tightened immigration restrictions, some of which made it more difficult for unmarried women to immigrate. While the introduction of quotas allowed the government to shape the racial and religious makeup of arriving immigrants, family-based exceptions allowed many married women to avoid the quotas. During the fierce immigration debates of this era, sexism, racism, and the growing movement for women’s rights had a significant effect on the laws concerning marriage in immigration.

Although the law was complicated by the *War Brides Act* following World War II and increased suspicion of immigrants during the Cold War, the overall structure of the immigration quotas remained intact until the Immigration Act of 1965 eliminated the national origin quota system. Restrictions on same-sex couples persisted, however, and the new legal framework created new issues. Once national origins quotas were no longer in place, the number of immigrants from previously-restricted countries in Asia, Latin America, and Africa expanded.

In the 1980s and 1990s, Congress created regulations which attempted to balance the United States’ economic interests with concerns for family unification. To address problems which resulted from earlier immigration laws, Congress developed new statutes to address concerns about marriage fraud and domestic violence. More recent developments include a greater acceptance of immigrants who are in same-sex relationships, and a trend toward prioritizing family relationships beyond exclusively marital relationships. Throughout the changing contexts and priorities over the decades, the government has consistently used regulation over marriage migration as a tool to shape the make-up of American society.

1- Early welcome: The promotion of marriage migration during colonization, slavery, and the early decades of the United States

Initially, America encouraged immigration to both promote Christian civilization in the New World and to have an adequate number of workers. Initial gender imbalances necessitated encouraging women to migrate. However, the majority of immigrants were indentured servants, who were not allowed to marry during their terms of indenture. Because of the high demand for labor, Americans also turned to the deplorable practice of slavery. Slave owners had complete control over the family relationships of slaves who had no rights to marriage or family unification. After independence, immigration

remained largely encouraged in the western United States, while an increase in the number of immigrants from Europe prompted the eastern United States to implement some immigration restrictions. Further, during this time period, America tied women's citizenship to that of their husband's.

A- Incentives and obstacles for marriage migration during colonization

In contrast to much of American history, colonial America and the early decades of the country encouraged both immigration to America and migration within it. For many early arrivals, the circumstances surrounding their immigration had little to do with marriage. As immigration continued, the resulting gender imbalance made it imperative to convince European women to come to the colonies.

The nature of much of the immigration itself hindered the ability to marry. Only a quarter of immigrants coming to colonial America were free, while the other three quarters entered the country as slaves, convicts, or indentured servants.¹ For instance, an estimated seventy to eighty-five percent of immigrants who came to the Chesapeake Bay before 1700 were indentured servants.² Indentured servitude created a temporary obstacle to marriage, as indentured servants were not allowed to marry during their terms of indenture.³ Many female servants attempted to be released from service by marrying, leading some colonies to pass laws to close this loophole and prevent their release.⁴ In contrast, members of the upper classes were much more likely to be married during the colonial era, creating a class divide in marriage rates.⁵ These economic and practical realities impacted both migration and the ability and choice to marry.

During this period, few limits on immigration existed, although some colonies enacted limited regulations to prevent the entrance of criminals, the sick, or the poor.⁶ In some cases, colonial assemblies tried to disincentivize immigration, such as by creating taxes, land restrictions, and voting qualifications based on religion.⁷ Overall, however, America's borders remained open—a trend that continued even after independence.

¹ Aaron S. Fogleman, *From Slaves, Convicts, and Servants to Free Passengers: The Transformation of Immigration in the Era of the American Revolution*, 85 J. AM. HIST. 43, 43 (1998).

² *Id.* at 46.

³ Herbert Moller, *Sex Composition and Correlated Culture Patterns of Colonial America*, 2 WM. & MARY Q. 113, 139 (1945).

⁴ *Id.* at 143.

⁵ *Id.* at 139.

⁶ Lolita Buckner Inniss, *Dutch Uncle Sam: Immigration Reform and Notions of Family*, 36 BRANDEIS J. FAM. L. 177, 184 (1997).

⁷ Erika Lee, *Immigrants and Immigration Law: A State of the Field Assessment*, 18 J. AM ETHNIC HIST. 85, 87 (1999).

Most of these early immigrants were unmarried men. Though precise numbers are not available, one estimate based on ship passenger lists says that the ratio of men to women arriving in New England on ships was 3:2, and as high as 6:1 in Virginia.⁸ Immigration patterns differed among various groups, accounting for the different ratios. The Puritans often immigrated as families to New England, whereas immigrants to Virginia were predominantly workers or indentured servants, and usually male.⁹ Quakers largely immigrated as families as well, yet even in that group the majority of immigrants were men.¹⁰

This gender imbalance had several social repercussions. Interracial marriages, including relationships between colonial men and indigenous women, became common throughout the Americas wherever European women were scarce.¹¹ Some colonists attempted to persuade women in England to travel to the colonies to marry, though it was difficult to convince many women to make the trip.¹² However, the high demand for wives made dowry requirements less common in the colonies, so poorer women in Europe who could not afford a dowry saw the benefits in immigrating.¹³ Once those women arrived, young people were encouraged to marry as quickly as possible, with some colonies taxing or fining bachelors.¹⁴ The colonies were advertised as marriage markets for older unmarried women as well.¹⁵ These efforts were not solely for the benefit of individual colonists who wished to marry; rather, marriage and families, via both migration and procreation, were a crucial part of the colonists' efforts to promote Christian civilization in the New World.¹⁶ Further, a higher population was needed not only for religious and societal purposes, but also to increase the number of workers.¹⁷

B- Tearing families apart: Marriage and slavery in the colonies and the independent United States

While the immigration of white Europeans was encouraged, it existed alongside America's deplorable history of forced migration and slavery. Slave traders first forcibly transported black Africans to the Americas in 1619.¹⁸ While indentured servitude provided one source of field labor, they were insufficient to meet the labor demands of

⁸ Herbert Moller, *Sex Composition and Correlated Culture Patterns of Colonial America*, 2 WM. & MARY Q. 113, 115-118 (1945).

⁹ *Id.* at 118.

¹⁰ Rosemary O'Day, *Women's Agency in Early Modern Britain and the American Colonies*, 133 (2007).

¹¹ Moller, *supra* note 8, at 131-34. (This was particularly true in the frontier of the American colonies, New Netherlands and New France, and in Latin America, though less common in Puritan New England or Virginia. For a lengthier discussion of the class, gender, and racial issues surrounding these relationships and their connection to the rise of racism in America, *see id.* at 135-37.).

¹² Moller, *supra* note 8, at 130.

¹³ *Id.* at 141.

¹⁴ O'DAY, *supra* note 10, at 147.

¹⁵ *Id.* at 131.

¹⁶ *Id.* at 59-60.

¹⁷ *Id.* at 60.

¹⁸ PETER KOLCHIN, *AMERICAN SLAVERY: 1619-1877* 3 (1993).

the American plantations.¹⁹ Slavery provided a previously absent source of cash crop labor, and colonists justified it with the calculated and political use of race to reduce the slave to an inferior, non-human status.²⁰ This marked the first manipulation of public ideals regarding race to justify the country's official treatment of migrants. Although enslaved Africans obviously did not come to America for marriage, slavery nonetheless has a significant impact on marriage as slave owners controlled slaves' family relationships.

Under both state and federal law, slaves were viewed as property and lacked both human and civil rights, including rights to marriage and family unification.²¹ Further, slaves had no legal right to their own children.²² Instead, slave owners controlled interactions between slaves and their families, and any "approval of the union by the plantation owner was merely a license to breed, a wealth generating mechanism used by plantation owners to increase the number of slaves for their ownership and control."²³ Slaves' inability to enjoy legal recognition of their unions and offspring contributed to family separation and instability. The frequent sale of black slaves from plantation to plantation across the country compounded this separation. In the nineteenth century, roughly one million black slaves were sold from the upper to the lower South.²⁴ Unlike later immigration policies directed towards family reunification, these practices often disintegrated black slave families. As such, although slaves could arguably be considered migrants—albeit forced – they were afforded far fewer rights than any other historical immigrant group entering the United States.²⁵

C- Favoring families: State immigration law and westward expansion

In the decades following independence, the governmental structure and priorities shifted in ways that would have far-reaching ramifications for marriage migration. Early on, following the United States' independence from England, the country began a project of westward expansion, in which immigration was usually encouraged as a way to expand the country's borders and settle new territory. Initially, responsibility for immigration policy fell overwhelmingly to states and western territories rather than to the federal government.²⁶ That was in part because Southern states, eager to prevent the entry of free blacks into their territories, insisted that control over the migration of persons

¹⁹ EDWARD S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* 236 (1975).

²⁰ *Id.*

²¹ Darlene Goring, *The History of Slave Marriage in the United States*, 39 *J. MARSHALL L. REV.* 299, 301 (2006).

²² IRA BERLIN AND LESLIE S. ROWLAND, *FAMILIES AND FREEDOM: A DOCUMENTARY HISTORY OF AFRICAN-AMERICAN KINSHIP IN THE CIVIL WAR ERA* 7 (1997); ELIZABETH REGOSIN, *FREEDOM'S PROMISE: EX-SLAVE FAMILIES AND CITIZENSHIP IN THE AGE OF EMANCIPATION* 1-3 (2002).

²³ Goring, *supra* note 21, at 310.

²⁴ HERBERT G. GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750–1925* 144 (1976).

²⁵ Rhonda V. Magee, *Slavery As Immigration?*, 44 *U.S.F. L. REV.* 273, 282 (2009).

²⁶ GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 19-20 (2010).

across state lines was exclusively a state power.²⁷ While immigration continued to be supported in the western United States, an increase in the number of immigrants from Europe led states in the East to begin putting restrictions on certain immigrants.

Following the Civil War and the official abolishment of slavery, the federal government felt more secure passing limited immigration-related legislation, some of which favored married couples. Examples of federal legislation to encourage westward migration include the *Oregon Donation Land Act* of 1852²⁸ and the *Homestead Act*,²⁹ which both allowed white immigrants from Europe and the East Coast of the United States to make homestead claims, provided they filed a declaration of intent to become a citizen.³⁰ Some of these government policies promoted family unity by favoring married individuals. The *Donation Land Act*, for example, provided twice as many acres to married settlers as it did to single ones,³¹ apparently intending to stabilize the Oregon Territory communities that lacked adequate numbers of women.³²

The *Homestead Act*, passed in 1862, both extended and reduced the availability of land to new settlers. Under the Act, any male or female who was “the head of a family, or who ha[d] arrived at the age of twenty-one years” and had lived on and farmed a property for five years could obtain a homestead, but the ownership advantages previously available to married couples were removed.³³ Following the passage of the *Homestead Act*, the federal government “went on a major publicity campaign in Europe, distributing pamphlets that advertised the high wages available to U.S. workers and publicizing the land available to European immigrants.”³⁴ This indicated the desirability of cultivating a population that was primarily white.³⁵

States and territories, still the primary architects of immigration policy, generally welcomed immigrants up until the mid-nineteenth century. In the mid-1800s immigrants escaping revolution, famine, and lack of economic opportunity in Europe began arriving in droves on the East Coast of the United States.³⁶ By 1870, foreign-born residents accounted for forty percent of the populations of several major cities, including New York and Chicago.³⁷

²⁷ *Id.* at 34.

²⁸ Oregon Donation Land Act, ch. 76, 9 Stat. 496 (1850), amended by Act of July 17, 1854, ch. 84, 10 Stat. 305 [hereinafter *Oregon Donation Land Act*]; Homestead Act, ch. 75, 12 Stat. 392, 394 (1862).

²⁹ Homestead Act, 12 Stat. 392, 394 (1862).

³⁰ Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353, 1405 (2009).

³¹ Oregon Donation Land Act, 9 Stat. 496.

³² Abrams, *Hidden Dimensions*, *supra* note 30, at 1404.

³³ Homestead Act, 12 Stat. 392, 394 (1862).

³⁴ Abrams, *Hidden Dimensions*, *supra* note 30, at 1405.

³⁵ *Id.*

³⁶ *Id.* at 1354.

³⁷ *Id.*

In response to the influx of new immigrants and the fear that these immigrants would take jobs and burden the government social safety net—a fear that continues to drive immigration restriction in the United States today—states began to restrict certain types of undesirable immigrants.³⁸ Those “undesirables” included convicts,³⁹ the sick, or those who were likely to become “public charges,” a designation that still today remains one of the most frequent factors cited in inadmissibility findings.⁴⁰ New York’s definition of a public charge included the poor, unaccompanied widows, and widows with children.⁴¹ Massachusetts enforced laws restricting poor immigrants’ access to local relief funds.⁴² State legislation generally employed one of three methods for curbing “undesired immigration: return of the immigrant, punishment of the immigrant, and punishment of third parties responsible for the immigrant’s arrival.”⁴³

In the west, immigration had an even more significant impact on the region’s settlement and development.⁴⁴ As the United States encouraged western expansion, migrants from the East Coast of the United States as well as European, Mexican, Chinese, and Japanese immigrants traveled to newly-conquered western territories.⁴⁵ Western territories seeking statehood often used immigration policy to mold the type of civilized and democratized population considered worthy of American statehood.⁴⁶ While a limited number of these policies aimed—like their east coast counterparts—to curb the immigration of criminals, paupers, or the sick, the majority sought instead to foster immigration that contributed to the expansion of the family. This was accomplished by offering legal incentives like property transfers, the right to vote, and the expansion of jury service to women.⁴⁷ Immigration policy became a tool to draw in a particular population of desirable immigrants—explorers, laborers, teachers, and those “brides” that would be economically supported by their husbands.⁴⁸

D- Marital expatriation ties women’s citizenship to their husband’s

While the United States was choosing its favored immigrant population, it also allowed male citizens to choose a favored immigrant as well; their wives. An 1855 law granted citizenship to foreign-born women who married a U.S. citizen, so long as they could be naturalized under existing law.⁴⁹ That caveat left racial citizenship exclusions in

³⁸ Neuman, *supra* note 26, at 21.

³⁹ *Id.*

⁴⁰ Inniss, *supra* note 6, at 186.

⁴¹ See Act of July 11, 1851, ch. 523, 4, 1851 N.Y. Laws 969, 971-72 (1851).

⁴² Inniss, *supra* note 6, at 186-87.

⁴³ Neuman, *supra* note 26, at 42.

⁴⁴ Abrams, *Hidden Dimensions*, *supra* note 30, at 1354.

⁴⁵ *Id.* at 1355.

⁴⁶ *Id.* at 1401-02.

⁴⁷ *Id.* at 1408.

⁴⁸ *Id.* at 1357-1358.

⁴⁹ Act of Feb. 10, 1855, ch. 71, § 2, 10 Stat. 604 (1855); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 419-20 (2005).

place, which in 1855 meant that only white women could gain citizenship.⁵⁰ The law also included gender disparities, as a U.S. woman could not grant citizenship to her new husband.⁵¹ Finally, the *1855 Act* did not specifically discuss U.S. female citizens marrying non-citizen men.⁵² Before the Act, those women did not automatically lose their citizenship, though some courts found that the combination of marriage to a foreigner and moving to a foreign country could sometimes divest a woman of her citizenship.⁵³ However, courts treated the issue inconsistently in the years that followed the passage of the Act.⁵⁴

The *1855 Act* was based largely on the coverture system, and determined that a woman's citizenship was based on her husband's.⁵⁵ For a significant part of American history, the doctrine of coverture governed the relationships between husbands and wives. Under coverture, husbands had complete authority over their households and married women gave up numerous rights upon marriage, including the right to own property or make contracts.⁵⁶ Many Americans viewed women as their husband's property.⁵⁷ Typically, women's status followed their husbands', and whether a woman's citizenship followed her husband's would continue to be a deeply contested issue.⁵⁸

2- Chinese exclusion: the racially-based fears of prostitution, polygamy, and chinese citizenship

Early encouragement of immigration in the Western United States gave way to fear and exclusion of Asian immigrants, particularly Chinese immigrants. In the late nineteenth century, as the ethnic make-up of the western states began to diversify beyond white Europeans, state policies began to shift away from the encouragement of migration to the West, and the United States began its first use of racial and national origin criteria to control immigration flows. Many of the laws targeted women in particular, deliberately preventing marriage migration and family unification. The experience of Chinese immigrants in California, and the effect it had on Chinese immigrants' family ties, epitomizes this trend. In 1882, Congress passed the *Chinese Exclusion Act*, which banned the immigration of any Chinese laborers for a period of ten years.⁵⁹ This law dramatically changed the lives of many Chinese immigrant families and those who were hoping to immigrate. It had significant importance for marriage-based immigration, particularly regarding women's rights, prostitution, polygamy, and citizenship.

⁵⁰ Volpp, *supra* note 49, at 422.

⁵¹ *Id.* at 419-20; Act of Feb. 10, 1855, § 2.

⁵² Volpp, *supra* note 49, at 424.

⁵³ *Id.* at 418-19.

⁵⁴ *Id.* at 424-25.

⁵⁵ *Id.* at 419-21.

⁵⁶ Kerry Abrams, *Family Reunification and the Security State*, 32 CONST. COMMENT. 247, 251 (2017).

⁵⁷ Todd Stevens, *Tender Ties: Husbands' Rights and Racial Exclusion in Chinese Marriage Cases, 1882-1924*, 27 L. & SOC. INQUIRY 271, 274 (2002).

⁵⁸ Claire A. Smearman, *Second Wives' Club: Mapping the Impact of Polygamy in U.S. Immigration Law*, 27 BERKELEY J. INT'L L. 382, 440 (2009); Stevens, *supra* note 57 at 273.

