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Deported by Marriage: Americans Forced to Choose Between Love and Country

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Deported by Marriage

AMERICANS FORCED TO CHOOSE BETWEEN LOVE AND COUNTRY

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"I pray that soon the good men and women in our Congress will ameliorate the plight of families like the [petitioners] and give us humane laws that will not cause the disintegration of such families."[1]

INTRODUCTION

More people have been deported from the United States in recent years than ever before—over five million people since 1997.[2] In the past decade, U.S. immigration enforcement has focused on apprehending people living in the interior of the country, resulting in more deportations of people with long-term ties to the United States. For example, one study found that while only 3% of deportees in Tijuana had lived in the United States for three years or more in 2004, this proportion

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[1] Memije v. Gonzales, 481 F.3d 1163, 1165–66 (9th Cir. 2007) (Pregerson, J., dissenting) (alteration in original) (quoting Cabrera-Alvarez v. Gonzales, 423 F.3d 1006, 1015 (9th Cir. 2005)).

[2] Tanya Golash-Boza, *The Parallels Between Mass Incarceration and Mass Deportation: An Intersectional Analysis of State Repression*, 22 J. WORLD-SYS. RES. 484, 486 (2016).

jumped to 38% by 2011.[3] Many of those deported in recent years have lived in the United States for long enough to consider it home.[4] 18–28% of all people deported to Mexico in 2012 reported their home or residence was in the United States.[5] As the government deports more people who have established their lives in the United States—people who have gotten married and had children here—growing numbers of citizens are affected by the deportation of their spouses or parents.

As a result of the recent surge in deportations of people with long-term ties to the United States, hundreds of thousands of American citizens' marriages have been fundamentally undermined.[6] Some stay in the United States without their life partners; others leave the country to keep their families together. Either way, they experience financial, psychological, and emotional hardships.[7] Those who choose to leave are uprooted, losing proximity to family and friends, access to their property, and professional opportunities they trained for in the United States. They face cultural and language barriers once they move abroad. Most importantly, they miss the intangible things—the smells, the sounds, and the incomparable feeling of home. Those who stay in their homes lose the companionship of their spouses and, with international borders between them, families are often pushed beyond their limits. Children may be separated from their deported parents, a separation which can

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[3] Ietza Bojorquez et al., *Common Mental Disorders at the Time of Deportation: A Survey at the Mexico-United States Border*, 17 J. IMMIGRANT MINORITY HEALTH 1732, 1732 (2015).

[4] Surveys of people deported to Mexico demonstrate the trend towards deporting people who lived in the United States for longer periods of time. *See, e.g.*, Bojorquez et al., *supra* note 3, at 1732.

[5] LAURA VELASCO & MARIE LAURE COUBÉS, REPORTE SOBRE DIMENSIÓN, CARACTERIZACIÓN Y ÁREAS DE ATENCIÓN A MEXICANOS DEPORTADOS DESDE ESTADOS UNIDOS 5 (2013) (reporting 18% of deportees stated the United States was their country of residence); JEREMY SLACK ET AL., IN THE SHADOW OF THE WALL: FAMILY SEPARATION, IMMIGRATION ENFORCEMENT AND SECURITY 11 (2013) (finding that 28% of deportees surveyed reported their homes were in the United States).

[6] In a 2009 report analyzing deportations between 1997 and 2007, Human Rights Watch estimated that "at least one million spouses and children have faced separation from their family members due to these deportations." HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS): NON-CITIZENS DEPORTED MOSTLY FOR NONVIOLENT OFFENSES 3–4 (2009).

[7] For an in-depth exploration of the challenges people suffer as a result of the deportation of a spouse, including losing jobs, living apart from children, experiencing depression and suicidal ideation, and the dissolution of marriages, see NATHANIEL HOFFMAN & NICOLE SALGADO, AMOR & EXILE: TRUE STORIES OF LOVE ACROSS AMERICA'S BORDERS (2013).

result in serious emotional and mental health issues.[8] Under such stressful circumstances, marriages often crumble.[9]

The law currently requires a citizen whose spouse faces deportation to choose between *either* preserving her right to marriage (by moving out of the United States) or her right to enjoy the "privileges and immunities" of citizenship (by staying in the United States without her spouse) because courts have held that deporting an American citizen's spouse does not violate the citizen's rights.[10] A spouse's deportation does not infringe upon a citizen's right to marriage, the argument goes, because she "remains free to live with her husband anywhere in the world that both individuals are permitted to reside."[11] Alternatively, she could decide to stay in the United States without her husband.[12] Being forced to give up one fundamental right to protect another would generally violate the Constitution: the Supreme Court has found it "intolerable that one constitutional right should have to be surrendered in order to assert another."[13]

Yet, due to a convergence of factors rooted in racial and gender bias, courts have declined to recognize citizens' rights to challenge their spouses' deportations under the Constitution.[14] Denying constitutional protections to a citizen whose spouse is being deported means that *no one* can challenge the removal as a violation of the right to marriage because the person facing

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[8] *See infra* Section II.B.

[9] I obtained the statements and information reflected in this paragraph from first-hand interviews I conducted with women whose husbands have been deported to Mexico. I interviewed people in various cities in the border region of Mexico and in California between 2010 and 2016. Interview with wives of those deported to Mexico, in Border Region of Mexico & California (2010–2016).

[10] U.S. CONST. art. IV, § 2, cl. 1; *see* Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens' Rights*, 41 VILL. L. REV. 725, 776–77 (1996) (concluding that courts "do not give any serious consideration to the U.S. citizen's fundamental right to marry and to marital privacy" in immigration law cases).

[11] Kerry v. Din, 135 S. Ct. 2128, 2138 (2015) (plurality opinion).

[12] *See, e.g.*, Swartz v. Rogers, 254 F.2d 338, 339 (D.C. Cir. 1958) (concluding that although "[t]he physical conditions of the marriage may change [if she stayed in the United States without her husband] . . . the marriage continues").

[13] Simmons v. United States, 390 U.S. 377, 394 (1968); *see also* Mostofi v. Naplitano, 841 F. Supp. 2d 208, 213 (D.D.C. 2012) (rejecting claim that visa denial violates spouse's constitutional right to "freedom of personal choice in marriage and family life because they have 'done nothing more than say that the residence of one of the marriage partners may not be in the United States'").

[14] For a more detailed discussion of cases that have declined to recognize a citizen's right to challenge a spouse's deportation, see *infra* Section II.A. *See also* Burrafato v. U.S. Dep't of State, 523 F.2d 554, 555 (2d Cir. 1975); Silverman v. Rogers, 437 F.2d 102, 107 (1st Cir. 1970), *cert. denied*, 402 U.S. 983 (1971); Swartz v. Rogers, 254 F.2d 338, 339 (D.C. Cir. 1958).

deportation—a noncitizen—is not entitled to substantive due process protections in immigration proceedings.[15]

Two recent Supreme Court decisions signal an opening to reconsider the legal fiction that deporting a citizen's spouse does not implicate the citizen's rights. In *Obergefell v. Hodges*, the majority opinion extending the right to marriage to same-sex couples emphasized the fundamental importance of marriage.[16] *Obergefell*'s recitation of the various reasons the Constitution must protect the right to marriage highlights the problems with under-protecting the marital rights of citizens who marry foreigners. In *Kerry v. Din*, decided in the same term as *Obergefell*, an American citizen argued that her right to marriage implied the right to live with her husband in the United States.[17] There was no majority opinion in the case, but the tie-breaking opinion in the plurality rested on the assumption that the citizen's marital rights were implicated by the denial of her husband's visa.[18] Four dissenting Justices clearly concluded that citizens should be able to challenge decisions to exclude their spouses from the country.[19]

Fifty years ago, the Supreme Court struck down prohibitions against interracial marriages as unconstitutional in *Loving v. Virginia*.[20] Now, although *de jure* prohibitions against interracial marriages are history, marriages between people of different national origins continue to be undermined by the law.

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[15] *See* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1646 (1992) (discussing immigration law's historic exclusion of noncitizens from substantive due process protections in immigration related matters); *see also* DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA 136 (2012) ("However, for many deportees, one of the cruelest aspects of their plight is the complete disregard by the legal system of their family."); Kelly, *supra* note 10, at 771 (arguing for a "constitutionally humane approach" that would "recognize[ ] that all individuals, regardless of their ties to the United States, should be accorded rights"). Citizens cannot be deported without a constitutional assessment of the validity of the government's actions. *See* Afroyim v. Rusk, 387 U.S. 253, 268 (1967) (holding "that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship . . . . unless he voluntarily relinquishes that citizenship"); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 165–67 (1963) (holding a provision that stripped Americans of their citizenship "without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments" unconstitutional because forfeiture of citizenship amounts to a punishment); Trop v. Dulles, 356 U.S. 86, 102–03 (1958) (holding the divestment of citizenship of a soldier who was court-martialed for desertion violated the Eighth Amendment).

[16] Obergefell v. Hodges, 135 S. Ct. 2584, 2594–96 (2015).

[17] Kerry v. Din, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring).

[18] *Id.* at 2139 ("But rather than deciding, as the plurality does, whether Din has a protected liberty interest, my view is that, even assuming she does, the notice she received regarding her husband's visa denial satisfied due process.").

[19] *Id.* at 2142 (Breyer, J., dissenting).

[20] Loving v. Virginia, 388 U.S. 1 (1967).

In many respects, the forced separation of spouses and families under U.S. immigration law parallels the problems the Lovings fought against in that landmark case.

This article incorporates the experiences of women whose husbands have been deported to Mexico in order to challenge the foundational assumptions underlying the prevailing rule that spousal deportation does not implicate the rights of citizen spouses. It argues that the Constitution should protect the marriages of binational couples in the same way it protects all other marriages, and that strict scrutiny should apply to deportations of the husbands and wives of U.S. citizens.

The marginalization of women's rights to citizenship in spousal deportation cases is informed by a history of treating women as second-class citizens. In this context, the lack of protection afforded to women whose spouses face deportation is inextricably linked to gender. This article focuses specifically on the experiences of women whose husbands are deported because this is the population most affected by this phenomenon. Now that the Supreme Court has recognized the right to marriage for same-sex couples, the effects of spousal deportation on this population will likely become increasingly apparent. This is an area that warrants future research but is beyond the scope of this article.

Part I examines the gendered predecessors of excluding binational couples' marriages from constitutional protection, tracing the history of undervaluing women's citizenship status under U.S. law. Part II discusses racial subordination in the context of binational marriages, both historically and in the present. Part III describes the general rule—outside of the immigration context—that marriage, and the closely related right to live with one's spouse, are fundamental rights entitled to the highest level of constitutional protection, as emphasized recently in *Obergefell v. Hodges*. Building on these conclusions, this article argues that the right to marriage should be broadly construed to encompass the right to live in the United States with one's spouse, consistent with the dissent in *Kerry v. Din*. Part IV criticizes the common misconception that the deportation of one's spouse does not implicate a citizen spouse's fundamental right to marriage. Part V describes the severe consequences of a spouse's deportation to highlight the misguided nature of courts' analyses of the issue. Part VI argues that the Constitution should protect the rights of binational couples to live together in the United States because the Supreme Court has characterized being forced to choose between two constitutionally protected rights

as "intolerable" in other circumstances. In light of *Obergefell* and *Din*, the deportation of a citizen's spouse should—at the very least—be entitled to strict scrutiny review.[21]

I. HISTORICAL UNDER-PROTECTION OF WOMEN'S CITIZENSHIP

For nearly a hundred years—from the 1850s through the 1930s—American women who married foreign nationals lost their citizenship.[22] During that time period, men's citizenship was not at risk in the same way. The modern-day experiences of American women married to noncitizens who are excluded or deported from the United States is reminiscent of the expatriation of American women who married foreign nationals in the past.[23] By their marriage to a man from another country, women lost access to privileges otherwise guaranteed to all citizens. Although they were actually stripped of their citizenship in the past, the de facto deportation women experience today has remarkably similar effects. Women's citizenship was historically, and continues to be, under-protected.

Limiting women's access to the privileges associated with citizenship is rooted in American history. Historian Nancy F. Cott suggests that "there is something peculiar—more tenuous or vulnerable—about women's (or perhaps married women's) citizenship in the United States."[24] Women's access to the rights and privileges of citizenship has not been guarded as cautiously as men's, and this reality continues to influence current policy.[25]

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[21] Drawing from political philosopher Joseph Caren's concept of "the right to stay," I believe that the husbands and wives of U.S. citizens form such a crucial part of American families and society that they should be categorically exempt from deportation. *See* JOSEPH H. CARENS, IMMIGRANTS AND THE RIGHT TO STAY (2010). In other words, one's marriage to a U.S. citizen imbues him or her with a right to stay in the country. If a citizen's husband or wife commits a transgression, society should respond with the same sanctions it would for a citizen. Because of this broader perspective, I argue here that strict scrutiny review of spousal deportations is a minimum requirement. *See infra* Part VI.

[22] *See generally* LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES (1998) (examining divestment of women's citizenship under the Expatriation Act in the context of the broader subordination of women's rights in American history, focusing specifically on women's unique citizenship obligations); Nancy F. Cott, *Marriage and Women's Citizenship in the United States*, *1830–1934*, 103 AM. HIST. REV. 1440, 1444 (1998) (discussing the historic evolution of the relationship between marriage and women's citizenship).

[23] Expatriation Act of 1907, ch. 2534, 34 Stat. 1228, 1228–29 (1907), *repealed by* Nationality Act of 1940, ch. 876, 54 Stat. 1137 (1940).