⁵⁹ Act of May 6, 1882, ch. 126, § 15, 22 Stat. 58, 61 (1882).

A- The build-up to chinese exclusions and early laws

The first Chinese immigrants to the United States came seeking refuge from political oppression or in response to the labor shortage on the West Coast. At first, Chinese immigration was encouraged, as Chinese male immigrants provided labor for the construction of the transcontinental railroad.⁶⁰ The 1868 *Burlingame Treaty* with China⁶¹ recognized the mutual advantage of the free migration and exchange of the two countries' citizens, and granted Chinese nationals in the United States "the same privileges, immunities and exemptions in respect to travel or residence"⁶² as U.S. citizens. However, the treaty expressly denied U.S. citizenship to the Chinese.⁶³ Between 1850 and 1882, 250,000 Chinese immigrants arrived in the United States, the majority settling in California.⁶⁴

In the decades before the *Chinese Exclusion Act* was passed, public opinion concerning Chinese immigrants grew more negative as whites began to blame the Chinese for taking their jobs,⁶⁵ and resented the infiltration of non-white immigrants.⁶⁶ This negative sentiment was reflected in state court decisions and legislation. In 1854, for example,

The Supreme Court of California interpreted a California statute prohibiting 'blacks and Indians' from testifying in criminal proceedings against whites as barring testimony by Chinese. The court reasoned that the Chinese were a 'distinct ... race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point.'⁶⁷

California passed laws to deter Chinese entrants, including laws that denied them citizenship, excluded them from schools, levied specific taxes on them, prevented them from certain occupations, and specifically targeted Chinese women suspected of prostitution.⁶⁸

⁶⁰ Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century*

Origins of Plenary Power over Foreign Affairs, 81 TEX. L. REV. 1, 112 (2002) (In 1848, employers began to move their Chinese contract laborers to California to work the mines during the gold rush.). *Id.* at 112. Due to a shortage of women in California, Chinese men also filled positions doing laundry and cooking. Inniss, *supra* note 6, at 187.).

⁶¹ Treaty with China, July 28, 1868, U.S.-China, 16 Stat. 739 [hereinafter *Burlingame Treaty*].

⁶² *Id.* at art. VI.

⁶³ *Id.*

⁶⁴ Abrams, *Hidden Dimensions*, *supra* note 30, at 1355. (California became a state in 1850.).

⁶⁵ Cleveland, *supra* note 60, at 113 ("Forty-six percent of workers in the four major San Francisco industries, and twenty-five percent of all California workers, were Chinese.").

⁶⁶ *Id.* at 113-114 ("Chinese immigration was increasingly opposed by white labor groups, who equated Chinese workers with indentured 'coolie labor' which unfairly undermined white working conditions and wages.").

⁶⁷ *Id.* at 113.

⁶⁸ LUCY E. SALYER, *LAW HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* 5, 11-13 (1995).

Pressure from both California and prominent national political figures facilitated the start of the federal government's active involvement in directing immigration policy. Prior to this, the federal government had only passed two national immigration laws.⁶⁹ Specifically, Congress passed the *Page Law of 1875*,⁷⁰ which banned the immigration of women who entered into contracts for "lewd and immoral purposes," and made it a felony to import women into the U.S. for purposes of prostitution. Congress based the statute on the fear that the Chinese practices of polygamy and prostitution would infiltrate America via Chinese immigration, and passed the statute to prevent this from happening. Many Chinese immigrants were suspected of polygamy in the 1920s, and many polygamous wives were suspected of prostitution.⁷¹ Immigration officials mistook many Chinese polygamous wives and concubines for prostitutes, out of ignorance or disregard for Chinese families that included first wives (often left with the husband's family in China), second wives, and concubines.⁷² In practice, the result of the enforcement of this newly federalized immigration system was not just a reduction in prostitutes, but the virtually complete exclusion of Chinese women from the United States.⁷³ As such, Congress was able to prevent Chinese family formation in the United States and pave the way for more comprehensive exclusionary legislation, such as the *Chinese Exclusion Act of 1882*.⁷⁴ Additionally, by identifying and excluding Chinese women as prostitutes, the law prevented the birth of Chinese American children and stunted the growth of Chinese American communities.⁷⁵ This maneuver marked the United States' first reliance on marriage as a tool to limit the immigration of certain marginalized groups.

B- Efforts to prevent chinese immigrants and their descendants from gaining citizenship

Several of the immigration laws and treaties that were drafted prior to *the Chinese Exclusion Act* were specifically focused on denying citizenship to Chinese individuals. For example, even though the *Burlingame Treaty* welcomed immigration, it also stated that the law did not confer citizenship on Chinese citizens in the U.S. and vice versa.⁷⁶ Congress reaffirmed the Chinese's ineligibility for citizenship in 1875.⁷⁷

⁶⁹ Naturalization Act, ch. 3, 1 Stat. 103, 103-104 (1790) (repealed 1795) (a "whites only" naturalization rule that remained in place until 1870, when aliens of African descent were eventually permitted to naturalize. See Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256 (1870)); Alien and Sedition Act, Act of June 25, 1798, 1 Stat. 570 (1798) (permitting the president to deport individuals deemed by him to be dangerous, and used to silence anti-American political and ideological views).

⁷⁰ Act of Mar. 3, 1875 (Page Law), ch. 141, 18 Stat. 477 (1875) (repealed 1974).

⁷¹ MARTHA GARDNER, *THE QUALITIES OF A CITIZEN* 33 (2005); Martha M. Ertman, *Race Treason: The Untold Story of America's Ban on Polygamy*, 19 COLUM. J. GENDER & L. 287, 355 (2010).

⁷² Ertman, *supra* note 71 at 355-356.

⁷³ Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 698 (2005).

⁷⁴ *Id.* at 643.

⁷⁵ *Id.* at 641.

⁷⁶ *Burlingame Treaty*, *supra* note 77 at art. VI.

⁷⁷ Act of Feb. 18, 1875, ch. 80, §300B, 18 Stat. 316 (1875).

While Chinese men were feared because they may take jobs away from whites, Chinese women induced a different type of fear because they could have American citizen children, thus posing a threat to a white Christian America.⁷⁸ The United States' citizenship laws granted citizenship to anyone born in the U.S. and to the children of U.S. citizens born abroad.⁷⁹ However, although U.S.-born citizens of Chinese descent could bring their wives from China, those wives could not become citizens after the Supreme Court held that the law granting citizenship to the wives of Americans only applied to white women, and Chinese immigrants were unable to become naturalized citizens.⁸⁰

Further, many saw the Chinese practice of indentured servitude as slavery, which fortunately had become unacceptable in the United States in the decades following the Civil War.⁸¹ In the minds of xenophobic Americans, an increasingly Chinese population would bring a culture of slavery to a free America.⁸²

C- Polygamy's impact on chinese exclusion and 19th century immigration

Antipathy towards polygamy has been intertwined with immigration, racism, religious intolerance, and American family ideals almost since the advent of United States immigration law, and had a particular impact during the *Chinese Exclusion* era. The Supreme Court condemned polygamy as early as 1879, stating that it was an offense against society and that principles of religious freedom did not prevent the government from banning it.⁸³ Polygamists have been inadmissible since 1891, a ban that was reaffirmed in the 1950s.⁸⁴

The initial immigration ban was a response to both Mormon and Chinese polygamous practices.⁸⁵ Many Chinese immigrants were suspected of polygamy, particularly in the 1920s, and many polygamous wives were suspected of prostitution.⁸⁶ In Congress's mind, polygamy and prostitution were significant parts of Chinese culture, leading Congress to stereotype Chinese women as slave-like, with relationships that differed significantly from American marriages based on love.⁸⁷ If Chinese women had

⁷⁸ Abrams, *supra* note 73, at 661-62.

⁷⁹ Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629, 665 & 706 (2014).

⁸⁰ Stevens, *supra* note 57, at 287; Smearman, *supra* note 58, at 427 n. 330 (Citizenship derived from birth in the U.S. is known as *jus soli* citizenship, and citizenship derived from being born to a U.S. citizen is called *jus sanguinis* citizenship.).

⁸¹ Abrams, *Polygamy*, *supra* note 73, at 651-62.

⁸² *Id.*

⁸³ *Reynolds v. US*, 98 U.S. 145 (1878) (upholding the criminalization of polygamy); Sam Bernsen, *Needed Revision of Grounds of Exclusion: Marijuana, Communists, Homosexuals, and Polygamists*, 3 IN DEFENSE OF THE ALIEN 45, 52-53 (1980).

⁸⁴ Immigration and Nationality Act of 1952, ch. 477, § 212(a)(11), 66 Stat. 163, 182 (codified at 8 U.S.C. § 1182(a)(11) (1952)); Bernsen, *supra* note 83, at 52.

⁸⁵ Smearman, *supra* note 58, at 382.

⁸⁶ GARDNER, *supra* note 71, at 33; Ertman, *supra* note 71, at 355.

⁸⁷ Abrams, *Polygamy*, *supra* note 73, at 643.

American-born children, some Americans feared that those characteristics would spread to the United States.⁸⁸ American society also closely associated polygamy with slavery in the post-Civil War era, under the belief that women could never consent to such a system and were treated as slaves.⁸⁹ There were claims that polygamy would "pollute" the American family.⁹⁰ Much of the opposition to polygamy was religious. In the 19th century, polygamy was considered barbaric, implying that it was a foreign practice.⁹¹ Christianity and United States' status as a Christian nation were frequently invoked when discussing polygamy throughout immigration history.⁹²

D- The intersection of coverture and racial barriers

The Chinese Exclusion Act came head to head with the coverture law that prevailed for married women in the United States. Coverture laws found themselves at the intersection of race, marriage, immigration, and sexual immorality in many immigration proceedings. At the time of the *Chinese Exclusion Act*, the Chinese population in the U.S. was more than ninety-five percent male.⁹³ Typically, if an immigrant was married, his wife remained in China to care for parents and children.⁹⁴ If a man tried to bring his wife from China he faced a grey area of law where racial exclusion conflicted with a husband's right to have his wife's company under coverture.⁹⁵

Women labeled as prostitutes were deported, based in large part on the assumption that a prostitute could not be a true wife, invalidating any coverture rights their husband might have had.⁹⁶ In *U.S. v. Gue Lim*, the Supreme Court allowed wives of merchants to enter so long as their husband was exempted from exclusion laws, and immigration officials extended that exception to American citizens of Chinese descent and their wives.⁹⁷ The outcomes of similar cases were inconsistent, as judges recognized the husband's rights, but sometimes determined that opening the door to any Chinese woman to enter the country as a wife would undermine the *Exclusion Act*.⁹⁸ The denial of coverture rights was not limited to Chinese immigrants. Though coverture was the prevailing law at the time, non-white men were routinely denied coverture rights throughout the 19th century, including for marriages between slaves and via anti-miscegenation laws restricting whom men could choose as their wives.⁹⁹ While the denial

⁸⁸ *Id.* at 661-662.

⁸⁹ *Id.* at 659-60.

⁹⁰ Smearman, *supra* note 58, at 382.

⁹¹ Ertman, *supra* note 71, at 353-354.

⁹² *Id.* at 336, 356, 365. (citing *State v. Gibson*, 36 Ind. 389 (Ind. 1871); *Matter of H--*, 9 I&N Dec. 640 (B.I.A. 1962)).

⁹³ Stevens, *supra* note 57, at 271.

⁹⁴ *Id.* at 278.

⁹⁵ *Id.* at 273.

⁹⁶ *Id.* at 276.

⁹⁷ *Id.* at 275-276 (citing *U.S. v. Mrs. Gue Lim*, 176 U.S. 459, 20 S. Ct. 415, 44 L. Ed. 544 (1900)) (Chinese merchants were exempted from the Exclusion Act and their travel was never restricted.) *Id.* at 281.

⁹⁸ *Id.* at 275.

⁹⁹ *Id.* at 274.

of coverture rights would ordinarily be a victory for women, in this particular context it resulted in some wives' deportation, rather than any expansion of women's rights separate from their husbands.

3- Early twentieth century immigration laws: Married women's citizenship and immigration quotas

The federal government began increasing its control over immigration in the late 19th and early 20th centuries as a response to significant societal changes. In the marriage migration context, these controls would lead to two major immigration battles; one over marital expatriation, and the other over the quotas and restrictions that had impacted marriage and family unification. As Erika Lee observed, this increased federal control had two main causes:

First, drastic changes in the racial, ethnic, religious and cultural composition of the immigrant population between the 1870s and World War I triggered an explosive xenophobic reaction based on racial and religious prejudice, fears of radicalism, class conflict, and other concerns regarding national identity. Secondly, the growth and expansion of the national state provided the federal government with the administrative capacities to exercise its control over immigration.¹⁰⁰

Congress's Immigration Act of 1891 institutionalized the shift from state to federal dominion over immigration policy. With this Act, Congress gave federal administrators the sole power to enforce immigration laws.¹⁰¹ As a result, U.S. immigration history from the 20th century onward is centered on the federal government and its broad, exclusive power over immigration. With the support of the public and increasing immigration powers, policymakers had significant authority to keep anyone who did not fit the racial, religious, or economic profile of the ideal American immigrant out of the country. In pursuit of those goals, the federal government took two significant steps that would profoundly affect immigrant families and marriage: women's citizenship and quotas.

A- Women's citizenship through marriage and the expatriation Act of 1907

The ideal citizen, to lawmakers, did not include American women who "betrayed" their country by marrying a foreigner. The *Expatriation Act* of 1907¹⁰² had a profound impact on marriage in immigration by providing that American women who married alien husbands lost their U.S. citizenship and became aliens themselves.¹⁰³ This provision was

¹⁰⁰ Lee, *supra* note 7, at 88-89.

¹⁰¹ SALYER, *supra* note 68, at 1.

¹⁰² Expatriation Act of 1907, ch. 2534, 34 Stat. 1228 (1907).

¹⁰³ *Id.* at §3; GARDNER, *supra* note 71 at 14; CANDICE LEWIS BREDBENNER, A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP 66 (1998). (Before this law, it was unclear what the citizenship status of a woman who married a non-citizen was, but in practice she was still considered an American citizen unless she had lived abroad for a certain period of time.) *Id.* at 58. This provision was upheld in *Mackenzie v. Hare*, 239 U.S. 299 (1915).

another example of an immigration law based on coverture.¹⁰⁴ This led to statelessness for some women who did not gain automatic citizenship in the country of their husband.¹⁰⁵ The *Expatriation Act*'s goal was to reduce the number of U.S. citizens who were perceived to have harmed their citizenship with some type of foreign ties.¹⁰⁶ For the same reason, the Act also divested citizenship from those who lived abroad for too long.¹⁰⁷

Before passage, there was little public debate or support for expatriating women who married non-citizens.¹⁰⁸ After it was passed, women's groups immediately opposed the law due to the barrier it created to women's equality and citizenship.¹⁰⁹ Many women's groups were highly nativist, and many were affronted by the fact that foreign-born women could gain the right to vote while American born women were stripped of that right along with their citizenship upon marriage.¹¹⁰ Despite that outcry, the public came to view women who married non-citizens as willingly renouncing their citizenship, and public perception was fixated on women who married wealthy, titled Europeans in defiance of American disdain for aristocracy.¹¹¹ Women married to aliens could be expelled from the U.S., fired from certain jobs, excluded from some public assistance, or were classified as the enemy during World War I.¹¹²

The *Expatriation Act* was not the sole immigration law passed that year. *The Immigration Act* of 1907 also continued the country's history of preventing prostitutes, primarily Chinese prostitutes, from entering the country.¹¹³ Immigration officials believed that many marriages among Chinese immigrants were designed to smuggle prostitutes into the country.¹¹⁴ This law emerged as part of a broader trend of urban social reform and increased anxiety over gender roles, morality, and the white slave trade, continuing many of the concerns that had motivated the *Chinese Exclusion Act*.¹¹⁵

There was further concern that European women could circumvent immigration restrictions after committing crimes such as prostitution by marrying citizens.¹¹⁶ In Congress's mind, it was forced to weigh the values of family unification and a husband's right to be with his wife against the goal of protecting public health from prostitution.¹¹⁷ In an illustrative example, the case of *Low Way Suey v. Backus* concerned a Chinese woman whose husband and children were U.S. citizens and who was caught in proximity

¹⁰⁴ Smearman, *supra* note 58, at 440.

¹⁰⁵ Volpp, *supra* note 49, at 425.

¹⁰⁶ BREDBENNER, *supra* note 103, at 57.

¹⁰⁷ Expatriation Act of 1907, § 2; BREDBENNER, *supra* note 103, at 57.

¹⁰⁸ BREDBENNER, *supra* note 103, at 64.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (At the time, only some states allowed women to vote.)

¹¹¹ *Id.* at 72-73.

¹¹² *Id.* at 68.

¹¹³ Immigration Act of 1907, ch. 1134, §2, 34 Stat. 898 (1907); Stevens, *supra* note 57, at 291-292.

¹¹⁴ Stevens, *supra* note 57, at 291-292.

¹¹⁵ *Id.* at 292.

¹¹⁶ *Id.* (This was an issue the Dillingham Commission focused on heavily.). BREDBENNER, *supra* note 103, at 31.

¹¹⁷ Stevens, *supra* note 57, at 293.

to a brothel.¹¹⁸ By allegedly engaging in prostitution, she forfeited her rights as a wife and was deported.¹¹⁹ As Todd Stevens describes it, the case illustrates "the power of an accusation of prostitution to stigmatize a woman and strip her of any privileges judges reserved for wives and mothers."¹²⁰

B- The 1917 immigration Act: Restrictions and their impact on unmarried women

Congress continued to pass increasingly restrictive immigration laws, and a 1917 law represented a shift from regulation to restriction, targeting unmarried women, lower-class immigrants, and Asians.¹²¹ The deportation rules were strict. The law asserted that, if at any time within five years after entry into the country, it was discovered that an immigrant had violated the 1917 Act or any other United States law by advocating for anarchy, becoming a public charge, committing a crime of moral turpitude, practicing prostitution, or entering the United States without inspection, they could be deported.¹²² Further, the importation of any alien for prostitution was made punishable for a term of 10 years or less and a fine of \$5,000 or less.¹²³ The law additionally introduced an English literacy test.¹²⁴ Unmarried women already had difficulty entering the U.S. as they were likely to be deemed a public charge and sent back, but the literacy test provided yet another barrier.¹²⁵ Finally, the law also created an Asiatic barred zone, banning immigrants from many Asian countries.¹²⁶

Congress deliberately prevented women who engaged in immoral acts from becoming citizens, regulating the type of female citizen who was considered acceptable. A specific provision noted that marriage of a female of the "sexually immoral classes" to an American citizen would not vest her with United States citizenship if the marriage was solemnized after her arrest or after the commission of acts which made her liable to deportation under the act.¹²⁷ Another provision required the detention of the immigrating wives or minor children of a permanent resident if they had a contagious disease, pending determination that the disease was curable.¹²⁸ However, if the husband was a naturalized citizen, his wife or minor children would not be detained, and instead would be admitted for treatment in a hospital.¹²⁹

¹¹⁸ *Id.* at 294 (citing *Low Wah Suey v. Backus*, 225 U.S. 460 (1912)).

¹¹⁹ *Id.* at 294-95 (citing *Low Wah Suey*, 225 U.S. at 476.)

¹²⁰ *Id.* at 295.

¹²¹ BREDBENNER, *supra* note 103, at 40.

¹²² Immigration Act of 1917, ch. 29, 39 Stat. 874 §3 (1917).

¹²³ *Id.* at §4.

¹²⁴ *Id.* at §3; Inniss, *supra* note 6, at 191.

¹²⁵ Kerry Abrams, *Peaceful Penetration: Proxy Marriage, Same-Sex Marriage, and Recognition*, 2011 MICH. ST. L. REV. 141, 156 (2011).

¹²⁶ Immigration Act of 1917 §3; BREDBENNER, *supra* note 103, at 114.

¹²⁷ Immigration Act of 1917 §19; BREDBENNER, *supra* note 103, at 114.

¹²⁸ Immigration Act of 1917 §22; BREDBENNER, *supra* note 103, at 114.

¹²⁹ *Id.*

C- Growing opposition to marital expatriation

Marital citizenship and the *Expatriation Act* of 1907 gained significance in the 1920s, when female citizens were given the right to vote, a right that dramatically increased the importance of citizenship.¹³⁰ Similarly, the old 1855 law naturalizing women who married American men now presented a challenge to Congress's intention to restrict citizenship.¹³¹ When women gained the right to vote, the cost of losing their citizenship and thus their voting rights was thrown into sharp relief, escalating the urgency of ending marital expatriation.¹³² Congress supported derivative citizenship for wives for some time, arguing that it gave privileges to their American husbands, protected women from the challenges of non-citizenship, and promoted assimilation.¹³³ Congress also assumed that foreign-born women would view gaining American citizenship upon marriage as a gift, without considering that many may want to retain their own citizenship or have some choice in the matter.¹³⁴ Many women pointed out the discrepancy that American men were considered patriotic for marrying foreign-born women, while women who married foreign-born men were considered disloyal.¹³⁵ Women's nationality and citizenship rights were deeply intertwined with the immigration debate during this time period.¹³⁶

The *Cable Act* of 1922,¹³⁷ also known as the *Married Women's Independent Citizenship Act*, separated marriage from citizenship by determining that wives of United States citizens were no longer entitled to automatic citizenship.¹³⁸ While the Act was a victory for women's rights, the remaining restrictions made it harder for someone women to access citizenship. The *Cable Act* ended the expatriation of white or black women married to white or black foreign-born men.¹³⁹ However, American women who married men who were ineligible for citizenship, such as Asian men, would still lose their citizenship.¹⁴⁰ If those women were American born but not white or black, they could never regain their citizenship because they were now declared ineligible due to their race.¹⁴¹ Women who lived outside of the United States during their marriage were presumed to have renounced their citizenship, even after the marriage ended.¹⁴² Despite these serious

¹³⁰ BREDBENNER, *supra* note 103, at 17.

¹³¹ *Id.* at 17.

¹³² *Id.* at 81.

¹³³ *Id.* at 22.

¹³⁴ *Id.* at 90.

¹³⁵ *Id.* at 105.

¹³⁶ *Id.* at 111.

¹³⁷ Cable Act, ch. 411, §2, 42 Stat. 1021 (1922).

¹³⁸ Kerry Abrams, *What Makes the Family Special?*, 80 CHI. L. REV. 7, 11 (2013); GARDNER, *supra* note 71 at 124. (Women who married U.S. citizens were granted citizenship beginning in 1855.) BREDBENNER, *supra* note 103 at 115.

¹³⁹ Cable Act §3; Rose Cuison Villazor, *The Other Loving: Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361, 1393 (2011).

¹⁴⁰ Cable Act §3; Villazor, *supra* note 139, at 1393; Volpp, *supra* note 49, at 434.

¹⁴¹ BREDBENNER, *supra* note 103 at 98.

¹⁴² Cable Act §3. (Women lost their citizenship if they lived in their husband's country for two years, or in any other country for five years.); BREDBENNER, *supra* note 103, at 98.

issues in the *Cable Act*, most wives could now maintain their premarital citizenship, or begin the process of naturalization on their own volition as long as their husbands were eligible for citizenship.¹⁴³

When combined with other immigration laws, the *Cable Act* effectively excluded many women, both foreign and American-born, from entry and citizenship.¹⁴⁴ For example, women who married Americans after 1921 were still subject to the quota restrictions, discussed below, though they still had preferential status.¹⁴⁵ For expatriated women to regain their citizenship, they needed to return to the United States, establish residency, and petition for citizenship.¹⁴⁶ Unfortunately, the quotas barred some expatriated women from returning at all.¹⁴⁷ Despite gaining independent citizenship, not all women saw their situations improve, with results often based on the race of either spouse.¹⁴⁸ Immigration also became harder for foreign-born wives of Americans as they faced restrictions instead of automatic citizenship, though they did have more power to choose their country of citizenship.¹⁴⁹

The *Cable Act* was amended in 1930 to make the repatriation process easier, granting non-quota status to women who had lost their citizenship, and repealing the provision that removed citizenship from Americans living abroad.¹⁵⁰ The United States ended marital expatriation in 1934, though because they did not automatically regain citizenship, many women felt its effects long after.¹⁵¹

D- Introduction of permanent quotas and family privilege

Congress introduced the quota system to aggressively control the racial and national makeup of immigrants to the United States, while still promoting family unification values by allowing exceptions to the quotas. Laws passed in both 1921 and 1924 were the products of a nativist movement in the United States which arose partly from the Red Scare and a more generalized fear of both foreign and domestic radicals, and targeted Catholics, Jews, and radicals.¹⁵² The 1921 *Emergency Quota Act*,¹⁵³ proposing the suspension of immigration except for close relatives of resident immigrants, created the first quotas.¹⁵⁴ The House and Senate compromised on a

¹⁴³ BREDBENNER, *supra* note 103, at 97-98.

¹⁴⁴ *Id.* at 99.

¹⁴⁵ *Id.* at 115.

¹⁴⁶ *Id.* at 101.

¹⁴⁷ *Id.* at 115.

¹⁴⁸ *Id.* at 148.

¹⁴⁹ *Id.* at 149.

¹⁵⁰ *Id.* at 166.

¹⁵¹ *Id.* at 243.

¹⁵² Lee, *supra* note 7, at 91.

¹⁵³ Emergency Quota Act, ch. 8, 42 Stat. 5 (1921).

¹⁵⁴ *Id.* at §2; Abrams, *Peaceful Penetration*, *supra* note 125, at 155-56.

percentage plan that would base European immigration on national percentages from the 1910 census, and retained the bar against Asian immigrants.¹⁵⁵

However, the *Emergency Quota Act* is considered the first immigration law to specifically privilege family members over other types of immigrants.¹⁵⁶ Even with the quotas, the federal government still supported family unification, and made it easier for men to bring their families and establish a stable home with wives who were, as far as Congress was concerned, unlikely to compete for jobs.¹⁵⁷ Between the quotas, literacy tests, and the "likely to become a public charge" designation, marriage became incredibly valuable for women seeking to immigrate.¹⁵⁸

While initially viewed as temporary implementations, quotas were made permanent with the *Immigration Act* of 1924.¹⁵⁹ The main goal of the 1924 Act was to impose quotas on certain groups and entirely ban others.¹⁶⁰ Immigration of any nationality was limited to annual quotas of two percent of the number of that nationality that was residing in the United States according to the 1890 United States census.¹⁶¹ Because there were more European immigrants at that time than other nationalities, this ratio gave Europeans a higher quota. In addition, continuing anxiety over the growing Japanese population led to the complete exclusion of the Japanese, who had not been excluded by the 1917 Act's bar on many Asian countries.¹⁶²

There were "non-quota immigrants" exceptions for family members categorized as an unmarried child under 18 years of age or the wife of a citizen of the United States.¹⁶³ However, no exceptions existed for wives or minor children of resident aliens, or for husbands of United States citizens.¹⁶⁴ As a result, United States citizen women had more difficulty bringing their husbands to the United States because, unlike the wives of United States citizens, husbands were subject to the quotas.¹⁶⁵ For purposes of the quotas, women were assigned to the country of their husband's birth in some circumstances.¹⁶⁶ Congress considered the hardship the law would cause in separating immigrant families, but was also concerned about the possibility that family exceptions would lead to fraud.¹⁶⁷

¹⁵⁵ Inniss, *supra* note 6, at 191. (Japanese immigrants were still allowed in some cases.).

¹⁵⁶ Abrams, *What Makes the Family Special?*, *supra* note 138, at 11.

¹⁵⁷ BREDBENNER, *supra* note 103, at 117.

¹⁵⁸ Abrams, *Peaceful Penetration*, *supra* note 125, at 156.

¹⁵⁹ Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924).

¹⁶⁰ Abrams, *Peaceful Penetration*, *supra* note 125, at 169.

¹⁶¹ Immigration Act of 1924 §11(a); Inniss, *supra* note 6, at 192 (The law specified that in 1927, the ratio would be determined according to the 1920 census instead.).

¹⁶² Abrams, *Peaceful Penetration*, *supra* note 125, at 152-54.

¹⁶³ Immigration Act of 1924 § 4(a); Inniss, *supra* note 6, at 192.

¹⁶⁴ Immigration Act of 1924, 43 Stat. 159; Inniss, *supra* note 6, at 192.

¹⁶⁵ Abrams, *What Makes the Family Special?*, *supra* note 138, at 12-13.

¹⁶⁶ Immigration Act of 1924 § 12(a); Albert E. Reitzel, *The Immigration Laws of the United States - An Outline*, 73 VA. L. REV. 1099, 1112 n. 55 (1946).

¹⁶⁷ GARDNER, *supra* note 71 at 131 (citing Frank L. Auerbach, *The Status of Women Under US Immigration Law*, 25 INTERPRETER RELEASES 3 (1948)).

The 1924 Act also excluded aliens who would be ineligible for citizenship.¹⁶⁸ Only blacks and whites were eligible for citizenship, and Central, Southern, and Eastern Europeans qualified as white.¹⁶⁹ This categorically banned everyone of Asian descent from entering the country, even if they were married to United States citizens.¹⁷⁰ Wives of citizens who were themselves ineligible for citizenship weren't specifically mentioned in the Act, but immigration officials arrested many of them when they tried to enter the United States.¹⁷¹ In practice, however, many of those wives were allowed to stay with their families on bonds.¹⁷²

The 1924 Act additionally defined the type of immigrant marriages that the United States government considered acceptable by banning proxy marriages and picture-marriages, which were marriages that occurred without the groom in the home country.¹⁷³ The *1908 Gentlemen's Agreement* with Japan had essentially barred laborers from immigrating, but wives of Japanese men already in the United States were still able to immigrate.¹⁷⁴ Since returning to Japan to find a wife was difficult and expensive, many unmarried men used picture marriages to find wives, a practice where photos of the couple were exchanged and a ceremony was held in Japan without the groom.¹⁷⁵ Some Americans regarded this as deceitful and immigration officials would force the couple to remarry once the wife arrived.¹⁷⁶ Bowing to pressure from the United States, Japan agreed to stop issuing visas to picture brides in 1920.¹⁷⁷ As a result, Japanese men briefly returned to Japan to marry and brought their new wives back.¹⁷⁸ Americans opposed to Asian immigration claimed that women were brought over for immoral purposes, echoing many of the debates around the *Chinese Exclusion Act*.¹⁷⁹ The American public was also concerned that the wives were truly laborers and that Japanese women could give birth to American citizens and therefore change the racial makeup of the United States, also mirroring the concerns behind the *Chinese Exclusion Act*.¹⁸⁰

¹⁶⁸ Immigration Act of 1924 §13(c); A. Warner Parker, *The Ineligible to Citizenship Provisions of the Immigration Act of 1924*, 19 AM. J. INT'L L. 23, 23-24, 26 (1925).

¹⁶⁹ Parker, *supra* note 168, at 26-27.

¹⁷⁰ Mae M. Ngai, *Nationalism, Immigration Control, and the Ethnoracial Remapping of American in the 1920s*, OAH MAG. HIST., 13 (2007)

¹⁷¹ Stevens, *supra* note 77, at 300.

¹⁷² *Id.*

¹⁷³ Immigration Act of 1924, ch. 190, §28(n), 43 Stat. 153 (1924). Abrams, *Peaceful Penetration*, *supra* note 125, at 143.

¹⁷⁴ Abrams, *Peaceful Penetration*, *supra* note 125, at 143.

¹⁷⁵ *Id.* at 144-45.

¹⁷⁶ *Id.* at 146.

¹⁷⁷ *Id.* at 151.

¹⁷⁸ *Id.* at 152.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 149.

The ban on proxy marriages also excluded Eastern and Southern Europeans who had also been using proxy marriages to gain preferred status under the 1921 *Quota Act*.¹⁸¹ On the whole, the opposition to proxy marriages was based on racism and fear of "undesirable" people evading immigration laws and invading the U.S.¹⁸²

As marriage increasingly became the primary means for female immigration to the United States, Congress expanded beyond regulations on proxy marriages, and began regulating fraudulent marriages. A 1937 Act addressed the issue of using fraudulent marriage to gain entry into the United States.¹⁸³ The act determined that if an alien was discovered to have fraudulently contracted a marriage, they would be taken into custody for gaining entry using an invalid visa.¹⁸⁴ Additionally, the Act provided that if an immigrant failed or refused to fulfill the promise to marry that allowed their entry to the country, they would immediately become subject to deportation.¹⁸⁵ Under the authority of this Act, the United States devoted resources to vetting the validity of marriages, a trend that has grown over time and remains a priority today.

4- Military regulations and the war brides Act

The second World War had an enormous impact on all of American society, and marital immigration was no different. World War II provided the opportunity for millions of American soldiers to meet citizens of foreign countries, form relationships, and try to get married.¹⁸⁶ This presented very different issues from the immigration debates of the prior decades. The Supreme Court "has long recognized that the military is, by necessity, a specialized society separate from civilian society," and military law was instead based on the Articles of War at the time.¹⁸⁷ Within this framework, the military issued several regulations throughout World War II to prevent soldiers from pursuing marriages that would ultimately be broken up by American immigration laws. In the 1940s, military service personnel were required to obtain permission from their supervisors prior to getting married.¹⁸⁸

However, in 1945, American servicemen wanted to bring thousands of foreign brides back to the United States with them, pressuring Congress to create legislation to address the situation. In 1945, Congress estimated that there were "75,000 to 100,000 spouses of American service people throughout the world."¹⁸⁹ Considering the sacrifice that these military service members had made, the *War Brides Act* was passed. This Act

¹⁸¹ *Id.* at 157.

¹⁸² *Id.* at 166-67.

¹⁸³ Act of May 14, 1937, entitled "An act to authorize the deportation of aliens who secured preference-quota or non-quota visas through fraud by contracting marriage solely to fraudulently expedite admission to the United States and for other purposes." ch. 182, 50 Stat. 164 (1937).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Villazor, *supra* note 139, at 1399.

¹⁸⁷ *Id.* at 1398.

¹⁸⁸ *Id.* at 1407.