[24] Cott, *supra* note 22, at 1441.

[25] The most obvious example is the doctrine of coverture, wherein women obtained rights only through their husbands. *See generally* TERESA ANNE MURPHY, CITIZENSHIP AND THE ORIGINS OF WOMEN'S HISTORY IN THE UNITED STATES (2013) (tracing the history of women's citizenship in the United States and linking women's struggles to

The marginalization of women's access to the rights of citizenship was embodied in the doctrine of coverture, which the United States imported from English common law. William Blackstone summarized the doctrine as follows: "By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband."[26] Coverture "transferred a woman's civic identity to her husband at marriage."[27] Rather than owe allegiance to the state, a married woman owed her loyalty to her husband. Any wages married women earned belonged to their husbands, they could not enter into contracts, and they could not file lawsuits because any legal transgressions against them were perceived as transgressions against their husbands.[28] Further, men gained control of their wives' property through marriage and were held responsible for crimes their wives committed because married women's civic identities were subsumed by their husbands' identities.[29] The marginalization of women as full citizens was so extreme that in a property dispute at the end of the eighteenth century, an attorney argued that a woman "is not a member; has no *political relation* to the *state* any more than an *alien*."[30] Under coverture, married women had virtually no rights apart from their husbands.

Through coverture, married women's access to the rights and responsibilities of citizenship was limited. The rights of married women whose husbands were not American were even more marginalized. In the mid-1800s, women who married men from other countries and then moved out of the United States often lost their citizenship.[31] Many courts treated a married woman's citizenship as "suspended" if she married a citizen of a different country and moved abroad.[32] For example, President Ulysses S. Grant's daughter married a citizen of England in 1874 and lived with him in England for a period of time.[33] She lost her citizenship, which was later restored by Congress.[34]

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obtain full citizenship and universal rights to challenging "a narrative of exclusion that legitimated the differentiated citizenship considered suitable for women").

[26] 1 WILLIAM BLACKSTONE, COMMENTARIES *441.

[27] KERBER, *supra* note 22, at 11–12.

[28] *See* CANDICE LEWIS BREDBENNER, A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP 18–19 (1998).

[29] *Id.*

[30] *See* KERBER, *supra* note 22, at 25.

[31] *See id.* at 40–41.

[32] *Id.* at 41.

[33] *Id.*

[34] *Id.*

In contrast, American men who married foreign women did not lose their citizenship.[35] Rather, under an 1855 law, their wives automatically became citizens without having to go through the naturalization process, as long as they fell within a racial category of people who were allowed to naturalize.[36] At the time, women understood that their citizenship was more vulnerable than men's. In the words of an expatriated citizen, "[i]f for men it is even a patriotic deed to extend by marriage the influence and partnership of their country in foreign lands, why should it not be the same when it is an American girl who marries a foreigner?"[37]

The Expatriation Act of 1907 codified the loss of a woman's citizenship upon marriage to a foreigner by expressly providing that "any American woman who marries a foreigner shall take the nationality of her husband."[38] As of 1907, women no longer had to move out of the country to lose their citizenship. For fifteen years after the passage of the Act the "legislative command denationalized or denaturalized every woman who married an alien."[39] The law provided that a woman could "resume her American citizenship" if her marriage ended.[40]

Widespread concerns about increased migration from southern and eastern Europe, which peaked in 1907, influenced the passage of the Expatriation Act.[41] Many Americans perceived immigrants from these countries as "a fearsome threat to the country's cultural and economic well-being," and women who married them were thus "discardable."[42] According to historian Candace Lewis Bredbenner, in "the nativist-tinged rhetoric of '100 percent Americanism,' a citizen woman's marriage to a foreigner became vulnerable to interpretation as a brazenly un-American act."[43] The Expatriation Act was one of the several laws passed to weed out citizens with potential allegiances to foreign governments.[44]

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[35] *Id.* at 37.

[36] *Id.* This requirement only applied to "any woman who might lawfully be naturalized under the existing laws," thus excluding Asian women and others due to race. *Id.* See *infra* Part II, for a discussion of the convergence of gender and race in this area of the law.

[37] BREDBENNER, *supra* note 28, at 105 (quoting Letter of Linda E. Hardesty de Reyes-Guerra to NWP Headquarters, May 1922).

[38] Expatriation Act of 1907, ch. 2534, 34 Stat. 1228, 1228–29 (1907), *repealed by* Nationality Act of 1940, ch. 876, 54 Stat. 1137 (1940).

[39] BREDBENNER, *supra* note 28, at 47.

[40] Expatriation Act of 1907 ch. 2534, 34 Stat. at 1229.

[41] BREDBENNER, *supra* note 28, at 5–6.

[42] *Id.*

[43] *Id.* at 6.

[44] *Id.* at 5–6.

Ethel Mackenzie challenged the law in 1915.[45] She had been active in the campaign for women's voting rights in her home state of California, but was unable to vote even after the state granted the right in 1911 because she had lost her citizenship when she married a foreigner.[46] An activist with the financial means to take her case to the Supreme Court, Mackenzie could have regained her citizenship status because her husband qualified to naturalize.[47] Recognizing that this course of action "would still [sic] avail nothing to other women," she instead challenged the law in the Supreme Court.[48] Her lawyer argued her American citizenship was "a right, privilege, and immunity which could not be taken away from her except as a punishment for crime or by her voluntary expatriation."[49] However, she lost.[50] The Court found the power to divest citizenship to be within Congress's plenary power, finding her decision to marry a foreigner tantamount to voluntarily relinquishing her citizenship because she did so "with notice of the consequences."[51] It reasoned that "[t]he marriage of an American woman with a foreigner . . . may involve national complications."[52] Despite critiques from legal scholars that the law was a blatant violation of the Constitution,[53] the Court conflated binational marriage with national security issues.

Not surprisingly, women's lives were impacted profoundly when they were stripped of their citizenship. When the Nineteenth Amendment was ratified in 1920, women who had lost their citizenship could not exercise the long-awaited right to vote. According to Bredbenner, "[i]n addition to being denied a voice at the polls, women married to aliens could be excluded or expelled from the United States, denied access to or fired from certain occupations (including female-dominated professions such as public school teaching), and exempted from many public-assistance programs" as a result of losing their citizenship.[54] For example, Lillian Larch, who had been born and raised in the United States, applied for public benefits to support her three

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[45] *See* Mackenzie v. Hare, 239 U.S. 299, 299 (1915).

[46] BREDBENNER, *supra* note 28, at 65.

[47] *Id.*

[48] *Id.* (quoting *Becomes Citizen for Wife's Vote*, 44 WOMEN'S J. & SUFFRAGE NEWS 401, 401 (1913)).

[49] *Mackenzie*, 239 U.S. at 308.

[50] *Id.* at 300 (equating a woman's marrying a foreigner to voluntarily renouncing her citizenship).

[51] *Id.* at 311–12.

[52] *Id.* at 312.

[53] *See, e.g.*, BREDBENNER, *supra* note 28, at 6 (quoting C. A. Hereshoff Bartlett, *Woman's Expatriation by Marriage*, 33 L. MAG. & REV. 150, 164 (1908)).

[54] *Id.* at 68.

children.[55] Since she had lost her citizenship status when she married a foreign man, the government initiated deportation proceedings against Larch and her three children on the ground that she qualified as a "public charge."[56]

The Expatriation Act was partially repealed in 1922 with the passage of the Cable Act, also referred to as the Married Women's Independent Nationality Act. The Cable Act provided that a woman married to a foreigner would no longer lose her citizenship *as long as her husband was eligible to become a citizen*.[57] As the next part will discuss, women married to men who could not naturalize—usually due to their race—continued to lose their citizenship for many years after the passage of the 1922 Cable Act.[58]

II. RACE AND EXCLUSION

Immigration law in the United States has a long history of racial exclusion. The Page Act of 1875, for example, was the first federal immigration law to restrict migration to the United States.[59] It specifically prohibited the entry of people deemed "undesirable," which included convicts, Asian workers, and those Asian women who were projected to engage in prostitution once in the United States.[60] Then, in 1882, all people of Chinese heritage were restricted from entering the United States by the Chinese Exclusion Act.[61] Informed by overt racism towards people of Chinese descent, the Act formalized racial exclusions in U.S. immigration law. The Supreme Court upheld the legitimacy of the Act in 1889, equating the migration of "vast hordes of its people crowding in upon us" with an act of foreign aggression.[62]

In the early twentieth century, the Immigration and Nationality Act allowed only "white" people or people of African descent to naturalize.[63] Other people classified as "non-white"

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[55] *Id.* at 1.

[56] *Id.* at 1, 173.

[57] Meg Hacker, *When Saying "I Do" Meant Giving Up Your U.S. Citizenship*, GENEALOGY NOTES 56, 58 (2014), http://www.archives.gov/publications/prologue/2014/spring/citizenship.pdf [https://perma.cc/QK95-RW42].

[58] *See* KERBER, *supra* note 22, at 42–43.

[59] *See* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 643 (2005).

[60] Page Act of 1875, ch. 141, 18 Stat. 477 (repealed 1974).

[61] *See* Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 27 UCLA L. REV. 405, 413 (2005) [hereinafter Volpp, *Divesting Citizenship*].

[62] The Chinese Exclusion Case, 130 U.S. 581, 606 (1889).

[63] *See generally* IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) (discussing the requirement that noncitizens be "white" in order to

were categorically prohibited from naturalizing and, in many cases, from coming to the United States.[64] Statutory prohibitions against Asian immigration expanded in the early twentieth century, eventually barring people from the entire "Asiatic zone" spanning from Afghanistan to the Pacific.[65] The Supreme Court specifically considered individual cases of people of Japanese and Indian ancestry, holding that they could not naturalize because they were not "Caucasian" or "white."[66]

Among those who lost their citizenship due to marriage, women who were prohibited from naturalizing due to their race suffered more than their white counterparts. Because they were not eligible to naturalize, they were blocked from recovering their citizenship after it was divested. For example, Ng Fung Sing, the daughter of Chinese parents, was born in the United States in 1898, acquiring birthright citizenship.[67] She moved to China with her parents as a child, where she eventually married a Chinese citizen.[68] Her husband died, and Sing tried to return to the United States in 1925.[69] She was denied admission and was not allowed to recover her American citizenship because she was of Chinese descent.[70] If she had been white, she would have been allowed to resume her citizenship upon her husband's death.[71] However, because she was, in the words of the court, of "yellow race," she was prohibited from returning to the country of her birth.[72]

Women who married foreigners deemed "non-white" (and not of African descent) also suffered more than women who married "white" foreigners. American women who married "non-white" foreigners continued to lose their citizenship for over a decade after the passage of the Cable Act since it only applied to women whose husbands otherwise qualified to naturalize. According to Professor Leti Volpp, the Cable Act of 1922 only

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naturalize). For an in-depth discussion of racial exclusion in U.S. immigration law, see Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111 (1998).

[64] Immigration Act of 1924, ch. 190, § 11(d), 43 Stat. 153, 159 (1924).

[65] Volpp, *Divesting Citizenship*, *supra* note 61, at 414.

[66] *See* United States v. Thind, 261 U.S. 204 (1923) (excluding an immigrant from India from naturalizing because he was not "white"); Ozawa v. United States, 260 U.S. 178 (1922) (excluding an immigrant from Japan from naturalizing because he was not "white").

[67] Volpp, *Divesting Citizenship*, *supra* note 61, at 407 (*citing Ex parte* Ng Fung Sing, 6 F.2d 670, 670 (D.D.C. 1925)).

[68] *Id.*

[69] *Id.*

[70] *Id.* (*citing Ex parte* Ng Fung Sing, 6 F.2d 670, 670 (D.D.C. 1925)).

[71] *Id.* at 407, 430; *see In re* Fitzroy, 4 F.2d 541, 542 (D. Mass. 1925) (holding that upon "termination of the marriage and her continuation or resumption of domicile [in the United States], her original citizenship revive[d]").

[72] *Id.* at 407–08.

allowed "white or black women expatriated for marrying white or black noncitizen men to be renaturalized."[73] Asian American women were most affected by the Act because they were most likely to marry Asian men, (particularly given that fifteen states had laws prohibiting marriages between whites and Asians).[74]

But any women married to men prohibited from naturalizing were excluded from the protections of the 1922 Cable Act. White women married to men from China, India, and Mexico all challenged the loss of their citizenship in the 1920s.[75] Congressional representative Victor Houston estimated 80,000 women from Hawaii alone would be unable to recover their citizenship after marrying foreign men due to the racial exclusions of the 1922 Act.[76] Through a series of amendments to the Cable Act between 1930 and 1936, citizenship rights were finally restored to all women.[77]

Race continues to play a central role in the creation and enforcement of immigration law. Lines are no longer drawn between "white" and "non-white" to specify who qualifies for naturalization, but immigration law continues to have racially disparate impacts. Whereas Asian immigrants were most negatively impacted by immigration laws in the past, Latino immigrants currently suffer most under U.S. immigration policies.

Over 90% of people deported from the United States are Latino men.[78] In Fiscal Year 2015, the top four countries receiving deportees from the United States were Mexico, Guatemala, El Salvador, and Honduras.[79] These countries collectively received 221,610 out of 235,413 total people deported from the United States, amounting to 94% of all deportees that year.[80] In contrast, the government rarely deports unauthorized immigrants from Europe and Canada. While there are an estimated 600,000 such people in the United States—comprising 17.75% of the estimated total number of unauthorized immigrants in the country—only

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[73] *Id.* at 433.

[74] *See id.* at 433–35.

[75] *Id.* at 435–36, 438.

[76] *Id.* at 441–42.

[77] Cott, *supra* note 22, at 1469; Volpp, *Divesting Citizenship*, *supra* note 61, at 444–46.

[78] *See* U.S. DEP'T OF HOMELAND SEC., 2014 YEARBOOK OF IMMIGRATION STATISTICS 103–06 (2016), https://www.dhs.gov/sites/default/files/publications/DHS%20 2014%20Yearbook.pdf [https://perma.cc/5JR8-U4KF]; Tanya Golash-Boza & Pierrette Hondagneau-Sotelo, *Latino Immigrant Men and the Deportation Crisis: A Gendered Removal Program*, 11 LATINO STUD. 271 (2012) (discussing the targeted deportation of Latino men).

[79] *See* U.S. DEP'T OF HOMELAND SEC., ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT, FISCAL YEAR 2015 9 (2016), https://www.ice.gov/sites/default/files/ documents/Report/2016/fy2015removalStats.pdf [https://perma.cc/NUW7-PEGU].

[80] *Id.*

1.12% of all unauthorized immigrants apprehended by the Department of Homeland Security in 2012 originated from Europe or Canada.[81]

U.S. citizens who marry Latino noncitizens therefore disproportionately experience the risk of constructive deportation. The Pew Research Center found that approximately 26% of Latino marriages are interracial, indicating that Latina citizens of the United States are likely the group most affected by the widespread deportation of Latino men.[82]

In a social and political context where projections about Latino population growth are perceived by some as a threat to American culture,[83] myths surrounding Latina fertility poise Latina women as a threat: their children will contribute to the projected Latino majority. According to anthropologist Leo R. Chavez, high fertility rates among Latinas have been discussed in national magazines as "dangerous," "pathological," "abnormal," and even a threat to national security.[84] Chavez reviewed seventy-six individual issues of ten national magazines published between 1965 and 1999 to examine how the magazines discussed Latina fertility.[85] He found many instances where the theme of high fertility rates among Mexican women was linked to Latino population growth even though Mexican

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[81] According to the Pew Hispanic Research Center, as of 2012, an estimated 600,000 unauthorized immigrants in the United States were born in Europe or Canada. Jeffrey S. Passel & D'Vera Cohn, *Unauthorized Immigrant Totals Rise in 7 States, Fall in 14: Decline in Those from Mexico Fuels Most State Decreases*, PEW RESEARCH CTR. (Nov. 18, 2014), http://www.pewhispanic.org/2014/11/18/unauthorized-immigrant-totals-rise-in-7-states-fall-in-14/ [https://perma.cc/F6KV-UCRR]. The Department of Homeland Security reports that 6,720 unauthorized immigrants from Europe and Canada were apprehended in 2012, out of a total of 671,327 apprehensions. U.S. DEP'T OF HOMELAND SEC., 2014 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 78, at 92 tbl.34.

[82] WENDY WANG, PEW RESEARCH CTR., THE RISE OF INTERMARRIAGE (2012), http://www.pewsocialtrends.org/2012/02/16/the-rise-of-intermarriage/ [https://perma.cc/67C8-KZGK].

[83] Nativist sentiment has combined with racist stereotypes to create a culture wherein Latinos are conceptualized as "immigrants" or "aliens." *See generally* LEO R. CHAVEZ, THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION (2008) (analyzing negative stereotypes about Latinos, with a particular emphasis on immigrants, and exploring how these stereotypes influence public policy). Latino citizens have not been fully embraced in mainstream understandings of citizenship, and widespread fears of an impending Latino majority have ignited anti-Latino sentiment across the country. *See* EDIBERTO ROMÁN, THOSE DAMNED IMMIGRANTS: AMERICA'S HYSTERIA OVER UNDOCUMENTED IMMIGRATION 36–41 (2013). Politicians, academics, and news outlets warn of a "Latino invasion." Popular discourse within the United States has essentially erased the history of the U.S. invasion and taking of Mexican land and has paradoxically reframed the issue to characterize Mexicans—and Latinos more broadly—as invaders who threaten to take over the United States. For examples of this rhetoric, see PETER BRIMELOW, ALIEN NATION (1995); Samuel Huntington, *The Special Case of Mexican Immigration: Why Mexico Is a Problem*, AM. ENTERPRISE, Dec. 2000, at 20–21.

[84] Leo R. Chavez, *A Glass Half Empty: Latina Reproduction and Public Discourse*, 63 HUMAN ORG. 173, 174 (2004).

[85] *Id.* at 175.

women in the United States do not have dramatically more children than their Anglo counterparts.[86]

A 2004 article by Harvard professor Samuel P. Huntington clearly expresses the popular perception of the link between Latina fertility and the projected Latino majority.[87] Huntington warns "the fertility rates of these immigrants" from Mexico present "the single most immediate and most serious challenge to America's traditional identity."[88] Myths surrounding Latina women's fertility may contribute to the under-protection of Latina citizens' rights.

Although women no longer lose their citizenship upon marrying foreign nationals, citizens whose spouses are deported lose access to fundamental privileges of citizenship. As in the past, the citizenship of women whose husbands are not U.S. citizens is particularly vulnerable. As Linda Kerber notes in her history of women's citizenship status, "glimpses of a world in which women's citizenship was dependent of that of their husbands can still be discerned."[89]

III. THE RIGHT TO LIVE AT HOME AS A MARRIED COUPLE

The right to marriage is a fundamental right protected by the Fifth and Fourteenth Amendments such that any government infringement on the right is subject to strict scrutiny review.[90] In the immigration context, however, deportation challenges based on governmental interference with a citizen's right to marriage have been subject either to no scrutiny or, in the cases more favorable to immigrants' rights, to rational basis review.[91] Although the freedom to choose whom to marry is

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[86] *Id.* at 175–76, 178.

[87] Samuel P. Huntington, *The Hispanic Challenge*, FOREIGN POL'Y, Mar.–Apr. 2004, at 32.

[88] *Id.*

[89] *See* KERBER, *supra* note 22, at 46.

[90] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015) ("Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause."); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause."); Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men").

[91] Many cases have declined to apply any scrutiny to challenges to spousal deportations or exclusions from the country because courts conclude the right to marriage is not impacted by deportation or exclusion. *See, e.g.*, Burrafato v. U.S. Dep't of State, 523 F.2d 554, 555 (2d Cir. 1975); Silverman v. Rogers, 437 F.2d 102, 107 (1st Cir. 1970), *cert. denied*, 402 U.S. 983 (1971); Swartz v. Rogers, 254 F.2d 338, 339 (D.C. Cir. 1958). Others apply a low-level of rational basis review. *See, e.g.*, Bustamante v. Mukasey, 531 F.3d 1059, 1062 (9th Cir. 2008) (requiring the government to present "a facially legitimate and bona fide reason" for denying a visa); Stephen H. Legomsky, *Ten More Years of Plenary*

recognized as a "basic civil right[],"[92] citizens who choose to marry noncitizens do not benefit from the same marital protections that apply to unions between citizens.

This part discusses the long-standing recognition of the importance of protecting the right to marriage outside of the immigration context. The centrality of cohabitation to marriage is discussed to support the argument that government actions that interfere with a couple's ability to live together—including deportation—should be subject to constitutional limits. Building on the seminal marriage rights cases of *Loving v. Virginia* and *Obergefell v. Hodges*, this article argues that the Constitution should protect marriages threatened by deportation. The dissent in *Kerry v. Din* was correct to recognize the right to marriage as encompassing the right to live in one's country with one's spouse.

A. Marriage as a Fundamental Right

The Supreme Court has recognized the importance of marriage as early as 1888, in *Maynard v. Hill*, when it found that marriage "creat[es] the most important relation in life."[93] In 1967, the Court concluded in *Loving v. Virginia* that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[94] The choice of whom to marry is, according to the *Loving* opinion, a "'basic civil right[] of man,' fundamental to our very existence and survival."[95] Most recently, the Court reiterated the importance of marriage, and its status as a fundamental right, when it extended the right to marriage to same-sex couples in *Obergefell v. Hodges*.[96]

Obergefell both reinforced and expanded the constitutionally protected right to marriage. Justice Kennedy's majority opinion in *Obergefell* begins by emphasizing "the transcendent importance of marriage," stating that marriage has historically "promised nobility and dignity to all persons."[97] The opinion notes that marriage "allows two people to find a life that could not be found alone" and "is essential to our most

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Power: Immigration, Congress, and the Courts, 22 HASTINGS CONST. L.Q. 925, 931, 934 (1995) (explaining that "[i]t is now routine for lower courts to state the test in rational basis terms, with varying degrees of actual bite" in "substantive due process and equal protection challenges in the deportation setting").

[92] *See Loving*, 388 U.S. at 12 (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

[93] Maynard v. Hill, 125 U.S. 190, 205 (1888).

[94] *Loving*, 388 U.S. at 12.

[95] *Id.* (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

[96] Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015).

[97] *Id.* at 2593–94.

profound hopes and aspirations."[98] According to *Obergefell*, marriage is "the foundation of government" that operates as an essential "bond of society."[99]

In explaining its decision to expand the right to marriage to include same-sex couples, the Court reviewed "the basic reasons why the right to marry has been long protected," focusing on four primary justifications for the government's interest in promoting marriage.[100] First, the choice of whom to marry is "inherent in the concept of individual autonomy" and is "among the most intimate that an individual can make."[101] Further, "[c]hoices about marriage shape an individual's destiny."[102] Second, marriage is a unique, important bond that "offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other."[103] Third, marriage "safeguards children and families" by "allow[ing] children 'to understand the integrity and closeness of their own family'" and "afford[ing] the permanency and stability important to children's best interests."[104] Finally, marriage is important as a "keystone of our social order."[105] It fulfills both functional and spiritual needs. Functionally, marriage provides "material benefits" available only to married couples, such as tax benefits, hospital access, health insurance, and survivor's rights.[106] Spiritually, marriage also has "transcendent purposes," including its great emotional importance in people's lives.[107] *Obergefell* reaffirms the longstanding rule that marriage deserves constitutional protection because of its importance to individuals, families, and society.

Because of its central importance, marriage is thus protected by the highest standard of constitutional review. Government actions that "significantly interfere[] with the exercise" of the right to marry are subject to "'critical examination' of the state interests advanced in support of the classification" that interfere with the right.[108] For example, *Zablocki v. Redhail* addressed a state law that required residents to "obtain[] court order[s] granting permission to marry," which would only be

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[98] *Id.* at 2594.
[99] *Id.*
[100] *Id.* at 2599–601.
[101] *Id.* at 2599.
[102] *Id.*
[103] *Id.* at 2600.
[104] *Id.* (quoting United States v. Windsor, 133 S. Ct. 2675, 2694–95 (2013)).
[105] *Id.* at 2601.
[106] *Id.*
[107] *Id.* at 2602.
[108] Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (citing Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312, 314 (1976)).

issued to those who were in compliance with their child support obligations, and to those whose children "are not likely . . . to become public charges."[109] The Supreme Court applied strict scrutiny to analyze the constitutionality of the statute because of marriage's "fundamental importance" to all individuals.[110] The Court reasoned, "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."[111] Thus, in *Zablocki*, the Court found the statute to be "substantially overinclusive" and therefore not sufficiently narrowly tailored.[112] Accordingly, the statute was deemed unconstitutional.[113] Government intrusions into marriages are uniformly subject to strict scrutiny when the intrusion does not involve immigration law.[114]

B. Marriage and Living Together

Living with one's spouse is such a central aspect of marriage that the right to marriage must also protect the right of a married couple to live together. Marriage simply cannot fulfill many of its "transcendent" or functional purposes when spouses are prevented from living together. In *Obergefell*, the Court discussed companionship and the "intimate association" of spouses as important aspects of marriage.[115] The benefits of companionship are necessarily limited when people reside across international borders from one another, and the ability to foster intimate association with one another is similarly hampered.

Companionship and intimacy are such important aspects of marriage that a law that infringes upon the right to live together as a married couple should be understood to infringe upon the marriage itself. The Supreme Court has recognized the

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[109] *Id.* at 375 (quoting WIS. STAT. §§ 245.10(1),(4),(5) (1973)).

[110] *Id.* at 384.

[111] *Id.* at 388.

[112] *See id.* at 390.

[113] *Id.* at 390–91 ("The statutory classification . . . thus cannot be justified by the interests advanced in support of it.").

[114] *See* Turner v. Safley, 482 U.S. 78, 96–99 (1987) (applying strict scrutiny to a prison regulation that required inmates to obtain permission from the prison superintendent, based on compelling reasons, in order to get married); Zablocki v. Redhail, 434 U.S. 374, 383 (1978); Edith Z. Friedler, *From Extreme Hardship to Extreme Deference: United States Deportation of Its Own Children*, 22 HASTINGS CONST. L.Q. 491, 497–98 (1994) ("Regardless of how far the courts have expanded this penumbra of rights, its core philosophy has remained intact; the right of family association is a significant interest in fundamental rights jurisprudence. Any state action that potentially affects such rights should be analyzed under the strict scrutiny test.").

[115] Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015).

right to "establish a home and bring up children" as central to marriage.[116] This recognition is premised on the unstated assumption that the married couple would live together in the home they establish. One of the purposes of marriage is to protect children by affording them "permanency and stability" in the context of their families.[117] Living together is essential to create the stable home environment the Supreme Court has recognized as a central feature of marriage. This purpose is fundamentally undermined when a married couple is separated by deportation.