¹⁸⁹ *Id.* at 1404.

allowed for alien spouses or alien children of military veterans to gain entry to the United States without the delays incurred by the quota system.¹⁹⁰

The text of the *War Brides Act* only waived exclusionary bars related to physical and mental disabilities, not the exclusionary bars based on ineligibility for citizenship.¹⁹¹ Rather, the law explicitly stated that the noncitizen had to be “otherwise admissible under the immigration laws.”¹⁹² However, in 1947, Congress amended the *War Brides Act* to provide that the “alien spouse of an American citizen . . . shall not be considered as inadmissible because of race, if otherwise admissible.”¹⁹³ This would have allowed in alien spouses of Japanese descent, but the impact of this change was countered by military policy. In 1947, the Armed Forces created a regulation which explicitly articulated that: “Except under very unusual circumstances, United States military personnel and civilians employed by the War Department, will not be granted permission to marry nationals who are ineligible to citizenship in the United States.”¹⁹⁴ Individuals of Japanese descent were still ineligible for citizenship until 1952. Soldiers who submitted applications to marry Japanese women would sometimes instead be transferred to another country, to a Korean battlefield, or back to the United States.¹⁹⁵ However, applications for marriages between Japanese American soldiers and Japanese women were often approved because both spouses were the same race.¹⁹⁶

Since the “ineligible for citizenship” bar was not lifted until 1952, only 7,049 Asians entered the United States as war brides between 1946 and 1950, including only 766 Japanese brides.¹⁹⁷ In contrast, over 80,000 brides from Europe and thousands from Canada, Australia and New Zealand were allowed entry.¹⁹⁸ When Congress lifted the “ineligible for citizenship” bar to admission in 1952, over 4,000 Japanese war brides entered the United States that year.¹⁹⁹ Due to the combination of military and immigration regulations, an estimated 100,000 Japanese women married to American servicemen were left behind.²⁰⁰

The impact of the War Brides Act continued on in to the Cold War era. However, during that time, courts prioritized national security concerns above marital relationships. Nonetheless, the American public and media advocated for security concerns to be proven before they were used to exclude an alien spouse of an American citizen.

¹⁹⁰ Act of Dec. 28, 1945, ch. 591, 59 Stat. 659 (1945).

¹⁹¹ Villazor, *supra* note 139, at 1406.

¹⁹² *Id.*

¹⁹³ *Id.* at 1419.

¹⁹⁴ *Id.* at 1409.

¹⁹⁵ *Id.* at 1413.

¹⁹⁶ *Id.* at 1415.

¹⁹⁷ *Id.* at 1416.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 1417.

²⁰⁰ *Id.* at 1418.

A- War brides Act Clashes with racial barriers to citizenship: Bouiss

The confluence of immigration and military policy served as a barrier to many American soldiers who wanted to get married to Japanese citizens. Congress tried addressing these concerns through new policies and amendments to the *War Brides Act*. This involved negotiating tensions between two policy goals; promoting family unity for military members and keeping certain races out of the United States.

Helene Wilson and John Bouiss' case demonstrates the consequences of the combination of military and immigration policy. They faced the same difficulties as thousands of other couples, which eventually led to amendments in the *War Brides Act*. Helene Wilson, a half-Japanese, half-German woman and John Bouiss, an American soldier, met in November 1945.²⁰¹ By the time John was discharged in 1946, they were engaged and looking to move to the United States.²⁰² They married while on board a ship headed to the United States.²⁰³

Helene was refused entry to the United States by immigration officials at the border because of the ongoing bar to citizenship and admissibility for those of Japanese descent.²⁰⁴

The Board of Immigration Appeals affirmed the exclusion, so Helene was set to be deported.²⁰⁵ John filed a writ of habeas corpus on Helene's behalf in a federal district court, arguing that she was the lawful wife of a United States citizen, thus admissible under the *War Brides Act*.²⁰⁶ The case continued through the U.S. court system, and an appellate court ultimately determined that the *War Brides Act* did not expressly lift the excludability of persons ineligible for citizenship, thus it still excluded Japanese war brides.²⁰⁷ The case did not go on to the Supreme Court.

However, popular demand and lobbying caused Congress to pass the 1947 amendment to the *War Brides Act*, mentioned above, which allowed in alien spouses who were inadmissible based solely on race.²⁰⁸ This amendment only applied to couples who had married by August 22, 1947.²⁰⁹ A later 1950 amendment allowed couples who married within the six months following the amendment's enactment.²¹⁰ These amendments allowed thousands of couples to get married, and Helene and John's marriage was validated by the 1947 amendment.²¹¹

²⁰¹ *Id.* at 1363.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Brief for Appellant at 2, *Bonham v. Bouiss*, 161 F.2d 678 (9th Cir. 1947) (No. 11451).

²⁰⁵ Villazor, *supra* note 139, at 1384-1385.

²⁰⁶ *Id.* at 1385.

²⁰⁷ *Id.* at 1387, *see also Bouiss* at 679-680.

²⁰⁸ Villazor, *supra* note 139, at 1419.

²⁰⁹ *Id.* at 1421.

²¹⁰ *Id.* at 1421.

²¹¹ *Id.* at 1422.

B- War brides Act creates opportunity for marriage fraud: *Lutwak v. United States*

Though Congress wanted to honor American veterans and allow them to bring an alien spouse to the United States with them, the *War Brides Act* also created an opportunity for fraudulent marriages. In *Lutwak*, United States citizens were indicted for conspiracy to bring Polish refugees from a Nazi concentration camp to the United States. A sister and her nephew, who were domiciled in the United States, arranged marriages between the United States resident nephew and his refugee aunt-in-law, and the nephew's two uncles and two discharged female veterans.²¹² The plan was to have the three United States veterans travel to Paris, have marriage ceremonies with the refugees, and return to the United States, presenting the refugees as alien spouses of World War II veterans.²¹³ Upon returning to the United States, they ultimately intended to sever the legal ties between the veterans and refugees.²¹⁴ None of the marriages were consummated, nor did any of the spouses cohabit.²¹⁵

One defendant was acquitted because he had begun living with his new wife and expressed a desire to stay married by the time the trial started.²¹⁶ However, the other two defendants (the sister and nephew who had arranged the marriages), and the other two refugee spouses were all convicted of “‘conspiracy to defraud the United States of and concerning its government function and right of administering’ the immigration laws... by obtaining the illegal entry into this country of three aliens as spouses of honorably discharged veterans.”²¹⁷

In so deciding, the Supreme Court determined that the validity of the marriages was not even material to their decision. Instead, the Court considered the marriage ceremonies as “only a step in the fraudulent scheme and actions taken by the parties to the conspiracy.”²¹⁸ The Court was displeased that the parties had used marriage to defraud the immigration system and gained a benefit that they did not deserve.²¹⁹ While it allowed “alien spouses” of citizen war veterans to enter the United States, “Congress did not intend to provide aliens with an easy means of circumventing the quota system by fake marriages in which neither of the parties ever intended to enter into the marital relationship...”²²⁰ Thus, the immigration process for legitimate alien spouses of citizen war veterans had to be accompanied by monitoring and vetting to ensure that these easier paths of entry were not used for fraudulent ends.

²¹² *Lutwak v. United States*, 344 U.S. 604, 606 (1953).

²¹³ *Id.* at 607.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Abrams, Family Reunification and the Security State*, *supra* note 56, at 261-262.

²¹⁷ *Lutwak v. United States*, 344 U.S. 604, 605 (1953).

²¹⁸ *Id.* at 612.

²¹⁹ *Abrams, Family Reunification and the Security State*, *supra* note 56, at 263.

²²⁰ *Lutwak v. United States*, 344 U.S. 604, 611 (1953).

C- National security interests outweigh family reunification during Cold War era

Knauff v. Shaughnessy and *Shaughnessy v. Mezei* were cases decided at the height of the Cold War,²²¹ during a period when the United States Supreme Court upheld congressional and executive actions that allegedly promoted national security, even at the cost of family separation.²²² This prioritization reflected heightened anxiety over border security and concerns that foreign spouses could be spies.²²³ Judicial decisions made during this political climate resulted in a doctrine of judicial deference to the executive branch in the area of immigration.²²⁴ These two cases involved allegations of a national security threat, and the judicial branch was warned that its interference could jeopardize national security.²²⁵

Based on the political environment and these legal doctrines, *Knauff* established that an alien has no right to enter the United States: the minimal statutory procedures were the full process of law for an excludable alien.²²⁶ Taking one step further, the Court in *Mezei* held that detention under minimal statutory procedures was permissible.²²⁷ Both cases involved separation of one spouse from a United States citizen spouse, but the Supreme Court did not find this interest sufficiently weighty to overcome ostensible security threats.

Knauff v. Shaughnessy was a 1950 case involving an alien war bride seeking to enter the United States.²²⁸ The Court of Appeals determined that the Attorney General could bar an alien bride without a hearing during a national emergency, and the Supreme Court affirmed that decision.²²⁹ Ms. Knauff was a German citizen who married U.S. citizen Kurt W. Knauff, a civilian employee of the United States Army, in 1948.²³⁰ Ms. Knauff sought to enter the United States to be naturalized in 1948.²³¹ Instead, she was excluded without a hearing, and the Attorney General entered a final order of exclusion.²³² The Attorney General concluded that the public interest required denial of Ms. Knauff's entry to the United States.²³³ This decision was based on confidential information, and the Attorney General denied her a hearing because he believed that disclosure of the confidential information would endanger the public security.²³⁴

²²¹ Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 1003 (1995).

²²² Abrams, *Family Reunification and the Security State*, *supra* note 56, at 259.

²²³ *Id.* at 264.

²²⁴ Weisselberg, *supra* note 221, at 938.

²²⁵ *Id.* at 1003.

²²⁶ Christopher Yukins, *The Measure of a Nation: Granting Excludable Aliens Fundamental Protections of Due Process*, 73 VA. L. REV. 1501, 1509 (1987).

²²⁷ *Id.*

²²⁸ *Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

²²⁹ *Id.* at 547.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* at 539-540.

²³³ *Id.* at 544.

²³⁴ *Id.*

In approaching this case, the Supreme Court found that the decision to admit or exclude aliens is an executive power, and that the President could delegate the function to an executive officer, such as the Attorney General.²³⁵ The Court deemed that nothing indicated that Congress intended to permit members of the armed forces to bring alien spouses into the United States who the President, acting through the Attorney General, denied entry for security reasons.²³⁶

However, the Supreme Court's decision was not the last word on Ms. Knauff. Nationwide media condemned the decision, and Congress began supporting this initiative, with private bills for Ms. Knauff's relief introduced in both the Senate and House.²³⁷ Ms. Knauff was given a hearing by the Attorney General.²³⁸ Though she initially lost, she won on appeal and was admitted into the United States.²³⁹ The confidential information that Ms. Knauff's case was based on was later revealed as a false allegation made by her husband's former lover.²⁴⁰ Although the executive branch and the Supreme Court were willing to prioritize alleged threats to national security over family reunification, the American public was unwilling to accept Ms. Knauff's exclusion absent evidence of an actual threat to national security.

Shaughnessy v. Mezei, decided in 1953, presented a case that was substantially similar to *Knauff*, though *Mezei* had the added element that the immigrant spouse was prevented from returning to his old country.²⁴¹ The Court based its decision in *Mezei* on national security, and gave little consideration to family unification.

Mezei, immigrated from Gibraltar in 1923, and lived in New York until 1948.²⁴² During that time, he married an American citizen and had children, however, he still retained "alien" status.²⁴³ He then left the country to visit his dying mother.²⁴⁴ Upon his attempted return, he was excluded by an immigration inspector and awaited his case's outcome on Ellis Island.²⁴⁵ The Attorney General reviewed the evidence and ordered permanent exclusion, based on "information of a confidential nature, the disclosure of which would be prejudicial to the public interest."²⁴⁶

²³⁵ *Id.* at 543.

²³⁶ *Id.* at 547.

²³⁷ Weisselberg, *supra* note 221, at 960. (These bills did not end up passing, but in the January 1951 session, Congress introduced private bills once more.)

²³⁸ *Id.*

²³⁹ *Id.* at 963-964.

²⁴⁰ Niels W. Frenzen, *National Security and Procedural Fairness: Secret Evidence and the Immigration Laws*, 76 No. 45 INTERPRETER RELEASES 1677, 1678 (1999).

²⁴¹ *Shaughnessy v. Mezei*, 345 U.S. 206 (1953).

²⁴² *Id.* at 208.

²⁴³ *U.S. ex rel Mezei v. Shaughnessy*, 195 F. 2d 964 (2nd Cir. 1952).

²⁴⁴ *Mezei*, 345 U.S. at 208.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

Mezei then attempted to gain entry to over a dozen other countries, but was refused.²⁴⁷ Finally, he stopped trying to leave, found himself stuck on Ellis Island, and sought habeas relief.²⁴⁸ The District Court and the Court of Appeals decided that Mezei could not continue to be detained without proof of his danger to public safety.²⁴⁹

The Supreme Court, however, found that Mezei was properly excluded and detained without a hearing. Again, the Court asserted that the power to exclude aliens is a “fundamental sovereign attribute” that is “largely immune from judicial control.”²⁵⁰ The Court stated that “whatever the procedure authorized by Congress is, it is due process.”²⁵¹ The Court was unwilling to allow family reunification to override Congress’ preference for national security.

As with Knauff, this was not the end of Mezei’s story. Newspapers again vehemently disagreed with the opinion and Congress introduced private relief bills.²⁵² The Attorney General agreed to have the case reviewed.²⁵³ The review determined that Mezei should be excluded from the U.S. based on a crime he had committed, and membership in the Communist party.²⁵⁴ However, considering the light nature of his crime (receiving seven bags of stolen flour), and the minor role Mezei had played in the Communist Party, another off-the-record recommendation was made that Mezei be released on immigration parole.²⁵⁵ On the same day that the exclusion decision was handed down, the Attorney General announced that Mezei would be paroled into the United States.²⁵⁶

Five years later, the Court adopted a narrow interpretation of *Mezei* in *Leng May Ma v. Barber*.²⁵⁷ It determined that the nation’s right of self-protection should not allow for detention of excludable aliens except in situations where the alien poses a national security threat. Instead, the Court determined that parole could serve in the place of detention, and that detention should be the exception, not the rule.²⁵⁸

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *U.S. ex rel Mezei v. Shaughnessy*, 101 F. Supp. 66, 70 (S.D.N.Y. 1951); *United States ex rel. Mezei v. Shaughnessy*, 195 F.2d 964 (2nd Cir. 1952).

²⁵⁰ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

²⁵¹ *Id.* at 212.

²⁵² *Weisselberg*, *supra* note 221, at 970-971.

²⁵³ *Id.* at 971.

²⁵⁴ *Id.* at 975.

²⁵⁵ *Id.* at 983-984.

²⁵⁶ *Id.* at 984.

²⁵⁷ Barbara A. Bailey, *The Indefinite Detention of Excludable Aliens: Palma v. Verdeyen*, 16 N.Y.U. J. INT’L L. & POL. 119, 128 (1983).

²⁵⁸ *Id.* at 128-129.

5- The immigration and nationality Act of 1952: Balancing family reunification with economic goals

The 1952 Immigration and Nationality Act (INA) was the first comprehensive immigration act, which codified and revised prior immigration laws into a single act.²⁵⁹ Although the law effected every aspect of immigration, it also had a significant impact on marriage and families by allowing derivative status for family members of visa holders, creating family preference categories for immigration, and combatting marriage fraud. Its passage was accompanied by the repeal of immigration acts passed in 1917, 1924, and 1940, which created numerous immigration restrictions, including quotas, as described earlier.²⁶⁰ Passed during the Cold War, some proponents argued that the law was necessary because America was a last holdout of western civilization and needed protection from being overrun by those who might oppose its values.²⁶¹ Passage of the 1952 Act was controversial, and Congress had to override a veto by President Truman, who denounced the national origins quota included in the Act as “being unworthy of American ideals because it ‘discriminates, deliberately and intentionally, against many of the peoples of the world.’”²⁶²

This *Immigration and Nationality Act’s* stated goals were (1) the reunification of families, (2) the protection of the domestic labor force, and (3) the immigration of people with needed skills.²⁶³ The goal of family unity was implemented in part by providing derivative immigration status to the spouses and children who would either “accompany” or “follow to join” an immigrant who fell into one of the family preference categories.²⁶⁴ This also applied to families joining employment-based immigrants and immigrants who gained status through the diversity program.²⁶⁵

The 1952 Act changed the formula that was created in 1924 to a quota that limited entry to one-sixth of one percent of the number of inhabitants in the United States who traced their ancestry to each country in 1920.²⁶⁶ This quota formulation resulted in more visas for northern Europeans as opposed to southern and eastern Europeans because more

²⁵⁹ Samuel W. Bettwy, *A Proposed Legislative Scheme to Solve the Mexican Immigration Problem*, 2 SAN DIEGO INT’L L. J. 93, 105 (2001).

²⁶⁰ Henry Hazard, *The Immigration and Nationality Systems of the United States of America*, 14 F.R.D. 105, 137 (1953, 1954).

²⁶¹ Gabriel J. Chin, *Were the Immigration and Nationality Act Amendments of 1965 Antiracist?*, in THE IMMIGRATION AND NATIONALITY ACT OF 1965 11, 25 (Gabriel J. Chin & Rose Cuison Villazor, eds. 2015).

²⁶² Mary Jane Lapointe, *Discrimination in Asylum Law: The Implications of Jean v. Nelson*, 62 IND. L. J. 127, 131 (1986).

²⁶³ Fernando Colon-Navarro, *Familia e Inmigracion: What Happened to Family Unity?*, 19 FLA. J. INT’L L. 491, 491-492 (2007).

²⁶⁴ *Id.* at 498.

²⁶⁵ The Diversity Immigrant Visa Program makes 50,000 immigration visas available annually, drawn from random selections among all entries to individuals who are from countries with low rates of immigration to the United States. U.S. CITIZENSHIP AND IMMIGRATION SERVS., GREEN CARD THROUGH THE DIVERSITY IMMIGRANT VISA PROGRAM (last updated Jan. 11, 2018), <https://www.uscis.gov/greencard/diversity-visa>.