Although physical proximity is not a prerequisite to marriage,[118] living together is an important aspect of a union. In fact, cohabitation is one of its defining characteristics. It is generally expected that once two people are married, they will live together.[119] Upon the dissolution of a marriage, it is similarly expected that the couple will no longer live together.[120] The centrality of cohabitation to marriage is evident in the doctrine of common law marriage, whereby couples who live together can be recognized as married at least in part *because of* their cohabitation.[121] Conversely, marriages were historically understood to end when it was "improper or impossible for the parties to live together."[122]

In the field of immigration law, cohabitation is a required element of establishing a valid marriage. According to the Immigration and Nationality Act (INA) section 319, a spouse of a citizen must have been "living in marital union with the citizen spouse" for the three years before filing an application to adjust status from lawful permanent resident to citizen.[123] The United States Citizenship and Immigration Services (USCIS)

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[116] *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[117] *Obergefell*, 135 S. Ct. at 2600.

[118] *See Turner*, 482 U.S. at 96 (concluding that prisoners maintain their right to marriage despite the fact that they cannot live with their spouses during their incarceration).

[119] During the Renaissance, "[a] traditional part of the wedding ceremony was the nuptial parade through the streets to escort the bride from her father's house to her new home." *Renaissance Wedding Gifts*, VICTORIA & ALBERT MUSEUM, http://www.vam.ac.uk/content/articles/r/renaissance-wedding-gifts/ [https://perma.cc/AV3K-YL99]. Women were given marriage chests to store linens and other household items they would take with them to their husband's home. *Id.* The modern incarnation is a wedding registry, through which people often register for household items based on the tradition of establishing a joint household following marriage.

[120] Much litigation in divorce cases focuses on which spouse will get the home they shared during the marriage. *See, e.g.*, Melissa Tapply, *Who Gets the House in a California Divorce?*, DIVORCENET, http://www.divorcenet.com/resources/divorce/marital-property-division/who-gets-house-california-divorce.htm#b [https://perma.cc/59BS-3VD7].

[121] *See* Jennifer Thomas, Comment, *Common Law Marriage*, 22 J. AM. ACAD. MATRIM. L. 151, 155–56 (2009) (reviewing the history of common law marriage).

[122] 1 WILLIAM BLACKSTONE, COMMENTARIES *441.

[123] Immigration & Nationality Act, 8 U.S.C. § 1430 (2012).

policy manual, which governs the conduct of immigration adjudicators conducting these interviews, provides that "USCIS considers an applicant to 'live in marital union' with his or her citizen spouse if the applicant and the citizen actually reside together."[124] If a couple cannot prove cohabitation, the application will typically be denied.[125]

When noncitizens apply to become lawful permanent residents based upon marriage to a citizen, they must attend an interview with an immigration officer.[126] Interview questions frequently focus on establishing whether a marriage is "bona fide," as opposed to a "sham marriage" entered into solely for an immigration benefit.[127] According to USCIS's Manual, "[y]ou will often have to question both the petitioner and the beneficiary to determine whether the marriage is bona fide."[128] According to the manual, "[n]o cohabitation" is an "indication[] that a marriage may have been contracted solely for immigration benefits."[129] The Board of Immigration Appeals defines a "sham marriage," which renders an applicant ineligible for immigration benefits through his or her spouse, as a marriage "the parties entered into with no intent, or 'good faith,' to live together."[130]

The requirements for petitioning for relief under the Violence Against Women's Act (VAWA)[131] reinforce the centrality of living with one's spouse to marriage. In addition to establishing a good faith marriage to a U.S. citizen or lawful permanent resident, a victim of domestic violence petitioning for immigration relief under VAWA must also establish that she lived with her spouse at some point.[132] Cohabitation is such

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[124] *Policy Manual: Marriage and Marital Union for Naturalization* vol. 12, pt. G, ch. 2, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartG-Chapter2.html [https://perma.cc/G3J7-M769].

[125] According to the USCIS policy manual, "[u]nder very limited circumstances and where there is no indication of marital disunity, an applicant may be able to establish that he or she is living in marital union . . . even though the applicant does not actually reside with citizen spouse." *Id.* These exceptions are limited to one spouse being in the military or required to travel for work. *Id.* Incarceration does not qualify. *Id.*

[126] *See Adjudicator's Field Manual* ch. 21, § 21.3, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-3481/0-0-0-4484.html#0-0-0-389 [https://perma.cc/Y2SY-8K3K].

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] Violence Against Women Act of 1994, 42 U.S.C. § 13925 (2012).

[132] 8 U.S.C. §§ 1154(a)(1)(A)(iii)(II)(dd), (B)(ii)(II)(dd) (2012); *see generally* WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42477, IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT (VAWA) (2012), https://www.fas.org/sgp/crs/misc/R42477.pdf [https://perma.cc/UB3T-4UBU] (describing VAWA's extension of family-based immigration benefits to foreign nationals who can demonstrate they suffered from abuse by U.S. citizens or lawful permanent residents).

an important indication of the validity of the marriage that it is codified as a requirement separate and apart from the marriage being entered into in good faith.

To be sure, people who cannot physically reside together may still cultivate meaningful marriages. For example, many prisoners serving lengthy sentences maintain strong bonds with their spouses despite the separation.[133] The Supreme Court recognized that the right to marriage persists during one's incarceration in *Turner v. Safley*, holding that prisoners maintain the right to get married during their incarceration.[134] Reasoning that "the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement," the Court found that despite physical incarceration of one spouse, several key aspects of marriage persist.[135] These aspects include marriage as an "expression[] of emotional support and public commitment."[136] From a functional perspective, "marital status often is a precondition to the receipt of government benefits" and to "other, less tangible benefits."[137] Accordingly, in *Turner*, the Court held that a prisoner maintains the right to enter into a marriage despite his or her incarceration.

Yet the fact that prisoners' marriages are recognized and valued does not undermine the centrality of cohabitation to the institution of marriage. Prisoners are subject to a wide range of severe restrictions on their liberty. Recognizing that they maintain a right to marriage despite these liberty restrictions does not mean that marriage is unaffected by the distance between spouses. Rather, some relationships survive a spouse's imprisonment *despite* the distance. While it is certainly true that a couple may maintain some important aspects of marriage although they are geographically separated, living with one's spouse remains a crucial aspect of marriage. Deportation policies that undermine a couple's ability to live with one another undeniably interfere with fundamental aspects of marriage, including companionship and intimacy.

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[133] *See, e.g.*, BRIDGET KINSELLA, VISITING LIFE: WOMEN DOING TIME ON THE OUTSIDE (2007) (describing her own relationship with a prisoner and telling the stories of several other women married to men in prison); Deena Guzder, *Bar-Crossed Lovers: Making a Marriage Work When a Spouse Is Serving Life*, AL JAZEERA AM. (Feb. 14, 2014), http://america.aljazeera.com/articles/2014/2/14/spouses-of-the-longtermincarcerated.html [https://perma.cc/U84E-6PC3] (describing the marriage of Eshawn and Jermaine Page).

[134] Turner v. Safley, 482 U.S. 78, 96 (1987).

[135] *Id.*

[136] *Id.* at 95.

[137] *Id.* at 96.

C. The Right to Live at Home as a Married Couple

A married couple's right to live together at home was central to the seminal marriage rights case of *Loving v. Virginia*.[138] *Loving v. Virginia* specifically held that "restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause" and the Due Process Clause because the "racial classifications embodied in these statutes" infringed upon the "fundamental freedom" to marry and thus were "subversive of the principle of equality at the heart of the Fourteenth Amendment."[139] Although less widely known, the *Loving* case was also about married people's choice to live together *in their home state.*

Mildred and Richard Loving, an interracial couple, got married in the District of Columbia.[140] When they returned to their home in Virginia, where the state law prohibited interracial marriages, they were prosecuted.[141] Instead of serving jail time, the Lovings were banished from Virginia and were prohibited from living together in their home.[142]

The Lovings moved to Washington, D.C. where they were allowed to live together as a married couple,[143] but they missed their families and wanted to return home to Virginia.[144] Richard Loving clearly articulated this concern in comments to his lawyer, whom he asked to tell the Supreme Court Justices "that I love my wife, and it is unfair that I can't live with her in Virginia."[145] In holding that the Virginia statute infringed upon the Lovings' right to marriage, the Court implied that the option to live with one's spouse in a different state did not cure the state's infringement on their right to marriage.

When the Supreme Court concluded that Virginia's law impermissibly interfered with the right to marriage on substantive due process grounds, the Court did not engage in the reasoning that is now common in deportation-based challenges predicated on the right to marriage. The Court could have reasoned that the Lovings' right to marriage was not infringed

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138 Loving v. Virginia, 388 U.S. 1 (1967).

139 *Id.* at 12.

140 *Id.* at 2.

141 *Id.* at 2–3.

142 *Id.* at 3 ("[T]he trial judge suspended the sentence [of one year in jail] for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years.").

143 *Id.* at 2–3.

144 *See generally* THE LOVING STORY (Augusta Films 2011) (a documentary telling the story behind the *Loving v. Virginia* case).

145 *See The Loving Story: Synopsis*, HBO, http://www.hbo.com/documentaries/the-loving-story/synopsis.html [https://perma.cc/NUV2-SZJH].

upon by the Virginia statute because they were free to live together as a married couple in Washington, D.C. But in *Loving*, the alternative of living somewhere else as a married couple did not render the interference with their marriage null. Rather, the Court vindicated their right to live as a married couple in the state they chose.[146]

The Supreme Court has recognized living with one's family members as a fundamental right entitled to due process protections in other contexts as well. In *Moore v. East Cleveland*, the Court protected a grandmother's right to share a home with her grandsons.[147] The Court applied strict scrutiny to a statute that would have prohibited this living arrangement, explaining that "when the government intrudes on the choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."[148] In reaching its conclusion, the Court found the due process clause protects "freedom of personal choice in the matters of marriage and family life."[149] Like in *Loving*, the Court did not reason that the grandmother could preserve her right to live with her grandsons by moving from her home to another location where this living arrangement would be allowed. Rather, the Court protected the grandmother's right to live *in her home* with her grandsons.

D. The Right to Live in the United States with One's Spouse

In the same way that the Lovings' right to marriage was impermissibly infringed upon when they were forced to live away from their home to preserve their marriage, the rights of U.S. citizens who are forced to leave the country to live with their spouses are similarly infringed upon by their spouses' exclusion or deportation.

The Supreme Court has not explicitly recognized the right to live at home with one's spouse as a fundamental component of the right to marriage, but more than half of the Justices on the Supreme Court signaled their support for acknowledging a citizen's right to live in the United States with her husband in the 2015 case of *Kerry v. Din*.[150] Although the case focused specifically on the doctrine of consular non-reviewability, it has broader

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146 *See Loving*, 388 U.S. at 12.
147 Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977).
148 *Id.*
149 *Id.*
150 Kerry v. Din, 135 S. Ct. 2128 (2015).

relevance to the question of whether an American citizen's right to marriage is implicated when a noncitizen spouse is either prevented from entering, or is forcibly removed from, the United States. Din, a U.S. citizen, argued that her right to marriage implied the right to live with her husband in the United States, and the denial of his visa interfered with that right such that the government must provide a "facially legitimate and *bona fide* reason" for its decision.[151]

Din's claim challenged the longstanding rule that consular decisions are not subject to judicial review. Although her claim ultimately failed, only three Justices concluded unequivocally that her rights were not implicated by her husband's exclusion.[152] The four dissenting Justices reached the opposite conclusion, stating that Din, as a citizen, has a constitutionally protected liberty interest in "her freedom to live together with her husband in the United States."[153] Justice Breyer's dissent recognized that "the institution of marriage . . . encompasses the right of spouses to live together and raise a family" in the United States.[154] The two concurring members of the Court—Justices Kennedy and Alito—concluded that they need not determine whether Din had a right to bring the claim.[155] They assumed her liberty interests *were* implicated by the visa denial and concluded the information the government supplied regarding the reason for the denial was sufficient.[156] While Justice Kennedy was careful to specify that the case "should not be interpreted as deciding whether a citizen has a protected liberty interest in the visa application of her alien spouse,"[157] the concurrence's assumption that the American citizen's marital rights were implicated by the denial of her husband's visa is significant.[158]

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[151] *Id.* at 2140 (Kennedy, J., concurring) (emphasis added). The "facially legitimate and *bona fide* reason" standard emerged in the case of *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), where a group of university professors challenged the exclusion of a speaker on the theory that his exclusion violated the professors' First Amendment rights.

[152] *Id.* at 2131 (rejecting Din's "claim[ ] that the Government denied her due process of law when, without adequate explanation of the reason for the visa denial, it deprived her of her constitutional right to live in the United States with her spouse" and concluding "[t]here is no such constitutional right").

[153] *Id.* at 2142 (Breyer, J., dissenting) (concluding that procedural due process protections apply to this right).

[154] *Id.* at 2142.

[155] *Id.* at 2139 (Kennedy, J., concurring) (indicating "[t]he Court need not decide . . . whether a citizen has a protected liberty interest in the visa application of her alien spouse" because "the Government satisfied due process").

[156] *Id.*

[157] *Id.*

[158] *Id.* at 2139 ("But rather than deciding, as the plurality does, whether Din has a protected liberty interest, my view is that, even assuming she does, the notice she received regarding her husband's visa denial satisfied due process.").

Outside of the immigration context, protecting people's liberty interest to decide whom to marry has animated the Court's decisions to protect the right to marriage.[159] In *Loving*, the Court explained, "[t]he Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations."[160] The Court echoed the importance of choice in selecting one's spouse in *Obergefell*: "Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make."[161] This freedom to choose whom one marries is fundamentally limited, however, when the decision to marry someone who is not a U.S. citizen results in the loss of a citizen's right to live in her country as a married person.

In 1995, Hiroshi Motomura considered whether constitutional protections of family unity constrain the government's power over immigration laws that affect families, concluding at the time that "courts are likely to rule that *Moore* and similar precedents are trumped by the plenary power doctrine, which generally precludes constitutional judicial review in immigration cases."[162] Now, over twenty years after Professor Motomura made this prediction, the climate may be changing. The expansion of marital rights exemplified by *Obergefell* coupled with the plurality's willingness to either conclude or assume that a citizen's rights are implicated by her husband's exclusion from the country point towards the possibility of the Supreme Court reconsidering the longtime exclusion of family unity cases from constitutional constraints

Extending constitutional protections to cases where a citizen's spouse faces deportation would be a logical yet

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[159] *See* Zablocki v. Redhail, 434 U.S. 374, 384 (1978) ("More recent decisions have established that the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause."); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) ("We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."); *see also* Carey v. Population Servs. Int'l, 431 U.S. 678, 684–85 (1977) ("While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage, procreation, contraception, family relationships, and child rearing and education.'" (internal citations omitted)); Whalen v. Roe, 429 U.S. 589, 598–600 & n.26 (1977).

[160] Loving v. Virginia, 388 U.S. 1, 12 (1967).

[161] Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015).

[162] Hiroshi Motomura, *The Family and Immigration: A Roadmap for the Ruritanian Lawmaker*, 43 AM. J. COMP. L. 511, 517 (1995).

groundbreaking change because previous cases have uniformly held that a citizen's constitutional rights are not implicated by the deportation or exclusion of a spouse.[163] The next part discusses these cases.

IV. THE LEGAL FICTION THAT DEPORTATION DOES NOT INTERFERE WITH MARRIAGE

Despite the active role the judiciary has taken in protecting the sanctity of marriage, over the past half century, courts have routinely rejected arguments that the deportation of a U.S. citizen's spouse violates the citizen's right to marriage.[164] Two primary lines of reasoning justify these decisions. First, citizen spouses can preserve their right to live in the United States and to enjoy the rights afforded to them by virtue of their citizenship status by residing in the country without their spouses. Second, they can preserve their right to marriage by moving to another country to live with their deported spouses. But they cannot simultaneously do both, so they are forced to choose between their right to live in their homeland or their right to marriage.

Rather than applying strict scrutiny to determine whether the government has a sufficient justification for infringing on the right to marriage—as the law requires outside of immigration law—the government is not required to justify its intrusion into marriages when a couple faces separation due to immigration-related issues. Historically, noncitizens facing exclusion or removal have very little legal recourse because the government's decisions over immigration matters have been deemed to fall under Congress's plenary power to regulate foreign affairs and international relations.[165] As such, courts are unlikely to intervene in immigration matters, and noncitizens' constitutional

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[163] *See infra* Section IV.A.

[164] *See infra* Section IV.A. Many cases have focused on the rights of citizen spouses in this context because noncitizens are not entitled to substantive due process rights in immigration-related matters. *See* Fong Yue Ting v. United States, 149 U.S. 698, 706–07 (1893) (holding that the right to deport people "is as absolute and unqualified as the right to prohibit and prevent their entrance into the country" and that constitutional limits do not apply due to Congress's plenary power over immigration matters). The Supreme Court subsequently recognized that noncitizens are entitled to procedural due process rights in deportation proceedings. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (acknowledging that the plenary power "is subject to important constitutional limitations"); The Japanese Immigrant Case, 189 U.S. 86, 100–01 (1903) (applying basic procedural protections to removal cases); Motomura, *supra* note 15, at 1646–48 (tracing the history of this area of the law).

[165] *See* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 70–75 (2007) (tracing the history of the plenary power doctrine); Legomsky, *supra* note 91, at 926.

rights are routinely disregarded in the immigration context.[166] Under the current state of the law, the substantive due process rights of noncitizens are not entitled to protection in immigration-related decisions.[167] Thus, noncitizens cannot (successfully) challenge deportation on the grounds that it interferes with the fundamental right to marriage.

Despite the robust body of case law expounding the importance of the right to marriage, courts continually refuse to recognize that a citizen spouse's right to marriage is implicated by the deportation of her noncitizen husband. This part reviews two lines of cases: one dealing with spousal deportation, and the other focusing on the deportation of a citizen's parent or child. It presents the primary justifications courts have provided for concluding that citizens' rights are not implicated when their spouses or parents face deportation or exclusion from the country.

A. Marriage Cases

Courts have consistently held that the deportation of a citizen's spouse does not interfere with the right to marriage and that "no constitutional right of a citizen spouse is violated by deportation of his or her alien spouse."[168] According to this analysis, the government does not need to justify its intrusion into the marriage, even under the lowest level of rational basis review, because justification is only required when one's fundamental rights have been violated.[169]

In *Silverman v. Rogers*, for example, the First Circuit Court of Appeals determined that requiring the wife of an American citizen to leave the country for two years does not "destroy[] their marriage," as the Plaintiff argued.[170] Rather, the court concluded that "say[ing] that the residence of one of

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[166] Discrimination based on gender and national origin are allowed in the immigration context whereas they would be prohibited in other areas of the law. *See, e.g.*, Flores-Villar v. United States, 131 S. Ct. 2312 (2011) (per curiam); Fiallo v. Bell, 430 U.S. 787 (1977) (upholding different rules for establishing citizenship of children born out of wedlock to American citizen fathers than for children born to American citizen mothers).

[167] *See* Kelly, *supra* note 10, at 730–31 (distinguishing "aliens' rights" cases where noncitizens have been vested with substantive due process rights outside the immigration realm from "plenary power" cases that deny them substantive due process protections in matters involving immigration law).

[168] Burrafato v. U.S. Dep't of State, 523 F.2d 554, 555 (2d Cir. 1975).

[169] *See id.* at 556–57 (concluding that when an American citizen challenged the exclusion of her husband from the country, "no constitutional rights of American citizens over which a federal court would have jurisdiction [were] 'implicated' here" and thus declined to require the government to present a "facially legitimate and bona fide" reason for the denial of a visa).

[170] Silverman v. Rogers, 437 F.2d 102, 103, 107 (1st Cir. 1970), *cert. denied*, 402 U.S. 983 (1971).

the marriage partners may not be in the United States" is a legitimate exercise of Congress's discretion that "does not attack the validity of the marriage."[171]

Similarly, in *Swartz v. Rogers*, the D.C. Court of Appeals rejected the argument of a citizen wife that her right to enjoy her marital status, including establishing a home and raising a family, is protected under the Due Process Clause of the Fifth Amendment and would be infringed upon by her husband's deportation.[172] The court found that deportation would not interfere with her right to marriage because even though "[t]he physical conditions of the marriage may change . . . the marriage continues."[173] Thus, although her husband's deportation would force her to choose between "living abroad with her husband or living in this country without him," even as a citizen, she does not have an explicit "right to live in this country."[174] Therefore, "the wife has no constitutional right which is violated by the deportation of her husband."[175] The Fifth Circuit has similarly concluded that the deportation order of a father had "no legal effect" upon his American citizen wife and children because "[i]t [did] not deprive them of the right to continue to live in the United States, nor [did] it deprive them of any constitutional rights."[176]

B. Parent-Child Deportation Cases

Previous attempts to challenge the deportation of the parent(s) or children of American citizens on constitutional grounds have also failed.[177] As with the marriage cases, courts

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[171] *Id.*

[172] Swartz v. Rogers, 254 F.2d 338, 339 (D.C. Cir. 1958).

[173] *Id.*

[174] *Id.*

[175] *Id.*; *see also* Mostofi v. Naplitano, 841 F. Supp. 2d 208, 213 (D.D.C. 2012) (rejecting claim that visa denial violates spouse's constitutional "right to freedom of personal choice in marriage and family life because they have 'done nothing more than say that the residence of one of the marriage partners may not be in the United States.'" (quoting *Silverman*, 437 F.2d at 107)); Udugampola v. Jacobs, 795 F. Supp. 2d 96, 101 (D.D.C. 2011) (concluding that a visa applicant's wife and daughter "cannot demonstrate that the defendant's denial of the visa implicated a constitutionally protected interest" and thus, their claim was not entitled to judicial review); Bangura v. Hansen, 434 F.3d 487, 496 (6th Cir. 2006) ("A denial of an immediate relative visa does not infringe upon their right to marry" because "[t]he Constitution does not recognize the right of a citizen spouse to have his or her alien spouse remain in the country." (quoting Almario v. Attorney Gen., 872 F.2d 147, 151 (6th Cir. 1989)) (alteration in original)).

[176] Garcia v. Boldin, 691 F.2d 1172, 1183 (5th Cir. 1982).

[177] *See* Hintopoulos v. Shaughnessy, 353 U.S. 72 (1957) (upholding the deportation of parents of a two-and-a-half-year-old American citizen child); David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1196 (2006) ("[T]he proposition that children's valid immigration or citizenship status alone is insufficient to overcome the removal of a parent from the United States is a firmly established starting point for courts considering the situation of citizen children whose

have typically rejected arguments that deportation implicates the constitutional rights of children whose parents face deportation. Similarly, in *Fiallo v. Bell*, the Supreme Court rejected a citizen's claim that his constitutional rights were violated by his son's exclusion from citizenship.[178]

In *Fiallo*, the Supreme Court considered a father's challenge to a law conferring immigration status on the foreign-born children of American citizens differently depending on whether the citizen parent is the child's mother or father.[179] The Court rejected the argument that a higher level of scrutiny than rational basis should apply to immigration laws that "infringe[] upon the due process rights of citizens and legal permanent residents, or implicate[] 'the fundamental constitutional interests of United States citizens and permanent residents in a familial relationship.'"[180] It reasoned that decisions regarding the entry and expulsion of "aliens" "have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of this Court to control."[181]

Justice Marshall, joined by Justice Brennan, vehemently dissented, writing that the Court had held "that discrimination among citizens, however invidious and irrational, must be tolerated if it occurs in the context of the immigration laws."[182] Marshall went on to emphasize his disagreement with the idea "that Congress has license to deny fundamental rights to citizens according to the most disfavored criteria simply because the Immigration and Nationality Act is involved."[183] He argued the Court should have recognized that the father's constitutional rights had been violated by excluding the son, because "[t]his case, unlike most immigration cases that come before the Court, directly involve[d] the rights of citizens, not aliens."[184]

However, Justice Marshall's view that preventing a citizen's immediate family member from living in the United States involves the citizen's constitutional rights has not been adopted in the forty years since *Fiallo*. According to a Fourth Circuit opinion, "[t]he courts of appeals that have addressed this

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parents face deportation."); *see also* Jennifer M. Chacón, *Loving Across Borders*: *Immigration Law & the Limits of* Loving, 2007 WIS. L. REV. 345 (2009).

178 Fiallo v. Bell, 430 U.S. 787, 800 (1977).

179 *Id.* at 788–89.

180 *Id.* at 794–95 (quoting Brief for Appellants at 53–54).

181 *Id.* at 796 (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 596–97 (1952)).

182 *Id.* at 800 (Marshall, J., dissenting).

183 *Id.*

184 *Id.* at 806.

issue have uniformly held that deportation of the alien parents does not violate any constitutional rights of the citizen children."[185]

Just as the majority did in *Fiallo*, courts have uniformly rejected claims that American children have the right to contest a parent's deportation as a constitutional violation. In *Enciso-Cardozo v. Immigration & Naturalization Service*, for example, attorneys for an American citizen child argued the child "has a right to be reared in the United States, [and] that the deportation of his mother necessarily implies his *de facto* deportation."[186] They unsuccessfully argued that his mother's deportation would amount to his constructive deportation.[187] The Second Circuit concluded that although there may be cases where due process would require a child to intervene in a parent's deportation case, this was not one of those cases.[188] Similarly, the Eighth Circuit considered whether "enforc[ing] the two year residence abroad requirement [against noncitizen parents] would be in violation of their United States citizen son's constitutional rights."[189] The court concluded that the son's rights were not implicated because "Congress has the power to determine the conditions under which an alien may enter and remain in the United States, even though the conditions may impose a certain amount of hardship upon an alien's wife or children."[190]

In *Acosta v. Gaffney*, the Third Circuit considered the fate of Lina Acosta, a twenty-two-month-old American citizen whose parents were ordered deported to Colombia.[191] Her attorney argued that deporting her parents would violate Lina's constitutional rights "because as an infant she must remain with her parents and go with them wherever they go."[192] The court acknowledged, "[i]t is the fundamental right of an American citizen to reside wherever he wishes, whether in the United States or abroad, and to engage in the consequent travel."[193] However, the court concluded that Lina's rights were not violated because her parents could decide to leave her behind with foster parents in the United States.[194] Alternatively, she could decide to return to the United States when "she grows older and reaches years of discretion" such that moving with her parents to

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185 Gallanosa v. United States, 785 F.2d 116, 120 (4th Cir. 1986).
186 Enciso-Cardozo v. INS, 504 F.2d 1252, 1253 (2d Cir. 1974).
187 *Id.*
188 *Id.* at 1254.
189 Mendez v. Major, 340 F.2d 128, 131 (8th Cir. 1965).
190 *Id.* at 131–32 (internal citations omitted).
191 Acosta v. Gaffney, 558 F.2d 1153, 1157–58 (3d Cir. 1977).
192 *Id.* at 1157.
193 *Id.*
194 *Id.* at 1158.