²⁶⁶ Chin, *supra* note 261, at 17.

northern Europeans were already in America in 1920.²⁶⁷ Thus, some southern and eastern European countries received low quotas, and sometimes even the minimum number of visas (100 per country).²⁶⁸ The 1952 Act also blatantly excluded Americans of African descent from counting for quota purposes, lowering the number of visas that they could qualify for.²⁶⁹

Within the quota, Congress created four preference categories, which demonstrated prioritization of economic need and family unification. The first 50 percent of spots were allocated to immigrants whose services were determined by the Attorney General to be urgently needed by the United States economy, its cultural interests or its welfare, and to the spouse or children of such immigrants.²⁷⁰ This constituted the creation of separate categories for employment-based immigration and family-based immigration.²⁷¹ The next 30 percent of visas were for immigrants who were parents of United States citizens who were at least 21 years old.²⁷² The final 20 percent of the quota was reserved for spouses or children of aliens lawfully admitted for permanent residence in the United States.²⁷³ If additional quota spots remained, they were to go to brothers, sisters, sons or daughters of United States citizens.²⁷⁴ In order to apply, the citizen or legal permanent resident (LPR) spouse had to submit a petition, meaning that they had control over the foreign spouse's immigration status.²⁷⁵ This control later created the need for additional regulations to protect such foreign spouses, as will be discussed below. The Act gave citizen women the same right to sponsor family members as citizen men.²⁷⁶ Additionally, the Act distinguished immigrants and nonimmigrants, with nonimmigrants being those who were given temporary admission, and who were expected to leave once their admission has expired.²⁷⁷

In addition to the restrictions imposed by the national origins quota, the Act restricted immigration in several other ways. The 1952 Act ended racial restrictions on naturalization, which was previously only available to whites, people of African ancestry, and more recently, Chinese, Filipinos, and Indians.²⁷⁸ Because admissibility had previously been limited to those who were able to naturalize, 31 classes of aliens became admissible under the Act.²⁷⁹ However, while the 1952 Act eliminated the bar against

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ 8 U.S.C.A. § 1153 (2006).

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture's Diminishment, but Not Its Demise*, 24 N. ILL. U. L. REV. 153, 166 (2004).

²⁷⁶ Rose Cuison Villazor, *The 1965 Immigration Act: Family Unification and Nondiscrimination Fifty Years Later*, in *THE IMMIGRATION AND NATIONALITY ACT OF 1965* 197, 204 (Gabriel J. Chin & Rose Cuison Villazor, eds. 2015).

²⁷⁷ Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952).

²⁷⁸ Villazor, *supra* note 276, at 203.

²⁷⁹ Hazard, *supra* note 260, at 137.

naturalization for citizens of Asian countries, this barrier was partially replaced by the “Asia-Pacific triangle.”²⁸⁰ All countries in Asia were limited to a collective cap of 2,000 visas.²⁸¹ President Truman opposed the Act for this reason, but Congress overrode the presidential veto.²⁸²

Additional immigration restrictions were imposed by categories of ineligibility including the insane, paupers, those who had committed crimes of moral turpitude, prostitutes, skilled or unskilled laborers if sufficient workers were available in the United States, those who were likely to become a public charge, and other categories.²⁸³ The Act also carried over the preexisting list of immigration offenses, including bringing illegal aliens into the United States, concealing facts from immigration officers to gain entry to the United States, reentering after deportation, importation of aliens for immoral purposes, and more.²⁸⁴

The Act also distinguished between marriages entered into for the purpose of gaining entry into the United States from marriages entered into for other reasons.²⁸⁵ If a marriage was entered into less than two years prior to entry and was annulled or terminated within two years subsequent to entry, the INA makes the immigrant deportable.²⁸⁶ However, deportation could be avoided if the alien could establish “to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws.”²⁸⁷ The Immigration and *Nationality Act* created the baseline regulation for immigration in the United States. The 1952 INA is still in use today, and it has undergone several rounds of amendments, discussed below.

A- Changes to the polygamy ban in the INA and through the modern era

In addition to the numerous changes that the INA made regarding immigrant families, the law also adjusted the longstanding polygamy ban. This portion of the INA has been amended several times since the law was originally enacted, with the scope of the ban narrowing slightly through the years. The INA excluded polygamists as well as those who practiced or advocated for polygamy.²⁸⁸ That definition remained in force for

²⁸⁰ Chin, *supra* note 261, at 23.

²⁸¹ Immigration and Nationality Act of 1952, 66 Stat. 163; Lapointe, *supra* note 262 at 131. (“The Asia-Pacific triangle included countries from Pakistan to Japan and the Pacific Islands north of Australia.”).

²⁸² CTR FOR IMMIGR. STUD., *Three Decades of Mass Immigration: The Legacy of the 1965 Immigration Act*, (Sept. 1, 1995), <http://www.cis.org/articles/1995/back395.html>.

²⁸³ Bailey, *supra* note 257 at n. 2, *see also* 8 U.S.C. §1182.

²⁸⁴ Bailey, *supra* note 257 at n. 2.

²⁸⁵ Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 702 (1997).

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ Immigration and Nationality Act of 1952, ch. 477, § 212(a)(11), 66 Stat. 163, 182 (codified at 8 U.S.C. § 1182(a)(11) (1952)); Smearman, *supra* note 58, at 397; This was similar to the ban dating back to the 1907 and 1917 Immigration acts, which extended the ban to those who believed in or advocated for polygamy as well as those actively engaged in the practice. *Id.* at 396.

decades, until the 1990 *Immigration Act* significantly reduced the categories of people who were excluded.²⁸⁹ The 1990 Act limited the ban to those who intended to practice polygamy in the United States and allowed former polygamists and polygamy advocates in, thus focusing exclusively on future conduct in the United States.²⁹⁰ In the modern era, the Board of Immigration Appeals has defined polygamist in immigration as someone who subscribes to the historic custom or religious practice of polygamy, saying that merely showing that a person had more than one spouse at once is not sufficient.²⁹¹ The current law states that, "any immigrant who is coming to the United States to practice polygamy is inadmissible."²⁹²

From the INA through today, the polygamy ban has impacted several stages of the immigration process, including initial admission, obtaining legal permanent resident status, and getting derivative spousal benefits.²⁹³ Good moral character is a requirement for many immigration benefits, including naturalization, and polygamy is a statutory bar for finding good character under INA § 1101(f)(3).²⁹⁴ For example, a domestic violence victim must prove good moral character to self-petition for residency or protection from removal under the Violence Against Women Act, which effectively prevents women in polygamous marriages from receiving these protections.²⁹⁵ Polygamy is also considered a crime of moral turpitude, and therefore subjects the practitioner to deportation.²⁹⁶ Although polygamy can prevent someone from getting permanent residency in an asylum claim or affect who counts as a derivative family member, forced polygamous marriages can alternatively constitute gender-based persecution and can be the basis for an asylum claim.²⁹⁷ The law also affects children from a polygamous marriage, since the INA distinguishes between children born in and out of wedlock.²⁹⁸ The first marriage is recognized for the purpose of immigration and so the children from that marriage are considered legitimate, though immigration officials do often recognize children from second and later wives as legitimate as long as the marriage was valid where celebrated.²⁹⁹

²⁸⁹ Smearman, *supra* note 58, at 400.

²⁹⁰ *Id.*

²⁹¹ *Matter of G*, 6 I&N Dec. 9 (1953); Bernsen, *supra* note 83, at 53.

²⁹² 8 U.S.C. § 1182(a)(10)(A).

²⁹³ Smearman, *supra* note 58, at 399.

²⁹⁴ *Id.* at 399, 416-17, 427.

²⁹⁵ *Id.* at 400.

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 434.

²⁹⁸ *Id.* at 409.

²⁹⁹ *Id.* at 410.

B- Amendments to the INA: The 1965 immigration Act prioritized family unification

The 1965 Immigration Act amended the *Immigration and Nationality Act* of 1952, and marked a dramatic change from the national origin preferences in past immigration regulations to the promotion of family unification.³⁰⁰ One of the main goals of the 1965 Immigration Act was to end the *National Origins Quota System* that began in the 1920s.³⁰¹ Passed during the same time period as the *Civil Rights Act* of 1964 and the *Voting Rights Act* of 1965, the 1965 Immigration Act continued this new wave of non-discrimination.³⁰² Family reunification became the primary method of immigration in the 1965 Immigration Act.³⁰³ This led to changes in the population composition of the United States, and allowed for the reunification of millions of United States citizens and lawful permanent residents with their family members.³⁰⁴ Under the quota system in the 1952 *Immigration and Nationality Act*, most people migrating to America were Caucasians from Europe.³⁰⁵ As a result of the Act, the majority of immigrants to America now came from Latin and South America and Asia, though the Act limited Latino migration in some ways.³⁰⁶

The 1965 Immigration Act prioritized family unification by allocating unlimited visas to immediate relatives – that is – spouses, children, and parents of United States citizens.³⁰⁷ Additionally, a limited number of visas were allocated for spouses and children of lawful permanent residents and siblings of United States citizens.³⁰⁸ For United States citizens, extended family members such as grandparents, aunts, nephews, and grandchildren did not benefit from prioritization.³⁰⁹ To replace the old quota system, which had varied by country, the limit was set to 20,000 people for all countries.³¹⁰ Within these caps, 75 percent of visas were prioritized for other types of relatives of United States citizens and permanent residents.³¹¹ Congress gave priority status, in the following order of family preference categories: 1) unmarried sons and daughters of United States citizens, 2) spouses, unmarried sons or unmarried daughters of permanent residents, 3) married sons or daughters of United States citizens and 4) brothers or sisters

³⁰⁰ Gabriel J. Chin & Rose Cuison Villazor, *Introduction*, in *THE IMMIGRATION AND NATIONALITY ACT OF 1965* 1, 1 (Gabriel J. Chin & Rose Cuison Villazor, eds. 2015).

³⁰¹ *Id.*

³⁰² *Id.* at 2.

³⁰³ Colon-Navarro, *supra* note 263, at 496.

³⁰⁴ Villazor, *supra* note 276, at 200.

³⁰⁵ Partially as a result of this quota, 85 percent of America's population at this time were non-Hispanic white and 11 percent were descendants of enslaved Africans. Chin, *supra* note 261, at 12.

³⁰⁶ *Id.* at 13.

³⁰⁷ Chin & Villazor, *supra* note 300, at 2.

³⁰⁸ *Id.*

³⁰⁹ Villazor, *supra* note 276, at 200.

³¹⁰ Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965).

³¹¹ Rhacel Salazar Parreñas & Cerissa Salazar Parreñas, *Workers Without Families: The Unintended Consequences*, in *THE IMMIGRATION AND NATIONALITY ACT OF 1965* 232, 239 (Gabriel J. Chin & Rose Cuison Villazor, eds. 2015).

of United States citizens.³¹² Spousal power to petition for a visa remained in the hands of the citizen or LPR spouse.³¹³ After the family-based categories, ten percent of visas were reserved for immigrants capable of performing specified skilled or unskilled labor when there was a shortage of employable Americans.³¹⁴ Finally, six percent of visas were reserved for the Attorney General to choose from a range of categories including asylum seekers and victims of natural catastrophes.³¹⁵ Again, immediate relatives were able to bypass the limitations of any of these categories.³¹⁶

The abolition of the national origins quotas received the most attention when the 1965 Immigration Act³¹⁷ was passed, but the abolition of these quotas did not create an equal opportunity to emigrate from each country. Since immigration into the United States was still based on family relationships or employment categories, it was still harder to emigrate from a country if there was not already a substantial number of people from that country in the United States.³¹⁸ For example, African immigration remained low.³¹⁹

Even for those who benefitted from prioritization for family members, annual visa caps caused long waits for certain categories of family members, especially from countries with high rates of demand.³²⁰ The government implemented an overall cap of 170,000 visas per year for people from countries in the Eastern Hemisphere.³²¹ For the first time, Western Hemisphere immigration was limited to 120,000 per year, though there were no per-country limits within that cap.

The 120,000 cap on the Western Hemisphere limited immigration of Latinos and Latinas.³²² Mexico, which had the highest demand for immigration to the United States, was hit especially hard by this cap.³²³ Cross-border families and networks had developed across the United States-Mexico border when migration was unrestricted, which increased Mexican demand for immigration to the United States.³²⁴ For nationals of high-demand countries like Mexico and the Philippines, the combination of overall visa caps, limits on the amount of visas available per family-sponsored preference categories, and

³¹² Act of Oct. 3, 1965, 79 Stat. 911.

³¹³ Calvo, *supra* note 275, at 166.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ Kevin R. Johnson, *The Beginning of the End: The Immigration Act of 1965 and the Emergence of the Modern U.S.-Mexico Border State*, in *THE IMMIGRATION AND NATIONALITY ACT OF 1965* 116, 133 (Gabriel J. Chin & Rose Cuison Villazor, eds. 2015).

³¹⁸ Bill Ong Hing, *African Migration to the United States: Assigned to the Back of the Bus*, in *THE IMMIGRATION AND NATIONALITY ACT OF 1965* 60, 64 (Gabriel J. Chin & Rose Cuison Villazor, eds. 2015).

³¹⁹ *Id.*

³²⁰ Villazor, *supra* note 276, at 199. (Families from China, the Philippines, Mexico, and India face can face waiting times of ten to twenty years).

³²¹ Chin, *supra* note 261, at 20.

³²² Johnson, *supra* note 317, at 119.

³²³ Johnson, *supra* note 317, at 123.

³²⁴ *Id.* at 127.

per-country limits created waiting times for some family preference categories that spanned from two to twenty-three years.³²⁵

6- Economic immigration Acts in the late 20th century and their effect on marriage

Marriage is not, of course, the sole reason that people immigrate. Rather, many immigrants sought jobs and other economic opportunities, and much of the United States' immigration law reflects that fact. From 1986 through 1996, Congress passed several Acts designed to deter illegal immigration through economic means. While these Acts all acknowledged the interest of family reunification in some way, American economic interests were clearly prioritized during this time period. The increasing xenophobia and an overall economic downturn during this time period elicited negative sentiments toward immigrants, and provided support for these anti-immigrant Acts.³²⁶ In 1986, the *Immigration Reform and Control Act* made it illegal to hire an alien who did not have legal status. This threat to employment destabilized immigrant lives and led to decreased marriage rates among Mexican men.³²⁷ In 1996, the *Immigration Reform and Immigrant Responsibility Act* (IIRIRA) and the *Personal Responsibility and Work Opportunity Reconciliation Act* (PRWORA) were passed. The PRWORA made aliens largely ineligible for any public benefits to prevent incentivizing immigration through public benefits.³²⁸ IIRIRA offered some support for family reunification, but also created new grounds of inadmissibility and deportability, and created three and ten-year bars to immigration for aliens who had been in the United States illegally.³²⁹ While the value of family unification was asserted, regulations designed to protect American economic interests harmed immigrants' family reunification prospects.

³²⁵ Villazor, *supra* note 276, at 221, 223.

³²⁶ Alberto Davila & Marie T. Mora, *The Marital Status of Recent Mexican Immigrants in the United States in 1980 and 1990*, 35 INT'L MIGRATION REV. 506, 510 (2001); Bruce Robert Marley, *Exiling the New Felons: The Consequences of the Retroactive Application of Aggravated Felony Convictions to Lawful Permanent Residents*, 35 SAN DIEGO L. REV. 855, 857 (1998).

³²⁷ SELECT COMM'N ON IMMIGR. AND REFUGEE POL'Y, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, FINAL REPORT 14-15 (1981); Davila & Mora, *supra* note 326, at 522; 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, 54 (1989).

³²⁸ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

³²⁹ Colon-Navarro, *supra* note 263, at 495.

A- The immigration reform and control Act - 1986: Immigrants and the workforce

The high levels of employment opportunities, wages, and other economic benefits in the United States during the 1980s created a magnet for immigration.³³⁰ In addition, the 1980s were a period of rising xenophobia.³³¹ In response to these factors, Congress created the *Immigration Reform and Control Act* (IRCA) in 1986 to address undocumented workers in the United States, though it expressed some concern for family unification. IRCA focused on economic concerns, while its sister Act in 1990, discussed *infra*, concerned family preference. The Act made it illegal to knowingly employ an illegal alien, to continue employing an alien while knowing that they are unauthorized, or to fail to verify the legal status of all new employees.³³² There was considerable concern that the new employer sanctions could cause employers to refuse to hire any Latino workers, to decrease their risk of violating the law.³³³ To alleviate that risk, the Act also included non-discrimination provisions, barring employers from discriminating based on national origin.³³⁴

A number of factors and considerations motivated IRCA. First, the findings of the *Select Commission on Immigration and Refugee Policy* in 1981 were a precursor to the law. That commission reported that family separation strongly incentivized individuals to try to circumvent immigration law.³³⁵ Nonetheless, the Commission reiterated the value of family unification.³³⁶

There were further economic and practical considerations. The stated purposes were twofold: to control the borders and to move people out of society's shadows by increasing the number of people who could qualify for legal status.³³⁷ Congress was concerned about high numbers of illegal immigrants entering the United States, though the statistics that Congress cited, however, have been called both dubious and exaggerated.³³⁸ The Immigration and Nationality Services (INS) Assistant Commissioner at the time described the Act's goals as increasing the number of jobs available to Americans and legal immigrants, while decreasing incentives for potential and current illegal immigrants

³³⁰ Francis A. Gabor, *The Immigration Reform and Control Act of 1986: An Analysis in the Light of Contemporary International Law*, 23 INT'L LAWYER 485, 500 (1989).

³³¹ Davila & Mora, *supra* note 326, at 510.

³³² Medina, *supra* note 285, at 681.

³³³ Wilbur A. Finch Jr., *The Immigration Reform and Control Act of 1986: A Preliminary Assessment*, 64 SOC. SERV. REV. 244, 253 (1990).