Colombia "will merely postpone, but not bar, her residence in the United States if she should ultimately choose to live here."[195]

Although often not expressly stated, these cases seem to minimize the extent to which a citizen's life is affected by the deportation of a parent. The Tenth Circuit, for example, clearly framed parental deportation as having merely an "incidental impact" on a child's life.[196] As Part V explores, the consequences of a family member's deportation contrast sharply with this characterization.

C. "Facially Legitimate and Bona Fide Reason" Test

A handful of cases has recognized that courts should be able to consider government infringements on citizens' constitutionally protected rights even when those infringements are caused by immigration laws. On the one hand, these cases represent a departure from the plenary power doctrine and from the prevailing rule that citizens' rights are not implicated by the deportation or exclusion of a spouse. On the other hand, these cases do not protect marriage according to the same standards that apply outside the immigration realm. Although the highest standard of constitutional review—strict scrutiny—generally applies to government interference with marriages, a lower standard of review has been applied in the few cases where courts have recognized that immigration policies interfere with a citizen's right to marriage.

The Supreme Court addressed a related issue in 1972 when it held in *Kleindienst v. Mandel* that the First Amendment rights of a group of American scholars and students were implicated when the government denied Mandel a visa.[197] He had planned to visit the United States to deliver speeches and participate in academic events on college campuses.[198] The Court upheld the denial of Mandel's visa because it applied a low standard of review, invoking the long line of cases that has deferred to Congress's plenary power to govern immigration.[199] It required only that the government provide a "facially legitimate and bona fide reason" for denying the visa.[200]

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[195] *Id.*

[196] Cervantes v. INS, 510 F.2d 89, 91–92 (10th Cir. 1975).

[197] Kleindienst v. Mandel, 408 U.S. 753 (1972).

[198] *See id.* at 765 ("[W]e are loath to hold on this record that existence of other alternatives extinguishes altogether any constitutional interest on the part of the appellees in this particular form of access.").

[199] *Id.* at 769–70.

[200] *Id.*

As the cases discussed in this section demonstrate, the right to marriage has not been protected in the same way as the citizens' First Amendment rights were protected in *Mandel*, where the Court at least subjected the government's actions to the "rough[] equivalent to the rational basis test."[201] In the marriage cases, courts have consistently ruled that the citizen spouse (or child) has no standing to challenge the family member's deportation on constitutional grounds. But the First and Ninth Circuits have recognized that a citizen's rights *are* implicated by the exclusion of a spouse and are therefore subject to the same level of review the Court employed in *Mandel*.[202] In 2008, the Ninth Circuit conducted a limited review into the reason for the denial of a visa by a consular official because the decision implicated the citizen spouse's "[f]reedom of personal choice in matters of marriage and family life," which is protected by the Due Process Clause.[203] The First Circuit similarly applied this low level of review to a visa denial that was challenged "based upon constitutional rights and interests of United States citizens," requiring the government to provide a "facially legitimate and bona fide reason" for the denial.[204]

While the recognition that the right to marriage is implicated by a spouse's deportation is a significant departure from the decisions of other circuits, these courts applied only rational basis review. Given the low burden the government bears under rational basis review, it is no surprise that both courts concluded that the consular officials had facially legitimate and bona fide reasons for denying the visas in both of these cases.[205] The decision to apply rational basis review rather than strict scrutiny was animated by the same judicial deference to Congress's plenary power to regulate immigration matters that has influenced other courts to conclude that the right to marriage is somehow unaffected by the forced removal of one's partner from the country.[206]

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[201] Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1839 n.31 (1993) (stating that the "facially legitimate and bona fide reason" test the Supreme Court applied in *Kleindienst v. Mandel* "appears roughly equivalent to the rational basis test").

[202] *See* Bustamante v. Mukasey, 531 F.3d 1059, 1062 (9th Cir. 2008).

[203] *Id.*

[204] *See* Adams v. Baker, 909 F.2d 643, 647 (1st Cir. 1990) ("Thus, if the Department of State's determination that Adams was ineligible to receive a visa . . . was based on a 'facially legitimate and bona fide reason,' we will be constrained to uphold Adams' exclusion.").

[205] *Id.*

[206] In *Noel v. Chapman*, for example, the court declined to apply strict scrutiny to analyze the constitutionality of the deportation, reasoning that

Just as strict scrutiny review applies to government infringements on marriages in all other realms, the same standard should apply to government interventions into the marriages of binational couples. While the First Amendment rights of citizens addressed in *Mandel* are undeniably important, government infringements on the right to marriage affect people's lives in a much deeper way. As the experiences of women whose husbands have been deported illustrate, deportation is a government intervention of the highest order; interferences with marriage should thus be subject to the highest standard of review.

V. THE REALITIES OF SPOUSAL DEPORTATION

The day-to-day life of a married couple changes dramatically when the partners live across international borders. Yet immigration law renders "[t]he compelling narratives of loss and separation that accompany the enforcement of immigration law . . . largely irrelevant," particularly under changes to the law in 1996 that stripped judges of the discretion to consider the effects of deportation on family members in many cases.[207] Although courts have historically framed deportation as causing merely "incidental impacts" on the lives of the U.S. citizen family members,[208] this reasoning does not hold up when considered in light of deportation's real-world effects on families. This part offers a closer examination of the lives of U.S. citizens whose spouses have been excluded or deported, revealing that the consequences of spousal deportation are far more profound than courts have recognized them to be.

The number of people affected by deportation has skyrocketed in recent years, making this issue more pressing. Under President Obama's leadership, the United States has embarked on a massive deportation effort, forcibly removing more people than under any other President in recent history—over 2.5 million and counting.[209] In fact, in his eight years in office,

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> [i]n view of the plenary power vested in Congress to fix and in the executive to enforce, the terms and conditions of entry and stay in the United States, alienage cannot be a suspect classification in this context, nor is there an interference with any fundamental rights to marry and to raise a family.

Noel v. Chapman, 508 F.2d 1023, 1028 (2d Cir. 1975).

[207] David B. Thronson, *Unhappy Families: The Failings of Immigration Law for Families that Are Not All Alike*, *in* THE NEW DEPORTATIONS DELIRIUM 36 (Daniel Kanstroom & M. Brinton Lykes eds., 2015).

[208] *See* Cervantes v. INS, 510 F.2d 89, 91–92 (10th Cir. 1975) (framing a parent's deportation as having an "incidental impact" on a child's life).

[209] Tim Rogers, *Obama Has Deported More Immigrants Than Any Other President*, FUSION (Jan. 7, 2016), http://fusion.net/story/252637/obama-has-deported-

President Obama is projected to deport more people than were deported in a 108-year period between 1892 and 2000.[210] The majority have been deported to Mexico—nearly 1.5 million people in the five year period between 2009 and 2013 alone.[211] Nearly a quarter of the people the United States deports are parents of American citizen children,[212] and still more are married to Americans. In a 2007 report analyzing deportations between 1997 and 2007, Human Rights Watch estimated that "at least one million spouses and children have faced separation from their family members due to these deportations."[213] The Migration Policy Institute estimates that "half a million children experienced the apprehension, detention, and deportation of at least one parent in 2011 through 2013" alone.[214]

The experiences of this population warrant attention. Drawing from social science research, as well as from observations obtained through primary research I have conducted with deportees and their families in Mexico, this part highlights the harms caused by laws that fail to protect citizens whose spouses face deportation.[215] In doing research for a book about the consequences of deportation, I have interviewed over one hundred people who have been deported to Mexico from the United States since 2009. Although Mexico is certainly not the only country to which American citizens' family members are deported, it is a useful example because the United States deports more people to Mexico than to any other country.[216]

A. Fractured Families

The experiences of couples separated by deportation are characterized by trauma and hardship. Deportation frequently creates economic hardships for family members who stay in the

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more-immigrants-than-any-other-president-now-hes-running-up-the-score/ [https://perma.cc/SVQ7-ZMQP].

[210] *Id.*

[211] U.S. DEP'T OF HOMELAND SEC., 2013 YEARBOOK OF IMMIGRATION STATISTICS 111, 114 (2014).

[212] Seth Freed Wessler, *Nearly 205K Deportations of Parents of U.S. Citizens in Just over Two Years*, COLOR LINES (Dec. 17, 2012), http://www.colorlines.com/articles/nearly-205k-deportations-parents-us-citizens-just-over-two-years [https://perma.cc/JF98-SEP2].

[213] HUMAN RIGHTS WATCH, FORCED APART BY THE NUMBERS 4 (2007).

[214] RANDY CAPPS ET AL., IMPLICATIONS OF IMMIGRATION ENFORCEMENT ACTIVITIES FOR THE WELL-BEING OF CHILDREN IN IMMIGRANT FAMILIES 9 (2015).

[215] Although there are certainly cases where male citizens experience the deportation of a spouse, and where same-sex couples are affected by the deportation of a spouse, the vast majority of couples I have interviewed in Mexico consist of a deported man and a citizen woman.

[216] *See* U.S. DEP'T OF HOMELAND SEC., *supra* note 79, at 9.

United States. Studies have consistently found that "[p]arental deportation has large negative consequences for family economic stability."[217] A study that investigated the implications of parental deportation and detention in the aftermath of immigration raids found that these "households experienced steep declines in income and hardships such as housing instability and food insufficiency."[218] Specifically, three out of five households reported they sometimes or frequently experienced difficulty paying for food in the months after a parent's detention and/or deportation.[219] The families they studied "had almost no income" nine months following the parent's detention and/or deportation.[220] Another study found that of sixteen mothers whose husbands had been detained or deported by immigration authorities, *all* had difficulties paying their rent, and many were forced to move.[221]

The economic consequences of deportation can also undermine familial relationships. Joanna Dreby, who has studied Mexican transnational families separated due to both voluntary migration and deportation, found that fathers who leave Mexico to come to the United States for work maintain ties to their children in Mexico through "frequent phone calls, gifts, and remittances."[222] However, deportees to Mexico cannot do the same because they earn so little in Mexico that they cannot support their children in the United States. Derby concludes, "[i]n the absence of an economic tie to their children, fathers' emotional connection also falters."[223] In addition to losing income due to deportation, families may incur legal expenses that further weaken their financial stability. Paying immigration attorneys to fight against deportation, or to seek permission to return, can cost tens of thousands of dollars.

Losing one's spouse to deportation also takes a deep emotional toll. Rebekah Rodriguez-Lynn's husband was permanently barred from entering the United States because he came to the country without permission on two separate occasions.[224] When she left her husband and son behind in Mexico

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[217] Jodi Berger Cardoso et al., *Deporting Fathers: Involuntary Transnational Families and Intent to Remigrate Among Salvadoran Deportees*, 50 INT'L MIGRATION REV. 197, 205 (2016).

[218] AJAY CHAUDRY ET AL., THE URBAN INST., FACING OUR FUTURE: CHILDREN IN THE AFTERMATH OF IMMIGRATION ENFORCEMENT viii–ix (2010).

[219] *Id.* at ix.

[220] *Id.*

[221] Joanna Dreby, *The Burden of Deportation on Children in Mexican Immigrant Families*, 74 J. MARRIAGE & FAM. 829, 838 (2012).

[222] *Id.* at 837.

[223] *Id.*

[224] Rebekah Rodriguez-Lynn, *How America's Immigration Laws Tore My Family Apart for Good*, WORLD POST (Apr. 28, 2015), http://www.huffingtonpost.com/

to return to the United States to finish a master's degree at Harvard University, she explains, "I felt as though my limbs had been torn from my body."[225]

Women report relying on telephone calls and video chats to communicate with their deported spouses.[226] Several have reported that their deported husbands were "virtually present" via video chat to observe the birth of a child in the United States. "That was painful," said one woman.[227]

Long-distance relationships can be challenging under any circumstance; however, when the distance is caused by deportation, the uncertainty of whether the couple will ever be able to live together in the United States adds additional stress. When her husband was deported, an American citizen, who calls herself "Ray's wife," described falling into a state of deep depression in a blog post:

> I wake-up and I no longer recognize my life. My husband is not next to me in bed and my bed is in this home I do not want to live in. I feel my life and my dreams slowly slipping away. I have to keep myself busy to avoid feeling the pain, desperation, and grief that is there. The reality is—"my family" and "my home" are gone and who knows how many years will be lost before we can have that back if we ever do get it back.[228]

When a partner is forcibly removed from the country, the partner who is left behind experiences a profound loss. Many experience symptoms of depression: loss of appetite, disrupted sleep patterns, and frequent episodes of crying.

Children suffer psychologically as well. An emerging body of social science research has found that children whose parents are deported suffer from higher rates of depression, demonstrate

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rebekah-rodriguezlynn/immigration-family-tore-apart_b_7129574.html [https://perma.cc/K3AK-ZDCN].

[225] *Id.* Deportation and the separation it brings about is often described by those experiencing it as feeling like losing part of one's body. *See, e.g.*, *A Guide to Belonging Everywhere*: *6 Years Down . . .* , WORDPRESS (Sept. 1, 2015), https://happycosmopolite.wordpress.com/2015/09/01/6-years-down/ [https://perma.cc/KVQ8-JF58] ("Our sentences (because it does feel like some horrid punishment) will be up September 2019, and it's sort of incredible to think that I have made it this long with an amputation as severe and heart breaking as being denied my family and a part of my home.").

[226] I make this observation based on interviews I conducted with deportees and spouses of deportees in Mexico. As discussed in the Introduction to this article, I have conducted research about deportation to Mexico for the past six years. Throughout this part, I discuss conclusions from this research and augment these findings with quotations from other sources. Unless otherwise specified, the conclusions presented in this part derive from interviews I have conducted in Mexico.

[227] Interview with Liliana H. (Aug. 4, 2016).

[228] FamiliesRforever, *Updates—Nov 4.*, RAYS DEPORTATION (Nov. 4, 2011, 7:56 AM), http://raysdeportation.blogspot.com/2011_11_01_archive.html [https://perma.cc/Y67F-DBC6].

more behavioral problems, and experience declines in their academic performance. In one study, 36% of children whose parents had been deported demonstrated three or more psychological or behavioral symptoms, with greater severity linked to a parent's arrest in the home, "cases where the child's primary caregiver was deported," and a parent's absence for more than a month.[229] In another, two-thirds of children whose parents were detained or deported via an immigration raid experienced changes in their patterns of eating or sleeping, symptoms indicative of mental health issues.[230] Over half "cried more often and were more afraid, and more than a third were more anxious, withdrawn, clingy, angry, or aggressive."[231]

The stresses that accompany long-term separation often contribute to divorce. Many couples report trying to keep their relationships alive across international borders yet ultimately deciding to divorce.

B. De Facto Deportation

Rather than face long-term or, in some cases, permanent separation, many citizens leave the United States to keep their families together.[232] Although it is unclear how many Americans have moved abroad due to a spouse's deportation, the 2010 Mexican Census found that over 500,000 U.S.-born children were living with their parents in Mexico alone.[233]

Courts characterize the decision to move out of the country as a choice, but it does not feel like one to those who experience it; it feels like living in exile.[234] Once in Mexico, American women lose their proximity to friends and family, access to their professional career paths, and, perhaps most profoundly, they miss being "home." Nicole Salgado describes herself as living in exile because she and her husband "choose to honor our marriage in making our home together here—not with an international border between us."[235] When she moved to Mexico, she missed her home. In her words, "I missed my friends, my mobility, even my students. I would fantasize that I was back at the beach in San

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[229] Cardoso et al., *supra* note 217, at 205.

[230] *See* CHAUDRY ET AL., *supra* note 218, at ix.

[231] *Id.*

[232] *See, e.g.*, Andrea Yancey Reyes, *Life on Mars . . . I Mean TJ: An Exiled Family Trying to Find Their Place in the World*, BLOGSPOT, http://lifeonmarsimeantj.blogspot.com/p/about-andrea.html [https://perma.cc/VD6H-QYZ8].

[233] JEFFREY PASSEL ET AL., PEW RESEARCH CTR., NET MIGRATION FROM MEXICO FALLS TO ZERO—AND PERHAPS LESS 14 (2012).

[234] *See, e.g.*, Reyes, *supra* note 232.

[235] HOFFMAN & SALGADO, *supra* note 7, at 74.

Gregorio or Half Moon Bay, inhaling the fresh, salty air . . . . That nostalgia burned brightly, like a candle amid my dark frustrations with my new residence."[236]

Some American women who have relocated to Mexico indicate that their quality of life is dramatically lower in Mexico than in the United States.[237] Particularly in rural areas, many homes lack running water. Others who reside in urban areas face many of the same challenges deportees face. They struggle to acclimate to a country where they may not speak the language, and finding employment is a challenge when one's education, training and licensing are all from a foreign country. Wages are dramatically lower in Mexico as well; people often earn twelve hundred pesos a week, which amounts to less than one hundred U.S. dollars.

Adapting to a new culture, particularly when the decision to move is forced, triggers both physical and emotional challenges. An American woman whose husband was deported to Mexico describes her first night in Mexico: "I cried myself to sleep that night thinking I had made the biggest mistake in the world. I cried because I felt stupid, homesick, spoiled, lost, sheltered, weak, and most of all scared shitless of what was to come."[238] She and her husband lived in Juarez, a notoriously violent city. Within two weeks, she saw a dead body and wondered, "What will I see in the next [ten] years?"[239]

For years after leaving the United States to live with her husband in Mexico, Nicole Salgado struggled to adapt to an environment where she could not find employment that utilized professional skills. She explains, "I was also feeling professionally aimless . . . . But there weren't any jobs in my field, at least nothing at a reasonable salary. My first 'job' was teaching English in a local community center a few hours a week—for $1.50 (U.S.) per student."[240]

Many couples settle in the border region so the American spouse can cross the border to work in the United States. This ensures higher wages for the family, and a much better quality of life than would otherwise be possible from wages in Mexico.

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[236] *Id.* at 34.

[237] The information contained in this paragraph was obtained by interviews conducted with deportees and their family members in Mexico and California between 2011 and 2016.

[238] Emily Bonderer Cruz, *The Real Housewife of Ciudad Juarez: Moving to Mexico*, BLOGSPOT (Aug. 18, 2010), http://therealhousewifeofciudadjuarez.blogspot.com/search?updated-min=2010-01-01T00:00:00-08:00&updated-max=2011-01-01T00:00:00-08:00&max-results=8 [https://perma.cc/DNK5-75ZT].

[239] *Id.*

[240] HOFFMAN & SALGADO, *supra* note 7, at 34.

However, crossing the border presents a major challenge in people's lives. With waits of up to three hours on a regular basis, people spend fifty to sixty hours per month waiting to cross the border.[241] One woman reported developing recurrent urinary tract infections because she could not leave the car to empty her bladder while waiting to cross the border.[242]

Children who grew up in the United States but moved to Mexico due to a parent's deportation face challenges with adjusting. This, in turn, impacts their parents. The Migration Policy Institute has concluded that "[t]he transition to life in Mexico can be difficult for children born and raised in the United States" due to cultural and language differences, barriers to entering schools, and the lower standard of living in most of the countries to which parents are deported.[243] Children of deported parents may struggle more with adapting to life in Mexico than their counterparts whose parents voluntarily return. A qualitative study of the experiences of twelve children who had relocated from the United States to Mexico with their parents found that seven of the twelve seemed "generally well adjusted to living in Mexico" while "five presented indications that they did not feel comfortable in Mexico."[244] Two of the twelve children in this sample had moved to Mexico because of a parent's deportation, others returned due to family needs or economic hardships. The researchers found that the children of deported parents "did not seem well prepared for the next chapter in their lives," and reported feeling mad, unhappy, and wanting to cry.[245]

"I hate that my kids have to suffer because of this," one woman reports. "It's not their fault their dad got deported." She wishes her children could finish school in the United States. Adjusting to attending school in Mexico is challenging for children who have been raised in the United States. The Binational Program of Migrant Education estimates that 4,000 American citizen children attended school in Tijuana in 2013.[246] Nearly half had recently transferred from U.S. schools. Many American children who move to Mexico do not speak Spanish and, according to López, Mexican schools do not have the resources to offer

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[241] *See supra* note 9.

[242] *See supra* note 9.

[243] URBAN INST. & MIGRATION POLICY INST., IMPLICATIONS OF IMMIGRATION ENFORCEMENT ACTIVITIES FOR THE WELL-BEING OF CHILDREN IN IMMIGRANT FAMILIES vi–vii (2015), http://www.migrationpolicy.org/research/implications-immigration-enforcement-activities-well-being-children-immigrant-families [https://perma.cc/GCP4-TUM9].

[244] Ali Borjian et al., *Transnational Children in Mexico: Context of Migration and Adaptation*, 10 DIASPORA, INDIGENOUS & MINORITY EDUC. 1, 46 (2016).

[245] *Id.* at 48.

[246] Interview with Yara Ampara Lopez,, in Tijuana, Mexico (Apr. 2016).

bilingual education or to teach Spanish as a second language. In addition to facing language barriers, students who come from the United States struggle to fit in. Differences in the educational methods and systems are particularly challenging for children who are accustomed to American schools.[247]

The hardships women and children endure as a result of a spouse's or parent's deportation call into question the legitimacy of the courts' reasoning in cases dismissing spousal deportation claims. While there may be cases where the government's interest in deporting an individual is compelling enough to justify this kind of intrusion into a marriage, the conclusion that a marriage is not interfered with when one spouse is required to live outside the boundaries of the United States is logically indefensible in light of the severe consequences of deportation.[248]

C. Inconsistent Protection of Family Unity

Immigration law prioritizes family unity in many contexts, providing special paths to residence and citizenship for the spouses, children, and immediate family members of citizens and lawful permanent residents.[249] Indeed, family unity is often referred to as the "cornerstone of our immigration policy."[250] Yet

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[247] URBAN INST. & MIGRATION POLICY INST., *supra* note 243, at 12 ("Research suggests that the transition to schooling in Mexico, for example, can be very difficult for children who have attended US public schools, as they generally do not have the Spanish language skills or familiarity with the Mexican school system necessary to succeed there.").

[248] If the courts applied strict scrutiny, the government would have to show that deportation is necessary to achieve a compelling government interest, and would have to consider other less restrictive means of accomplishing its goal before resorting to deportation. *See* Adarand Constructors v. Pena, 515 U.S. 200, 235 (1995) ("Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest."). It is difficult to imagine a scenario whereby deportation would be "necessary" given the robust mechanisms of social control available to government officials in their regulation of citizens. Spousal deportation may pass muster if the government could demonstrate evidence that a citizen's spouse was an active terrorist with plans to attack the United States, and with no pending criminal activity the government could prosecute to incapacitate him, leaving deportation as the only alternative. However, I hesitate to offer this example because national security exceptions have routinely been used to justify problematic immigration laws and policies, casting a wide net over people who do not present any threat to national security.

[249] Family reunification is widely recognized as a key priority of immigration law. *See* STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION & REFUGEE LAW & POLICY 262 (5th ed. 2009) ("The 1952 Act established the first comprehensive set of family-based preferences. Since then, one central value that the United States immigration laws have long promoted, albeit to varying degrees, is family unity. Consequently, much of immigration law has become federal family law.").

[250] Carol Wolchok, *Family-Sponsored Immigration*, 4 GEO. IMMIGR. L.J. 201, 201 (1990); *see also* Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629, 630 (2014) ("Family relationships are central to modern immigration and citizenship law. The vast majority of immigrants who acquire permanent residency each year do so based on family ties.").

policies that separate families are also pervasive in immigration law.[251] Immigration scholar David B. Thronson argues, "[f]or families that do not meet the exacting templates of immigration law, the story is not of family unity but rather of separation and hardship."[252]

Laws that fail to protect the marital rights of binational couples hearken back to a history of under-protecting the marriages of people of color and prohibiting the marriages of interracial couples.[253] During slavery, for example, the legal system allowed slaves' marriages and families to be torn apart with no protection.[254] Although the system of slavery was exponentially worse than the current immigration regime, people of color's rights to family unity continue to be systematically undermined by current immigration policy.

Further, although binational marriages are not prohibited by the law as were interracial marriages in the past, marriages between citizens and noncitizens are disincentivized by the law. In *Loving Across Borders*, Jennifer Chacón draws parallels between historic anti-miscegenation laws and current deportation laws that separate married people who have different citizenship statuses. Chacón argues that "[w]hile the maintenance of 'White Supremacy' may not be the overt purpose of contemporary immigration and nationality laws," as it was under anti-miscegenation laws, "it is a possible effect" of current immigration laws.[255] Historian Nancy Cott posits that "[b]y creating incentives for some kinds of marriages and disincentives for others . . . the states and the nation have sculpted the body politic" through immigration policies much like through prohibitions on marriages between whites and people of color.[256] The union of two people from different national origins is disincentivized by the law when one partner stands to lose the right to live in the United States with her spouse with no legal recourse.

VI. PROTECTING THE MARRIAGES OF BINATIONAL COUPLES

The Supreme Court recognizes that "[f]reedom of personal choice in the matters of marriage and family life is, of course, one

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[251] For example, family unity is undermined in cases where people are granted relief from deportation due to the risk of torture. *See* Lori A. Nessel, *Forced to Choose: Torture, Family Reunification and United States Immigration Policy*, 78 TEMP. L. REV. 897, 931–33 (2015).

[252] Thronson, *supra* note 207, at 33.

[253] *See* Chacón, *supra* note 177, at 349–55.

[254] *Id.* at 375–76.

[255] *Id.* at 378.

[256] Cott, *supra* note 22, at 1443.

of the liberties protected by the Due Process Clause."[257] The right to live with one's family members is a constitutionally protected right,[258] and family unity is widely recognized as a cornerstone of American immigration law. Combined with the right of citizens to live in their homeland, the fundamental right to marriage should encompass the right to live with one's spouse in the United States.[259]

The plurality opinion in *Kerry v. Din* signals that the law may be moving in this direction. It is time to follow Justice Marshall's call from the dissent in *Fiallo v. Bell*, that "[w]hen Congress grants a fundamental right to all but an invidiously selected class of citizens, and it is abundantly clear that such discrimination would be intolerable in any context but immigration, it is our duty to strike the legislation down."[260] The rights of citizens married to foreign nationals who face deportation should be protected by the Constitution in the same way that other marriages are protected. The current schema is a vestige of the past; it both under-values and under-protects women's citizenship.

A. An "Intolerable" Choice

Cases declining to recognize that deportation interferes with the right to marriage often rest on the premise that a marriage is not necessarily impeded by one spouse's deportation because the couple can live together outside of the United States.[261] Alternatively, courts posit that a citizen's right to remain in the United States is not infringed upon by a spouse's deportation because she is free to continue living in the United States without her spouse. In order to preserve her right to marriage—and to live with her family—she must give up her right to live in the United States. Conversely, in order to exercise her right to reside in her homeland, she must give up

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[257] Bustamante v. Mukasey, 531 F.3d 1059, 1062 (9th Cir. 2008) (citing Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974)).