³³⁴ *Id.*

³³⁵ This observation would play a more significant role in the later Immigration Act of 1990. SELECT COMM'N ON IMMIGR. AND REFUGEE POL'Y, *supra* note 327, at 14-15; Tucker, *supra* note 327, at 24-25.

³³⁶ Tucker, *supra* note 327, at 54.

³³⁷ William Arp, Marilyn K. Dantico & Marjorie S. Zatz, *The Immigration Reform and Control Act of 1986: Differential Impacts on Women?*, 17 SOC. JUST. 23, 25-26 (1990).

³³⁸ Tucker, *supra* note 327, at 28-29.

to enter the U.S.³³⁹ That goal would be balanced with the plan to help undocumented immigrants to legalize.³⁴⁰

Despite the lack of family issues stated in the law, ICRA's economic elements had an indirect impact on marriage among immigrants. There has been some speculation that because IRCA made it more difficult for immigrants to find employment, more immigrants stayed unmarried due to instability in their lives.³⁴¹ For example, marriage rates fell for Mexican men who arrived in the late '80s as compared to the '70s.³⁴² However, because IRCA also granted special concessions to groups such as seasonal agricultural workers, many of those now-legalized workers could eventually use immigration family unity policies to bring their families to the United States.³⁴³

B- A Rise of anti-immigrant sentiment leads to passage of the *Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)* and the *Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)*:

An economic slowdown in the early 1990's reduced the economic need for immigrant labor.³⁴⁴ As often occurred during an economic downturn, the immigrant population was blamed for high unemployment, high crime rates, and an increase in cost for services including social welfare and medical programs.³⁴⁵ In 1996, Congress passed the *Illegal Immigration Reform and Immigration Responsibility Act and the Personal Responsibility and Work Opportunity Reconciliation Act*. These laws reflected the rise in anti-immigrant sentiment, but IIRIRA still acknowledged Congress' longstanding policy of supporting family reunification.

The *Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)* was signed into law in 1996, with the goal to "end welfare as we know it."³⁴⁶ The Act discussed welfare and immigration, noting that self-sufficiency has been a basic principle of United States immigration law and stating that aliens should not rely on public benefits, nor should those benefits incentivize immigration.³⁴⁷ It also asserted that aliens would not be eligible for any public benefits, with a few exceptions for emergency medical treatment and immunizations, and some pre-existing housing benefits.³⁴⁸ The Act prevented alien eligibility for any federal means-tested public benefit for the first five

³³⁹ John R. Schroeder, *The Immigration Reform and Control Act of 1986*, 10 IN DEFENSE OF THE ALIEN 3, 3 (1987).

³⁴⁰ *Id.* at 4.

³⁴¹ Davila & Mora, *supra* note 326, at 509.

³⁴² *Id.* at 522.

³⁴³ *Id.* at 509.

³⁴⁴ Marley, *supra* note 326, at 857.

³⁴⁵ *Id.*

³⁴⁶ Kristalee Guerra, *The Policy and Politics of Illegal Immigrant Health Care in Texas*, 2 HOUS. J. HEALTH L. & POL'Y 113 (2002).

³⁴⁷ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

³⁴⁸ *Id.* at § 401.

years after arriving in United States.³⁴⁹ It also made any alien other than qualified aliens, nonimmigrants, or paroled aliens ineligible for any State or local public benefit.³⁵⁰ However, state legislatures were given discretion to pass “affirmative” laws extending health care eligibility to undocumented immigrants.

The *Illegal Immigration Reform and Immigrant Responsibility Act* amended the *Immigration and Nationality Act* of 1952, creating new grounds of inadmissibility and deportability in 1996.³⁵¹ The law coupled increased regulations and penalties for illegal immigration with some continued support for family unification. It primarily targeted immigrants with criminal convictions.³⁵² Several new criminal offenses were created, including fleeing an immigration checkpoint “in excess of the legal speed limit,” and penalties were increased for existing violations, including for alien smuggling and fraudulent use of government-issued documents.³⁵³

One particularly harsh component of the Act, demonstrating the strength of anti-immigrant sentiment, was the addition of INA § 212(a)(9)(B)(i)(I) and (II). Part I created a three-year bar to admission for any alien who had been in the country illegally for 180 days to one year before leaving the United States voluntarily.³⁵⁴ Part II created a ten-year bar for an alien who voluntarily left after being illegally present in the United States for one year or more.³⁵⁵ There were no exceptions for immediate relatives of United States citizens, demonstrating the decreased concern for family unity at the time the act was passed.³⁵⁶

This measure, meant to encourage aliens to spend less time in the United States without documentation, likely had the opposite effect. Rather than being incentivized to leave sooner, many aliens felt that they had to stay in the United States at all costs, to avoid the risk of a three or ten-year bar from admission, based on the amount time they had already spent in the United States with their families.³⁵⁷

However, in other ways, IIRIRA demonstrated Congress’ ongoing concern for family reunification. For example, immediate relatives of citizens and LPRs enjoyed exemptions from health-related exclusion grounds.³⁵⁸ Several family members could

³⁴⁹ *Id.* at § 403.

³⁵⁰ *Id.* at § 411. “Qualified” was defined as lawful permanent residents, refugees or asylees, people who were paroled into the United States for at least one year and battered spouses and children under the Violence Against Women Act. 8 U.S.C. § 1641(b) (2000).

³⁵¹ Colon-Navarro, *supra* note 263, at 495.

³⁵² *Id.*

³⁵³ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 203, 211, 216, 110 Stat. 3009 (1996).

³⁵⁴ Colon-Navarro, *supra* note 263, at 495, *see also* 8 U.S.C. § 1182(a)(9)(B)(i)(I) (2006); Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 101(a)(3), 66 Stat. 163 (1952).

³⁵⁵ Colon-Navarro, *supra* note 263, at 495, *see also* 8 U.S.C. § 1182(a)(9)(B)(i)(II).

³⁵⁶ 8 U.S.C. § 1255(a) (2009).

³⁵⁷ Colon-Navarro, *supra* note 263, at 495.

³⁵⁸ *Id.* at 502.

receive a waiver from vaccination requirements for a number of diseases.³⁵⁹ The waiver was also extended to aliens who married a U.S. citizen in good faith and their children, who were battered or subjected to extreme cruelty by the U.S. citizen.³⁶⁰

The Act made aliens who had committed certain crimes inadmissible.³⁶¹ However, Congress also created a waiver for immediate relatives if they could establish to the Attorney General that their denial of admission would result in extreme hardship to the U.S. citizen immediate relative.³⁶² Similarly, for a section of the Act that made inadmissible any immigrant who has been a member of or affiliated with the Communist or another totalitarian party, Congress provided a waiver for immediate relatives for humanitarian purposes, to assure family unity, or when it was otherwise in the public interest, provided that the immigrant was not a threat to the security of the United States.³⁶³

INA § 245, which covers Adjustment of Status, contained exceptions to some requirements for immediate relatives of U.S. citizens or LPRs.³⁶⁴ Exceptions allowed for immediate relatives to adjust their status even if they had unauthorized employment and were in the United States unlawfully.³⁶⁵ However, aliens who were in the United States without having been admitted or inspected remained barred to entry.³⁶⁶

7- Marriage and family focused immigration Acts of the late 20th century

In conjunction with economic immigration reforms, Congress also passed a number of laws that focused on family-based immigration, though it vacillated between favoring and preventing family unification. The creation of the fiancé visa made it easier for U.S. citizens to marry non-citizens. The Immigration Act of 1990 highlighted the importance of family unification and increased family-based immigration.³⁶⁷ On the other hand, the government's fear of potential fraud in immigration led to the passage of the *Immigration Marriage Fraud Amendments*.³⁶⁸ Finally, to address concerns about domestic violence in some marriages between immigrants and U.S. citizens, Congress included provisions about immigration in the *Violence Against Women Act*. The family-based immigration

³⁵⁹ Those categories of family members include an alien who is the spouse, unmarried son or daughter, or the minor unmarried lawfully adopted child of a United States citizen, LPR, or alien with an immigrant visa. *Id.* at 501.

³⁶⁰ *Id.*

³⁶¹ *Id.* at 502.

³⁶² *Id.* at 503.

³⁶³ *Id.* at 504.

³⁶⁴ Adjustment of Status is normally available for aliens who have been inspected and admitted, or paroled into the U.S. if (1) the alien applies, (2) if they are eligible to receive an immigrant visa and are admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time the application is filed. *Id.* at 505.

³⁶⁵ *Id.* at 506.

³⁶⁶ *Id.*

³⁶⁷ Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

³⁶⁸ Tucker, *supra* note 327, at 29.

laws of this period all focused on different areas of immigration, but they ultimately operated together to create much of the current system of family immigration.

A- Immigration Act of 1990 and the promotion of family unification

The Immigration Act of 1990 powerfully impacted family-based immigration. Congress focused on family unification when drafting the law, with a Senate Commission determining that family unification was humane and promoted the health and interests of family members and the United States as a whole.³⁶⁹ It increased levels of immigration to 480,000 family sponsored spots, 140,000 employment based spots, and 55,000 diversity spots.³⁷⁰ Spouses of United States citizens counted towards that limit, but they would not be excluded once the limit was reached, resulting in fewer spots for spouses of non-citizens.³⁷¹ Two thirds of the visas in the second family preference category were reserved for spouses and children of lawful permanent residents, while the remaining third were for their unmarried children aged 21 or older.³⁷² In addition to those changes, several new non-immigrant visa categories were created in the Act, including for widows/widowers of United States citizens.³⁷³

To address some of the more serious problems in marriage-based immigration, the Act provided the alien spouse with an opportunity to self-petition for immigration status (rather than being forced to rely on the United States citizen spouse for the petition) if certain conditions were met. If the spouse demonstrated that extreme hardship would result from removal, that the marriage was entered into in good faith but had been terminated, or if the marriage was entered into in good faith but the alien spouse or child was battered by or was the subject of extreme cruelty perpetrated by the citizen spouse, then the spouse could petition without the U.S. citizen.³⁷⁴ This gave alien spouses much more autonomy in the immigration process and eliminated some of the problems in family immigration.

B- Fiancé visas: Easing the challenges of marriage to foreign citizens

As more Americans married non-citizens, the United States government developed a visa specifically to facilitate marriage-based immigration. In the 1970's, the Vietnam War led to numerous marriages between American soldiers and Vietnamese citizens. At that time, the process of bringing Vietnamese women back to the United States was both

³⁶⁹ Atticus Lee, *Sexual Deviants Need Not Apply: LGBTQ Oppression in the 1965 Immigration Amendments*, in *THE IMMIGRATION AND NATIONALITY ACT OF 1965* 248, 268 (Gabriel J. Chin & Rose Cuison Villazor, eds., 2015).

³⁷⁰ Immigration Act of 1990, 104 Stat. 4978.

³⁷¹ Gunnar Birgisson, *Deficient Visas: Permanent Residents' Limited Marriage Rights in United States Immigration Law*, 19 *IN DEFENSE OF THE ALIEN* 47, 49 (1996) (citing 8 U.S.C. §§ 1151, 1153).

³⁷² The Act did not significantly change the other family preference categories in the INA. Michael Miller, *An Overview of the Immigration Act of 1990*, 14 *IN DEFENSE OF THE ALIEN* 14, 15 (1991).

³⁷³ *Id.*

³⁷⁴ 8 U.S.C.S. § 1186a (2013).

time consuming and challenging. The fiancé visa allowed entry for “an alien who is the fiancée or fiancé of a citizen of the United States and who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after entry, and the minor children of such fiancée or fiancé accompanying or following to join.”³⁷⁵ Only United States citizens, not permanent residents, are allowed to use fiancé visas.³⁷⁶

To receive approval for a fiancé visa, the parties must meet three criteria. They must prove that they “previously met in person within two 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.”³⁷⁷ These requirements are meant to ensure that immigrants do not simply use the fiancé visa “as a substitute for long-term permanent resident status.”³⁷⁸ Congress wants immigrant families to gain social and economic stability from marriage, which means that the marriage needs to last.³⁷⁹ Under that rationale, a couple who has either never met or has not seen each other in two years is less likely to marry, more likely to overstay their visa, and the marriage is less likely to last.³⁸⁰ The introduction of this visa made it much easier for U.S. citizens to marry non-residents, but Congress restricted the visa's use to ensure it could only facilitate genuine marriages, a trend that would be continued with the *Immigration Marriage Fraud Amendments*.

C- Immigration marriage fraud amendments of 1986: The rising fear of fraud

Along with the ability to obtain a fiancé visa came concerns that people were entering the United States through fraudulent marriages. An immigration system that strongly favored family members was undoubtedly going to produce this type of fraud.³⁸¹ The government also had the broader desire to move away from preferences for family unification.³⁸² As a result, the *Immigration Marriage Fraud Amendments* of 1986 (IMFA) sought to prevent two types of marriage fraud. The more common form is contractual fraud, in which the couple agrees that the marriage’s purpose is to gain preferential immigration standing for the immigrating spouse, and that the marriage would end once the immigration status is gained.³⁸³ Since a couple could divorce without penalty as soon as the immigrant spouse obtained permanent residence, there was considerable incentive to engage in marriage fraud.³⁸⁴ Alternatively, and more rarely, there is unilateral marriage fraud, in which an immigrant spouse leads an American spouse to believe that he or she

³⁷⁵ An Act to amend the Immigration and Nationality Act to facilitate the entry of certain nonimmigrants into the United States, and for other purposes. 91 Pub. L. No. 225, 84 Stat. 116 (1970).

³⁷⁶ Birgisson, *supra* note 371, at 50.

³⁷⁷ Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1651 (2007).

³⁷⁸ *Id.* at 1653.

³⁷⁹ *Id.* at 1650.

³⁸⁰ *Id.* at 1651.

³⁸¹ *Id.* at 1707.

³⁸² Tucker, *supra* note 327, at 50.

³⁸³ Marcel De Armas, *For Richer or Poorer or Any Other Reason: Adjudicating Immigration Marriage Fraud Cases Within the Scope of the Constitution*, 15 AM. U. J. GENDER SOC. POL’Y & L. 743, 746 (2007).

³⁸⁴ Kerry Abrams, *Marriage Fraud*, 100 CAL. L. REV. 1, 38 (2012).

genuinely wants to marry while secretly intending to end the relationship once he or she receives permanent residence.³⁸⁵

There was intense public pressure to curtail marriage fraud, though many of the public's concerns were overstated. Prior to the passage of the IMFA, the INS claimed that 30% of marriages in immigration were fraudulent, and there was considerable media coverage on marriage fraud.³⁸⁶ However, later research after the IMFA's enactment determined that the data Congress relied on was misleading and overestimated the problem.³⁸⁷

Specialized doctrines developed to assess marital validity in immigration. In American immigration law, a marriage is deemed valid if it was valid where it was celebrated.³⁸⁸ In implementing this Act, courts use one of two tests for marriage validity. The first, the "establish a life" test, simply asks if the couple has established a life together and a couple can pass even if immigration was the primary motivation to marry.³⁸⁹ The second test, the "evade the laws" test, follows the INA more closely and focuses on the couple's motivation for the marriage.³⁹⁰

To combat fake marriages, Congress imposed a two-year conditional status on permanent residency for any marriage that was less than two years old.³⁹¹ Congress likely believed that couples who have been married for two or more years were less likely to engage in fraud, while those who married solely for immigration purposes would be deterred by this conditional status.³⁹²

To get the conditional status removed, the alien spouse and the petitioning spouse must undergo an arduous process of filing applications, completing interviews, and providing evidence of a genuine marriage.³⁹³ The interview process asks for evidence to prove that the marriage is genuine, and immigration officials often ask detailed and personal questions.³⁹⁴ If the Attorney General determines that the couple has proven that the marriage is not fraudulent and is still in existence, the conditional status can be removed.³⁹⁵

³⁸⁵ De Armas, *supra* note 383, at 746.

³⁸⁶ Tucker, *supra* note 327, at 29.

³⁸⁷ *Id.* See *INS Reveals Basis for Fraud Claims*, 65 INTERPRETER RELEASES 26, 27 (1998); Joan Fitzpatrick, *The Gender Dimension of U.S. Immigration Policy*, 9 YALE J.L. & FEMINISM 23, 33 (1997).

³⁸⁸ Abrams, *Marriage Fraud*, *supra* note 384, at 30.

³⁸⁹ *Id.* at 34-35.

³⁹⁰ *Id.* at 36.

³⁹¹ Medina, *supra* note 285, at 703.

³⁹² Abrams, *Marriage Fraud*, *supra* note 384, at 31-32.

³⁹³ Tucker, *supra* note 327, at 38.

³⁹⁴ Abrams, *Marriage Fraud*, *supra* note 384, at 32-33; Medina, *supra* note 285, at 699. For examples of the types of evidence that can be presented, see 8 C.F.R. § 204.2(a)(1)(i)(B).

³⁹⁵ 8 U.S.C. § 1186a (Supp. IV 1986); Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 216, 66 Stat. 163 (1952).

Some immigrants faced problems when trying to comply with the IMFA. For example, marriage during deportation proceedings originally created an irrebuttable presumption of fraud and INS could deport the spouse for two years before granting any marriage benefits later.³⁹⁶ In 1990, Congress granted aliens in deportation hearings the opportunity to establish that the marriage is bona fide, and thus avoid the forced two-year period of foreign residence.³⁹⁷

Additionally, the IMFA created some abusive situations for spouses, often women, who stayed in dangerous situations to obtain permanent residency.³⁹⁸ Women might feel as though they had to stay in an abusive relationship in order to avoid deportation, which could mean facing poverty or separation from their children, among other challenges.³⁹⁹ *The Violence Against Women Act* would remedy some of these problems.