[258] *See* Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977).

[259] A citizen's right to live in the United States and to enjoy "the privileges and immunities" of citizenship is guaranteed by the Fifth and Fourteenth Amendments. U.S. CONST. amends. V, XIV; *see* Ng Fung Ho v. White, 259 U.S. 276, 284–85 (1922) ("To deport one who so claims to be a citizen, obviously deprives him of liberty, as was pointed out in *Chin Yow v. United States*, 208 U.S. 8, 13. It may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law.").

[260] Fiallo v. Bell, 430 U.S. 787, 816 (1977) (Marshall, J., dissenting).

[261] *See supra* Section IV.A.

her right to live with her family. Either way, she is forced to give up something of primary importance: her family or her home.

In other contexts, the Supreme Court has declared government actions unconstitutional when they force a citizen to choose between two fundamental rights. In *Simmons v. United States*, the Court found that the "choice" between testifying in a Fourth Amendment hearing or preserving one's Fifth Amendment right against self-incrimination created "an undeniable tension."[262] Accordingly, the Court found it "intolerable that one constitutional right should have to be surrendered in order to assert another."[263]

Similarly, in *Aptheker v. Secretary of State*, the Supreme Court held that a statute prohibiting members of the Communist party from obtaining and using passports violated the Constitution because it interfered with the right to travel abroad, which is "guaranteed under the Due Process Clause of the Fifth Amendment."[264] In that case, the First Amendment right of association collided with the right to travel. The Court reasoned that "[t]he restrictive effect of the legislation cannot be gainsaid by emphasizing, as the Government seems to do, that a member of a registering organization could recapture his freedom to travel by simply in good faith abandoning his membership in the organization."[265]

In *Aptheker*, the Supreme Court rejected the argument that a citizen's constitutionally protected liberty interest could be preserved by giving up another constitutionally protected right. According to the Court, "[s]ince freedom of association is itself guaranteed in the First Amendment, restrictions imposed upon the right to travel cannot be dismissed by asserting that the right to travel could be fully exercised if the individual would first yield up his membership in a given association."[266] Therefore, the Court applied strict scrutiny to analyze the constitutionality of the regulation, concluding that although Congress unarguably "has power to safeguard our Nation's security,"[267] the regulation was too broad because it "swe[pt] too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment."[268]

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[262] Simmons v. United States, 390 U.S. 377, 394 (1968).

[263] *Id.*

[264] Aptheker v. Sec'y of State, 378 U.S. 500, 505 (1964) (citing Kent v. Dulles, 357 U.S. 116, 127 (1958)).

[265] *Id.* at 507.

[266] *Id.* (footnote omitted).

[267] *Id.* at 509.

[268] *Id.* at 514.

Citizens whose spouses are deported are similarly forced to choose between two fundamental rights—the right to marriage, and the right to live in the United States. This article has already discussed the Supreme Court's commitment to protecting people's right to marriage at length. A citizen's right to live in the United States and to enjoy "the privileges and immunities" of citizenship is no less important, and is guaranteed by the Fifth and Fourteenth Amendments.[269] For example, citizens may not be forcibly removed or deported from the boundaries of the United States.[270] In 1922, the Supreme Court explained,

> To deport one who so claims to be a citizen, obviously deprives him of liberty . . . . It may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law.[271]

Just as strict scrutiny applies to government actions that force people to choose between constitutionally protected rights in other contexts, the same standard should apply to efforts to deport the spouses of citizens. Forcing citizens to choose between their marriages and their homeland is just as "intolerable" as forcing people to choose between the freedom to travel and the freedom of association.

B. The Under-Protection of Binational Marriages

Women's marriages to foreign nationals are less protected than other marriages, and the forced choice between the right to marriage and the right to live in their homeland is similarly less protected than other scenarios in which citizens have been forced to choose between fundamental rights. In other contexts where the government either interferes with a marriage or requires a citizen to choose between to fundamental rights, courts apply strict scrutiny to assess the legitimacy of the government's conduct. Spousal deportation or exclusion cases—

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[269] *See* Afroyim v. Rusk, 387 U.S. 253, 268 (1967) (holding that the Fourteenth Amendment "was designed to, and does, protect every citizen of this Nation against congressional forcible destruction of his citizenship . . . unless he voluntarily relinquishes that citizenship"); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 166–67 (1963) (holding a provision that stripped Americans of their citizenship "without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments" unconstitutional because forfeiture of citizenship amounts to a punishment); Trop v. Dulles, 356 U.S. 86, 102–03 (1958) (holding the divestment of citizenship of a soldier who was court-martialed for desertion violated the Eighth Amendment).

[270] Ng Fung Ho v. White, 259 U.S. 276, 284–85 (1922).

[271] *Id.*

and cases where the parent of a citizen faces deportation—are unique because strict scrutiny does not apply in these contexts.

Denying this level of protection to citizens in binational marriages affects women's lives in much the same way that women who were divested of their citizenship were affected in the past. When married women were stripped of their citizenship upon marriage to a foreigner in the early twentieth century, they often lost their property.[272] Now, women whose husbands are deported often lose their homes because they can no longer afford to make mortgage payments when they lose the economic stability that having two incomes provides, or when they move to a country where wages are much lower.[273]

As in the past, women who are constructively deported suffer emotionally because they feel ostracized from their own homeland. In 1926, Congressional testimony on the problems of divesting citizenship based on marriage highlighted the emotional aspect of being rejected by one's own country.[274] Elizabeth Kite, a scholar at the Library of Congress, spoke of the problems facing Mary Das, a citizen who lost her status due to her marriage to a man from India.[275] According to Kite, "[s]he happens to live in a place where having lost her citizenship, it does not affect the holding of property. But there are other things that are very seriously menaced, particularly the humiliation and the thought of not being wanted as an American citizen."[276] These sentiments parallel those reported by women affected by spousal deportation now. According to one such woman, who now lives in Mexico with her husband, "[i]t feels like I'm being punished . . . like my own country is telling me that I'm not wanted because of who I chose to love."[277]

Legal reforms are needed in order to move past this history of marginalizing women's access to full citizenship.

C. The Evolution of the Law

Two evolving trends in the law strengthen the case for reconsidering previous decisions on spousal deportation. First, as discussed in Part III, the definition of marriage and the

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[272] Volpp, *Divesting Citizenship*, *supra* note 61, at 427–28 & n.113.

[273] This conclusion is derived from my research in Mexico.

[274] Volpp, *Divesting Citizenship*, *supra* note 61, at 435–36.

[275] *Id.* (quoting *Immigration and Citizenship of American-Born Women Married to Aliens: Hearing on H.R. 4057, H.R. 6238, and H.R. 9825 Before the H. Comm. on Immigration & Naturalization*, 69th Cong. 22–28 (1926) (statement of Elizabeth Kite, Scholar, Library of Congress)).

[276] *Id.* at 436.

[277] Interview in Tijuana, Mexico (Aug. 6, 2015).

rights that accompany it have expanded, as evident in the majority opinion in *Obergefell* and the plurality in *Din*. Second, the consequences of deportation have become more severe over the past two decades; deportation is now virtually automatic and permanent in many cases. The reality of one's spouse being deported now is thus different than in the past.

During the past twenty years, deportation has become notably more pervasive, and its consequences more severe. Many deported for criminal convictions are prohibited from returning to the United States for the rest of their lives; their deportation is permanent. In 1996, Congress stripped judges of the discretion to consider the effects an individual's deportation may have on his family in many cases where the potential deportee has been convicted of a crime; "[t]he new deportation laws deny immigration judges the opportunity to take family integrity into consideration."[278] Excluding any consideration of the effect of deportation on citizen family members from the decision-making process makes constitutional protections even more important.

The laws governing deportation and exclusion have long been critiqued for their lack of proportionality.[279] People are permanently barred from the country if they have falsely claimed to be a citizen even on one occasion.[280] Others are banned for life because they entered the country on two occasions without permission, and were unlawfully present for at least one year.[281] They may seek a waiver of their exclusion, but only after residing outside the country for ten years.[282] In recent years, hundreds of thousands have been deported for the rest of their lives due to criminal convictions, the majority of which are nonviolent or occurred decades ago.[283] Requiring that the government's decision to deport be narrowly tailored in cases

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[278] Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1952 (2000).

[279] *See, e.g.*, Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651, 1655 (2009); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1688 (2009) ("Immigration law is, perhaps, the only area of law that eschews proportionality. Neither the gravity of the violation of immigration law nor the harm that results bears any relationship to whether deportation is imposed as a consequence."); Maureen Sweeney & Hillary Scholten, *Penalty and Proportionality in Deportation for Crimes*, 31 ST. LOUIS U. PUB. L. REV. 11, 13 (2011).

[280] 8 U.S.C. §§ 1182(a)(6)(C)(ii)(I), 1227(a)(3)(D)(i) (2012). There are only very limited waivers available for false citizenship claims, so those deported have virtually no hope of ever returning. *See* KEVIN R. JOHNSON ET AL., UNDERSTANDING IMMIGRATION LAW 266 (2009).

[281] *Id.* at 268.

[282] *Id.*

[283] GUILLERMO CANTOR ET AL., ENFORCEMENT OVERDRIVE: A COMPREHENSIVE ASSESSMENT OF ICE'S CRIMINAL ALIEN PROGRAM 14–15 (2015).

where noncitizens have a citizen spouse would imbue the immigration system with a modicum of proportionality.

In *Padilla v. Kentucky*, the Supreme Court recognized the more "severe" impacts of deportation in recent years and thus afforded a higher level of protection to criminal defendants who may face deportation.[284] According to the *Padilla* opinion:

> The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The "drastic measure" of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes.[285]

Courts should expand protections for spousal deportation cases because modern deportation practices render the consequences more severe than in the past. More American citizens are impacted by the deportation of a spouse than ever before given the shift towards internal enforcement.[286] Further, many deportation orders are now permanent, and the consequences people face as a result are more severe.[287] Many of the spousal deportation cases address situations in which citizens faced far shorter periods of exclusion from the country than modern deportation cases. For instance, several of the historical cases challenged two-year waiting periods,[288] whereas many citizens' husbands are now permanently barred from ever returning to the United States.[289]

Growing evidence of the profound emotional, psychological, and financial consequences of deportation and the widespread destruction of families that follows justifies reconsidering previous decisions that seem to rest on unstated assumptions that minimize the harm deportation brings to family members of the deported. Government interferences with marriages—even in the name of immigration control or national security—should be subject to

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[284] Padilla v. Kentucky, 559 U.S. 356 (2010).

[285] *Id.* at 360 (internal citation omitted).

[286] *See supra* notes 3–5 and accompanying text.

[287] *See Padilla*, 559 U.S. at 360.

[288] *See* Silverman v. Rogers, 437 F.2d 102, 103, 107 (1st Cir. 1970); Mendez v. Major, 340 F.2d 128, 131 (8th Cir. 1965).

[289] *See* 8 U.S.C. § 1182(a)(9)(A)(ii), (h) (2012). Cancellation of removal is barred for those who have aggravated felony convictions. *Id.* § 1229b(a). Legal permanent residents who have been convicted of aggravated felonies are disqualified for discretionary waivers of inadmissibility under § 1182(h).

strict scrutiny to ensure that citizens only experience constructive deportation or family separation when absolutely necessary.[290]

CONCLUSION

Fifty years ago, the Supreme Court struck down prohibitions against interracial marriages as unconstitutional in *Loving v. Virginia*.[291] Nonetheless, deportation policy currently threatens marriages between binational couples in much the same way that anti-miscegenation laws threatened the marriages of interracial couples in the past. In many respects, the struggles facing spouses whose marriages are threatened by deportation are reminiscent of the problems the Lovings faced. When combined, the right to marriage, the right to live with one's family members, and the right of a citizen to live in her homeland give rise to a citizen's right to live in the United States with her spouse.

When viewed together, the 2015 Supreme Court decisions in *Obergefell v. Hodges* and *Kerry v. Din* support this argument that deportations of citizens' spouses should be subject to strict scrutiny. *Obergefell* reiterated the central importance of marriage in people's lives and made clear that liberty requires the freedom to choose one's spouse regardless of sex or, presumably, national origin.[292] The current state of the law—where the Constitution protects all marriages except those between citizens and noncitizens facing exclusion or removal—discriminates against binational marriages.

Rules that discriminate against citizens who marry people of different national origins should be overruled, and the Constitution should protect the marriages of binational couples just as it protects all other marriages. Although the Supreme Court has held that it allows "Congress [to] regularly make[] rules that would be unacceptable if applied to citizens," due to its plenary power,[293] immigration laws that trigger the deportation of a parent or spouse of an American citizen impact the fundamental rights of the citizen family member. As Justice Breyer articulated in his 2015 dissent in *Kerry v. Din*, "the institution of marriage . . . encompasses the right of spouses to

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[290] *See* Kelly, *supra* note 10, at 779–80 (arguing the federal government should be subject to strict scrutiny when it interferes with the unity of immigrant families).

[291] Loving v. Virginia, 388 U.S. 1 (1967).

[292] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2594–96 (2015).

[293] Fiallo v. Bell, 430 U.S. 787, 792 (1977) (quoting Mathews v. Diaz, 426 U.S. 67, 80 (1976)).

live together and to raise a family" in the United States.[294] Courts should formally recognize this right, and should thus apply strict scrutiny to cases where the spouse of a U.S. citizen faces deportation.

[294] Kerry v. Din, 135 S. Ct. 2128, 2142 (2015) (Breyer, J., dissenting).