D- The Violence Against Women Act addresses the vulnerabilities of some immigrants

In 1994, President Bill Clinton signed the *Violence Against Women Act* (VAWA)⁴⁰⁰ into law as part of the 1994 Crime Control Act. Congress has since reauthorized VAWA three times, in 2000, 2005, and 2013.⁴⁰¹ A broad law intended to reduce domestic violence generally,⁴⁰² VAWA also included several immigration-related provisions which created new paths to permanent residency for individual petitioners who could prove they suffered domestic violence at the hands of a U.S. citizen or lawful permanent resident spouse, child, or parent. “[T]hrough VAWA 1994, Congress intended to limit the control an abuser had over the immigrant victim’s status and to encourage battered immigrants to flee from their violent domestic circumstances without fearing deportation.”⁴⁰³ As such, VAWA, like other U.S. immigration policies, conferred benefits only to those immigrants married to or related to U.S. citizens or LPRs.

³⁹⁶ *Id.* at 22; Medina, *supra* note 285, at 703.

³⁹⁷ Medina, *supra* note 285, at n. 17.

³⁹⁸ Christine S. Y. Chun, *The Mail-Order Bride Industry: The Perpetuation of Transnational Economic Inequalities and Stereotypes*, 17 U. PA. J. INT’L ECON. L. 1155, 1165 (1996).

³⁹⁹ Fitzpatrick, *supra* note 387, at 32.

⁴⁰⁰ Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 42 U.S.C.).

⁴⁰¹ Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1491 (2000) (codified as amended in scattered sections of 42 U.S.C.); Violence Against Women and Dep’t of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013).

⁴⁰² WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42477, IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN (VAWA) 1 (2012), available at <http://www.ilw.com/immigrationdaily/news/2012,0921-crs.pdf>.

⁴⁰³ Brief for the National Network to End Violence Against Immigrant Women as Amicus Curiae Supporting Petitioner, *Sanchez v. Keisler*, 505 F.3d 641 (7th Cir. 2007) (Nos. 06-2745 & 06-3424), available at http://www.asistahelp.org/documents/resources/Sanchez_Amicus_Brief_11_8_06_DB7906A53815D.pdf.

VAWA amended the INA to allow battered spouses, children, and parents of U.S. citizens and LPRs to self-petition for lawful permanent residency without the knowledge of the citizen or LPR abuser.⁴⁰⁴ In effect, an immigrant who has obtained conditional residence status through a familial relationship with a U.S. citizen or LPR sponsor—and is thus dependent on that relationship to graduate from conditional to permanent resident status—may use the VAWA self-petition to pursue permanent residency on his or her own without the participation of the initial sponsor.⁴⁰⁵ The following individuals may file under VAWA: “abused noncitizen spouses married to U.S. citizens or LPRs; noncitizen parents in such a marriage whose children were abused by U.S. citizens or LPRs; unmarried noncitizen children under age 21 abused by a U.S. citizen or LPR parent; and noncitizen parents abused by U.S. citizen adult children.”⁴⁰⁶

A VAWA self-petitioner must be a person of “good moral character,” must prove “extreme cruelty” at the hand of a U.S. citizen/LPR abuser, and must have resided in the United States with the U.S. citizen/LPR abuser.⁴⁰⁷ Self-petitioning spouses must also demonstrate that they entered the marriage in good faith, rather than purely for immigration benefits.⁴⁰⁸ Self-petitioning children and self-petitioning parents⁴⁰⁹ must show proof of the relationship to the U.S. citizen/LPR abuser.⁴¹⁰ An individual applying for immigration benefits under VAWA may also derivatively include his or her child in the self-petition.⁴¹¹

E- The International Marriage Broker Regulation Act Aimed to prevent abuse in mail order bride services

The murder of two “mail-order brides” by their United States citizen husbands spurred Congress to pass the *International Marriage Broker Regulation Act* (IMBRA) as part of the *Violence Against Women Act* (VAWA) in 2005.⁴¹² The Act’s main purpose was presumably to prevent domestic violence by reducing the number of marriages between vulnerable women and men who seemed likely to become domestic abusers.⁴¹³ In

⁴⁰⁴ Kandel, *supra* note 402, at 3.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ DEP’T OF HOMELAND SECURITY, UNITED STATES CITIZENSHIP AND IMMIGR. SERVICES, BATTERED SPOUSE, CHILDREN, & PARENTS, (last visited May 28, 2018), <https://www.uscis.gov/humanitarian/battered-spouse-children-parents#spouse>.

⁴⁰⁸ *Id.*

⁴⁰⁹ Congress’s 2005 reauthorization of VAWA expanded the category of eligible VAWA self-petitioners to include abused *parents* of U.S. citizens eligible for relief under VAWA. See MCLE Publishing, *Immigration Practice Manual*, 2nd Edition, Chapter 9 Relief Under the Violence Against Women Act, available at bloomberglaw.com. Amy M. Wax, *Relief Under the Violence Against Women Act*, in IMMIGRATION PRACTICE MANUAL § 9.2.2(b) (Mass. Continuing Legal Educ., Inc., 3rd ed. 2017).

⁴¹⁰ *Id.*

⁴¹¹ The child need not be the child of the abusive U.S. citizen or LPR; he or she just must be the child of the self-petitioner. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 42 U.S.C.).

⁴¹² Abrams, *Regulation of Marriage*, *supra* note 377, at 1653, 1659.

⁴¹³ *Id.* at 1659.

pushing for the legislation, advocates pointed out the marketing techniques used by international matchmaking websites made it more likely that relationships resulting from such services would lead to violence.⁴¹⁴ They marketed wealthy American men and a better life to foreign women, while marketing docile, controllable women to men.⁴¹⁵ To counteract that problem, IMBRA's requirements apply primarily to organizations that specifically target foreign women for marriage with American men, and do not apply to a "traditional matchmaking organization of a cultural or religious nature," which operates on a non-profit basis.⁴¹⁶

IMBRA requires international matchmaking companies to gather and disseminate information about their users' prior family relationships and criminal history before any contact with the foreign person can occur.⁴¹⁷ Marriage brokers must also search the sex offender registry.⁴¹⁸ Until this information is collected, the international matchmaking companies are not allowed to give the foreign client's contact information to U.S. clients.⁴¹⁹ If a couple proceeds with a courtship through an international matchmaking organization without following the rules, the foreign fiancée may subsequently be denied a visa.⁴²⁰ These requirements are designed to provide women with enough information to help them avoid entering a dangerous relationship.⁴²¹

8- Recent Supreme Court decisions and their impact on marriage and immigration

Recent Supreme Court decisions have reflected a shift regarding the issue of same-sex marriages and consistency in prioritizing national security concerns over the interest of family unification. A ban on LGBTQ immigrants to the United States which had begun in the 1950s was lifted in 1990. However, due to additional federal and immigration laws, it was not until 2013 that same-sex marriages were declared valid for immigration purposes. With regard to the balance between national security and family reunification, the Supreme Court demonstrated in *Kerry v. Din* that national security concerns still prevail over the interest of family reunification, at least in a case involving an issue of terrorism.

⁴¹⁴ *Id.*

⁴¹⁵ *Id.* at 1654.

⁴¹⁶ *Id.* at 1657.

⁴¹⁷ *Id.*

⁴¹⁸ 8 U.S.C. § 1375a(2)(A)(i).

⁴¹⁹ *Id.* at n. 129.

⁴²⁰ *Id.* at 1655.

⁴²¹ *Id.* at 1656.

A- LGBTQ marriage and immigration: From DOMA to Obergefell

Some of the more high-profile Supreme Court decisions in the last decade concerned same-sex marriage and opened up marriage-based immigration to same-sex couples. Discrimination against the LGBTQ community has a long history in United States immigration law, tracking the country's view of who qualified as an "ideal" American. One significant discriminatory immigration law was the 1952 INA, which effectively banned LGBTQ people from immigrating to the United States.⁴²² This ban lasted until the Immigration Act of 1990, which instead banned anyone who was HIV positive.⁴²³ The initial ban started during the McCarthyism period of the 1950s, a time when LGBTQ people were associated with communists and considered subversive, and homosexual sex was illegal.⁴²⁴ Even though the language of the INA did not specify "homosexuals," when originally passing the INA, the Senate wanted to include language explicitly barring homosexuals.⁴²⁵ However, the Public Health Service had advised Congress that psychopathic personality disorder, which was one of the barred afflictions, included homosexuality already, and the Senate Judiciary Committee stated that it fully intended to bar homosexuals.⁴²⁶ Examining that legislative history, the Supreme Court held that the INA definitively barred LGBTQ people in *Boutilier v. Immigration Services*.⁴²⁷

1952 was far from the beginning of homophobia in immigration. The earliest evidence of immigration officials' antipathy towards homosexual men dates back at least to 1909.⁴²⁸ Legislative history for the Immigration Act of 1917 indicated that homosexuality was considered a mental illness and people who were "mentally defective" were banned under that law.⁴²⁹ Because it was classified as a mental illness, homosexuality was not explicitly mentioned in that Act, though it was the precursor to the 1952 INA exclusion.⁴³⁰ The ban was made even more explicit in 1965 when the INA was

⁴²² Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(a)(4), 66 Stat. 163 (1952) (codified at 8 U.S.C. § 1182(a)(4) (1998)) (repealed 1990); *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118 (1967); Adam Francoeur, *The Enemy Within: Constructions of U.S. Immigration Law and Policy and the Homoterrorist Threat*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 345, 356 (2007); Darlene C. Goring, *Premature Celebration: Obergefell Offers Little Immigration Relief to Binational Same-sex Couples*, 59 HOW. L.J. 305, 311 (2016); Arnold H. Leibowitz, *Legislation and Regulations United States: Immigration Act of 1990*, 30 I.L.M. 326, 17 (1991).

⁴²³ Immigration and Nationality Act of 1952, § 212(a)(4) (codified at 8 U.S.C. § 1182(a)(4) (1998)) (repealed 1990); Lee, *supra* note 369, at 250; Francoeur, *supra* note 422, at 356; Goring, *supra* note 422, at 311; Leibowitz, *supra* note 422, at 17.

⁴²⁴ Francoeur, *supra* note 422, at 352; JonCarlo Serna, *Same-Sex Binational Couples: The Benefits and Pitfalls of Judicial Evolution and the Validity of Marriage*, 17 SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. 591, 602-04 (2015); Bijal Shah, *LGBT Identity in Immigration*, 45 COLUM. HUM. RTS. L. REV. 100, 102-104 (2013).

⁴²⁵ Francoeur, *supra* note 422, at 353 n. 35 (citing S. Rep. No. 82-1137, at 9 (1952), S. Rep. No. 81-1515, at 345 (1950)).

⁴²⁶ *Id.*

⁴²⁷ *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118 (1967).

⁴²⁸ Serna, *supra* note 424, at 597-98.

⁴²⁹ *Id.* at 599; Lee, *supra* note 369, at 250-51.

⁴³⁰ Serna, *supra* note 424, at 599-600.

amended, changing the language of the ban to those "afflicted with . . . sexual deviation."⁴³¹ Sex acts by male homosexuals were considered crimes of moral turpitude, which could also serve as a basis for exclusion.⁴³²

This ban slowly eroded over time. In 1979 the Surgeon General issued a policy determining that homosexuality was no longer considered a mental disease or defect.⁴³³ In *Hill v. INS*, the Ninth Circuit held that non-citizens could not be denied entry based solely on their sexual orientation without medical certification from the United States Public Health Service.⁴³⁴ Despite those gains, the Ninth Circuit decided *Adams v. Howerton* in 1982, which would be the controlling case on same-sex marriage in immigration for the next thirty years. The INA did not define the word "spouse," but the *Adams* court presumed that a same-sex marriage did not meet the definition.⁴³⁵ The court also required a two-part test for marriage validity in immigration, asking if the marriage was valid both under state law and the INA.⁴³⁶

The lifting of the ban in 1990 was far from the end of the story. *The Defense of Marriage Act* (DOMA) was enacted in 1996, defining marriage for federal purposes as between a man and a woman, meaning that married same-sex couples could not receive immigration benefits since immigration is under the purview of federal law.⁴³⁷ DOMA was predicated on the fear that Hawaii would legalize same-sex marriage and that same-sex couples could travel to Hawaii, marry, and return home, thus forcing other states to recognize those marriages under the Constitution's *Full Faith and Credit Clause*.⁴³⁸ DOMA's proponents were also afraid that this would allow same-sex couples get the public benefits that accompany marriage, continuing a long tradition, echoed throughout the history of immigration law, which feared that some "other" would take scare resources from the American public.⁴³⁹ In a much broader sense, DOMA's advocates feared that same-sex marriage would fundamentally change the family and American society.⁴⁴⁰ The act was widely supported, with one estimate saying that 75% of the country supported the law.⁴⁴¹

⁴³¹ Immigration and Nationality Act Amendments, Pub. L. No. 89-236, 79 Stat. 911, § 272(a)(3) (1965); Francoeur, *supra* note 422, at 353; Lee, *supra* note 369, at 249.

⁴³² Serna, *supra* note 424, at 601.

⁴³³ Francoeur, *supra* note 422, at 355; The American Psychiatric Association stopped classifying homosexuality as a mental disorder in 1973. Lee, *supra* note 369, at 262. Additionally, INS stopped asking immigrants about their sexual orientation, but would still deport them if it were revealed. *Id.* at 355.

⁴³⁴ Lee, *supra* note 369, at 355 (citing *Hill v. Immigration and Naturalization Service*, 714 F.2d 1470 (9th Cir. 1983)).

⁴³⁵ *Adams v. Howerton*, 673 F.2d 1036, 1038-39 (9th Cir. 1982).

⁴³⁶ *Id.* at 1038.

⁴³⁷ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (amending 1 U.S.C.A. § 7); Francoeur, *supra* note 422, at 358.

⁴³⁸ Abrams, *Peaceful Penetration*, *supra* note 125, at 167-68.

⁴³⁹ *Id.* at 168-169

⁴⁴⁰ *Id.* at 169.

⁴⁴¹ Serna, *supra* note 424, at 607.

A mere nine days after DOMA's passage, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act.⁴⁴² DOMA made it impossible for same-sex couples to use the IIRIRA's family-based waivers to prevent removal of their loved one.⁴⁴³ Some legislators attempted to pass a law in 2000 to add "permanent partners" wherever "spouse" appeared in the INA, but the legislation did not pass.⁴⁴⁴ As a result, many same-sex couples, including many who had children, had to leave the country to remain together.⁴⁴⁵

At the time DOMA was enacted, same-sex marriage was not legalized anywhere in the United States. After DOMA's passage, more and more states banned same-sex marriages either via legislation or constitutional amendment.⁴⁴⁶ Same-sex couples were denied immigration benefits – most importantly the ability to sponsor their partners for immigration. Because of DOMA, when Massachusetts became the first state to legalize same-sex marriage in 2003, those married couples still could not sponsor their spouses.⁴⁴⁷ Some states began to allow civil unions, beginning with Vermont in 2000, but those were also not entitled to immigration benefits.⁴⁴⁸

Both views and the law on same-sex marriage shifted rapidly in the two decades that followed DOMA.⁴⁴⁹ The Pew Research Center attributes this shift in part to the strong correlation between knowing someone who identifies as LGBTQ and supporting same sex marriage, and the increase from the 1990s in the number of people who say they know LGBTQ individuals.⁴⁵⁰ In 2013 and 2015, respectively, the Supreme Court decided the landmark same-sex marriage cases of *Windsor and Obergefell. U.S. v. Windsor* invalidated DOMA and declared that the definition of marriage under federal law, including immigration law, was open to same-sex couples.⁴⁵¹

At the time *Windsor* was announced, there were approximately 36,000 foreign nationals in same-sex relationships with United States citizens, about half of whom had children.⁴⁵² Immediately after *Windsor* was decided, both the Department of Homeland Security, which includes the U.S. Citizenship and Immigration Services (USCIS), and the

⁴⁴² Francoeur, *supra* note 422, at 356.

⁴⁴³ *Id.*

⁴⁴⁴ Permanent Partners Immigration Act H.R. 3650, 106th Cong. 3-18 (2000); Abrams, *Regulation of Marriage*, *supra* note 377, at 1669 n. 183.

⁴⁴⁵ Shah, *supra* note 424, at 114.

⁴⁴⁶ *Id.*

⁴⁴⁷ PEW RESEARCH CTR, *Same-Sex Marriage, State by State*, (June 26, 2015)

<http://www.pewforum.org/2015/06/26/same-sex-marriage-state-by-state/>. 2012-2014 saw rapid expansion in state legalization of same-sex marriage. Shah, *supra* note 424, at 114.

⁴⁴⁸ Shah, *supra* note 424, at 114.

⁴⁴⁹ PEW RESEARCH. CTR, *Support for Same-Sex Marriage at a Record High, but Key Segments Remain Opposed*, (June 8, 2015), <http://www.people-press.org/2015/06/08/support-for-same-sex-marriage-at-record-high-but-key-segments-remain-opposed/>.

⁴⁵⁰ *Id.*

⁴⁵¹ *U.S. v. Windsor*, 133 S.Ct. 2675, 2682, 186 L.Ed.2d. 808 (2013).

⁴⁵² Shah, *supra* note 424, at 112.

Department of State began to recognize marriage equality and treat visas from same-sex spouses the same as opposite-sex spouses.⁴⁵³

Shortly thereafter, the Board of Immigration Appeals ruled in *In Re Zelniak* that same-sex marriages were valid for immigration purposes based on *Windsor*.⁴⁵⁴ Couples who had previously been denied immigration benefits were given an opportunity to file motions to reopen their cases.⁴⁵⁵ U.S. citizens and LPRs were able to sponsor their spouses for residency and keep their families united.⁴⁵⁶ Finally, almost exactly two years later, *Obergefell v. Hodges* declared that same-sex marriage was legal throughout the United States.⁴⁵⁷ Immigration law itself did not change as a result of these decisions; rather, access to legal marriage changed and thus broadened the scope of who could qualify for marital benefits under immigration law.

B- A continued prioritization of national security interests over family reunification: *Kerry v. Din*

Kerry v. Din (2015) demonstrated that the Court still prioritizes national security concerns over the interest of family reunification.⁴⁵⁸ In *Kerry v. Din*, Fauzia Din, a United States citizen, petitioned to have her husband, Kanishka Berashk, be classified as an “immediate relative.”⁴⁵⁹ Berashk’s visa application was denied, with only the explanation that he was found inadmissible under the Security and Related Grounds section of the INA, which excludes aliens who have engaged in “[t]errorist activities.”⁴⁶⁰ Din filed suit to obtain a more detailed explanation for the denial.⁴⁶¹ Din argued that denial of her husband’s visa application violated her constitutional rights; claiming specifically that the Government denied her due process of law by depriving her of her constitutional right to live in the United States with her spouse without adequate explanation of the reason for visa denial.⁴⁶²

The Supreme Court found that Din did not have a due process claim to a more detailed explanation of the denial.⁴⁶³ The plurality added that the Government was only required to provide a “facially legitimate and bona fide” reason for its action, and that

⁴⁵³ Serna, *supra* note 424, at 617-18; Anna Carron, Notes and Comments, *Marriage-Based Immigration for Same-Sex Couples After DOMA: Lingering Problems of Proof and Prejudice*, 109 NW. UNIV. L. REV. 1021, 1023 (2015).

⁴⁵⁴ *In Re Zelniak*, 26 I&N Dec. 158, 159-60 (BIA 2013).

⁴⁵⁵ Laura Figueroa, *The Slow, Yet Long-Anticipated Death of DOMA and Its Impact on Immigration Law - Where are we Two Years Later?*, 16 SCHOLAR 477, 484-85 (2016).

⁴⁵⁶ Lee, *supra* note 369, at 249.

⁴⁵⁷ *Obergefell v. Hodges*, 135 S.Ct. 2584, 2608, 192 L.Ed.2d. 609 (2015).

⁴⁵⁸ Abrams, *Family Reunification and the Security State*, *supra* note 56, at 277.

⁴⁵⁹ *Kerry v. Din*, 135 S. Ct. 2128 (2015).

⁴⁶⁰ *Id.* at 2129.

⁴⁶¹ *Id.*

⁴⁶² *Id.* at 2131.

⁴⁶³ *Id.* at 2138.

here, citing the terrorism section as the reason for denial satisfied that requirement.⁴⁶⁴ The Court stated that it would not look behind the exercise of government discretion nor balance it against constitutional interests of citizens, particularly in the area of national security.⁴⁶⁵ However, some of the Justices assumed that Din did have a due process interest in her relationship with her spouse.⁴⁶⁶ *Din* may indicate that if Congress did not have sufficient national security interests behind their policies, the Court would possibly intervene to protect the interest of family reunification.⁴⁶⁷

9- Modern immigration issues and their effects on marriage

Immigration law concerning marriage is not, of course, merely historical. Every day, individuals and families must grapple with the practical consequences of immigration law. Those consequences are often financial. Two areas that exemplify those financial challenges are affidavits of supports and the work requirements in derivative non-immigrant visas. Affidavits of support make a family member responsible for ensuring that an immigrant is financially supported while he or she is in the United States. On the non-immigrant side, many spouses of non-immigrants such as students and workers are not allowed to work while they are in the United States, depriving the family of an income and creating potentially innumerable financial challenges for the family.

A- Affidavit of support and the financial requirements for marriage immigration

As discussed above, immigration regulations designed to limit the entry of poor people have existed since the American colonial period, but modern law gives family-based petitioners a way around those restrictions.⁴⁶⁸ Under the INA, an immigrant may be deemed inadmissible to the United States for being a “public charge,” i.e., financially dependent on the state.⁴⁶⁹ Today, this “public charge” designation remains one of the most common grounds of inadmissibility.⁴⁷⁰ To ensure that “an alien is not excludable as a public charge under INA § 212(a)(4),” Congress, as part of the IIRIRA, added § 213A to the INA—a new rule requiring immigrants filing immediate relative and family-based petitions⁴⁷¹ to submit an affidavit of support (Form I-184) as part of their petitions.⁴⁷² A

⁴⁶⁴ *Id.* at 2140.

⁴⁶⁵ Abrams, *Family Reunification and the Security State*, *supra* note 56, at 278.

⁴⁶⁶ *Id.* at 279.

⁴⁶⁷ *Id.*

⁴⁶⁸ Neuman, *supra* note 26, at 23.

⁴⁶⁹ Immigration and Nationality Act of 1952, ch. 477, § 212(a)(4), 66 Stat. 163 (1952) (codified at 8 U.S.C. § 1182).

⁴⁷⁰ Romulo E. Guevara & Frederick F. Calope. *Origin & Evolution: Ten Years Of The Affidavit Of Support Under IIRIRA*, IMMIGRATION DAILY (2007), available at <https://www.ilw.com/articles/2008,0717-guevarra.shtm>.

⁴⁷¹ An affidavit of support is also required for immigrants filing certain employment based petitions where the employer is a relative of the immigrant or the employer or the business filing the petition is one in which the relative owns a significant ownership interest.

⁴⁷² Immigration and Nationality Act of 1952 § 213A(a)(1) (codified at 8 U.S.C. § 1182(a)(4)(C)(ii)).

sufficient affidavit of support, in which a United States citizen, national, or permanent resident sponsor pledges nearly indefinite financial support to the immigrant petitioner, allows an immigrant to overcome an inadmissibility finding based on the “public charge” grounds.⁴⁷³

In making his or her sponsorship pledge,⁴⁷⁴ a “sponsor agrees to provide support to maintain the sponsored alien at an annual income not less than 125 percent of the Federal poverty line during the period in which the affidavit is enforceable.”⁴⁷⁵ United States courts have recognized this affidavit of support as a legally enforceable and binding contract.⁴⁷⁶ Should the sponsor fail to meet his or her obligation, the immigrant beneficiary may sue him or her for the support promised.⁴⁷⁷ In addition, if the immigrant beneficiary relies on any form of means-tested public benefit after becoming a lawful permanent resident, the government may sue the sponsor for reimbursement.⁴⁷⁸ A Form I-184 sponsor is thus signing up for a potentially lifelong obligation. In fact, a sponsor’s obligations only end if the beneficiary: (1) becomes a U.S. citizen; (2) has worked and paid taxes under the Social Security Act for forty quarters; (3) has lost status as a lawful permanent resident and has left the United States; (4) is subject to removal, but obtains a new grant of adjustment of status based on a new affidavit of support; or (5) dies.⁴⁷⁹ Notably, a divorce between a sponsor and the immigrant beneficiary does not end the sponsor’s obligation of support.⁴⁸⁰

B- Nonimmigrant visas: How work restrictions present challenges for spouses with derivative Visas

Non-immigrant visas often welcome those who are viewed as beneficial to the United States into the country, particularly highly skilled workers, businesspersons, and students. While these visas can provide many valuable opportunities to the recipients, the employment restrictions placed on their spouses have the potential to create a deeply

⁴⁷³ *Id.* at § 213 (codified at 8 U.S.C. § 1183a).

⁴⁷⁴ To qualify as a “sponsor,” the individual signing Form I-184 on behalf of a petitioning immigrant must reside in the United States and demonstrate an annual income of at least 125 percent of the federal poverty line. *Id.* at § 213(f)(1) (codified at 8 U.S.C. § 1183a(a)(1)(A)). Note that sponsors who are active duty military personnel are only required to support the beneficiary at 100 percent of the federal poverty level. 8 U.S.C. § 1183a(f)(3) (2012). The sponsor may be, but need not be, directly related to or the spouse of the petitioning immigrant.

⁴⁷⁵ 8 U.S.C. § 1183a(a)(1)(A).

⁴⁷⁶ Veronica Tobar Thronson, *Special Issue: Immigration and the Family Court: Special Issue Article: 'Til Death Do Us Part: Affidavits of Support and Obligations to Immigrant Spouses*, 50 FAM. CT. REV. 594, 597 (2012).

⁴⁷⁷ U.S. DEP’T OF HOMELAND SECURITY, U. S. CITIZENSHIP AND IMMIGR. SERV., FORM I-864, AFFIDAVIT OF SUPPORT UNDER SECTION 213A OF THE ACT, 8 (Sept. 19, 2011), *available at* <http://www.uscis.gov/files/form/i-864.pdf>.

⁴⁷⁸ *Id.*

⁴⁷⁹ *Id.* The obligation is also terminated if the *sponsor* dies. The sponsor’s estate, however, is not required to take responsibility for the immigrant beneficiary’s support. However, the estate may owe any support that the sponsor accumulated before he or she died.

⁴⁸⁰ *Id.*

problematic power imbalance within the marriage. When someone enters the United States on a nonimmigrant visa, primarily work or student visas, they can bring their spouse on what is known as a derivative visa. The couple does not have to be married before the primary visa holder obtains their visa in order to get a derivative visa.⁴⁸¹ As illustrated by the table in Appendix A, only spouses on a few types of visas are allowed to work in the United States, though some can go to school. Unmarried cohabitating partners and other family members who are ineligible for derivative visas can instead use the B-2 visitor visa to stay with someone who has another long-term nonimmigrant visa.⁴⁸²

The rules surrounding derivative visas affect hundreds of thousands of families each year. For example, in 2017, there were 27,435 spouses and children of student visa holders admitted to the U.S.⁴⁸³ Additionally, 136,393 spouses and children of temporary workers, including H1B visa holders, were admitted.⁴⁸⁴ There were also 85,254 family members of intracompany transferees and 39,354 admissions for the families of exchange visitors.⁴⁸⁵ Of those groups, some of the most common nonimmigrant visas, only the family members of intracompany transferees can be employed without separately qualifying for an employment visa.⁴⁸⁶

Derivative visas allow families to stay together while one member pursues education or employment opportunities in the United States, but they can have serious drawbacks. As a result of the work restrictions, spouses of visa holders, primarily women, become completely dependent on their spouse when they are unable to work, effectively resembling the old coverture system.⁴⁸⁷ Many spouses of H1-B employment visa holders, for example, had degrees and careers in their home country, but were forced to become homemakers in the United States when they were not allowed to work.⁴⁸⁸ Work authorization is also required for a nonimmigrant to get a social security number, which in turn is necessary to do basic tasks such as open a bank account or get a credit history.⁴⁸⁹ The principle visa holder also controls whether the spouse can remain in the United States, have access to their children, or become a permanent resident.⁴⁹⁰ The

⁴⁸¹ Birgisson, *supra* note 371, at 51.

⁴⁸² DEP'T OF STATE, FOREIGN AFFAIRS MANUAL, 9 FAM 402.2-4(B)(5) (2016).

⁴⁸³ DEP'T OF STATE, TABLE XVI(B) NONIMMIGRANT VISAS ISSUED BY CLASSIFICATION (INCLUDING BORDER CROSSING CARDS) FISCAL YEARS 2013-2017 (2018) (*see* F2 visa), <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2017AnnualReport/FY17AnnualReport-TableXVIB.pdf>.

⁴⁸⁴ *Id.* (*see* H4 visa).

⁴⁸⁵ *Id.* (*see* L2 and J2 visas).

⁴⁸⁶ *See* Appendix A, *infra*.

⁴⁸⁷ Sabrina Balgamwalla, *Bride and Prejudice: How U.S. Immigration Law Discriminates Against Spousal Visa Holders*, 29 BERKELEY J. GENDER L. & JUST. 25, 35-56 (2014); Madalena Bragun, Comment, *The Golden Cage: How Immigration Law Turns Foreign Women into Involuntary Housewives*, 31 SEATTLE U. L. REV. 937, 938 (2008).

⁴⁸⁸ Bragun, *supra* note 488, at 949. Most spouses on H-4 visas are women. Balgamwalla, *supra* note 488, at 34, 40.

⁴⁸⁹ Balgamwalla, *supra* note 488, at 41-42; Bragun, *supra* note 488, at 949, 952.

⁴⁹⁰ Balgamwalla, *supra* note 488, at 39.

derivative visa holder cannot leave their spouse without losing their immigration status, and they have no financial independence.⁴⁹¹ This dependence can increase the likelihood of domestic violence, as well as create numerous challenges in the day to day lives of these spouses.⁴⁹²

10- Conclusion

Immigration law in the United States is deeply tied to changes in the country throughout American history; both as a driver of and reaction to those changes. Marriage's central role in racial immigration restrictions has, fortunately, declined over time, but the impact of marriage migration on nonwhite groups across history has been powerful.

Racial marriage restrictions were designed to prevent immigrant women from giving birth to United States citizens, in addition to preventing them from immigrating at all. Religious groups were similarly targeted as another means of preventing people of certain races from immigrating. Family unification, however, has been and continues to be a powerful opposing factor to immigration restrictions.

The women's rights movement intersected with immigration law via the end of coverture, the fight over married women's citizenship, and through modern domestic violence protections. As women have gained an increasingly independent position in society, the benefits that can be obtained only through marriage have declined. Historically, spousal relationships, along with the parent-child relationships which accompanied those spousal relationships, have received the highest priority in immigration regulations. Some recent developments have potentially indicated that parent-child relationships and other non-spousal relationships may be receiving greater prioritization than spousal relationships.

A decline in the prioritization of marital relationships may be evidenced in the recent Travel Ban litigation. The Trump Administration issued a series of Executive Orders suspending the issuance of visas to citizens of certain countries, allegedly based on terrorist concerns.⁴⁹³ As a result, the inability to get a visa has resulted in the separation of some spouses. However, as in *Knauff*, *Mezei*, and *Din*, the Court has not elected to prioritize marital relationships above national security.

Parent-child relationships have been the focus of other recent immigration programs. This can be demonstrated through the Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) programs. While neither of these programs are currently in operation, DACA provided certain young undocumented individuals who arrived in the United States as

⁴⁹¹ Bragun, *supra* note 488, at at 953-54.

⁴⁹² Balgamwalla, *supra* note 488, at 51.

⁴⁹³ Exec. Order No. 13,769, 84 Fed. Reg. 8,977, §1-3 (Jan. 27, 2017).

children to request deferred action, in other words, to request a deferral of deportation.⁴⁹⁴ The DAPA program would make specified undocumented *parents* of United States citizens and lawful permanent residents eligible for deferred action.⁴⁹⁵ These programs demonstrated a shift from viewing family unification as a right for a man to live with his family members to a family unification right that extends beyond marriage.

The United States has alternately constrained and encouraged immigration for far more reasons than marriage, but marriage has been central to many immigrants' lives. Because of marriage's power, the United States government has wielded it as a tool in shaping the version of the American family that it most wants to see. However, trends may indicate that family relationships beyond spousal relationships – such as parent-child and other non-marital relationships – are beginning to be viewed as the most highly prioritized relationships in immigration legal and policy decisions.

⁴⁹⁴ U.S. DEP'T OF HOMELAND SECURITY, UNITED STATES CITIZENSHIP AND IMMIGR. SERVICES, FORM I-821D INSTRUCTIONS FOR CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (2017), *available at* <https://www.uscis.gov/i-821d>.

⁴⁹⁵ Memorandum from Jeh Charles Johnson, Sec'y, Dep't Homeland Sec., to Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., et al. 1-5 (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

Appendix A
Common Non-Immigrant Visas and Derivative Statuses⁴⁹⁶

Visa Category	Purpose	Spouse Information
B-1	Business visitors	No derivative status - need own B visa.
B-2	Tourist	No derivative status - need own B visa.
F	Student visa	Eligible for education, but not employment.
M	Students in a vocational or nonacademic program	Not eligible for employment
J	Exchange Students and professors	Eligible to work for their own support with authorization, but not allowed to support the principle exchange visitor.
E	Those working on treaty-based trade or investment. Business owners, managers, and employees.	Eligible for employment with authorization as of 2002.
L	Foreign employees/ intra-company transferee	Eligible for employment and education with authorization as of 2002.
H-2B	Temporary worker	Eligible for education, but not employment.

⁴⁹⁶ DEP'T OF STATE, DIRECTORY OF VISA CATEGORIES, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/all-visa-categories.html> (last visited May 28, 2018); UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES, WORKING IN THE U.S., <https://www.uscis.gov/working-united-states/working-us> (last visited May 28, 2018); AUSTIN T. FRAGOMEN, JR., CAREEN SHANNON, AND DANIEL MONTALVO, IMMIGRATION PROCEDURES HANDBOOK (2016).

H-3	Foreign employees participating in company training	Eligible for education, but not employment. As of March 2016, battered spouses can get employment authorization.
O	Persons of "extraordinary" ability in the sciences, arts, education, business, or athletics	Not eligible for employment without independent qualification.
P	Entertainers and athletes without extraordinary ability	Not eligible for employment without independent qualification.
Q	International cultural exchange visitor	No derivative visa.
I	Media/journalist	Eligible for education, but not employment.
H-1B	Specialty occupations in fields requiring highly specialized knowledge	Eligible for education, but not employment.
R	Religious worker	Not eligible for employment.
U	Victim of Criminal Activity	Eligible for employment.
T	Victim of Human Trafficking	Eligible for employment and study.