The Challenges of Family Law and Policy in Immigration Regulation

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Abstract

Stable nations and societies are largely based on stable family law and policy. Questions of family preservation and stability in immigration policy present new dimensions of legal intervention. Offering a review of the relevant literature, this paper presents the challenges in the family law and policy discussion. It considers challenges to United States policies, particularly regarding marriage definitions, Mexican migration, and the challenge of family preservation and restoration. This research further examines global concerns, namely national stability and the need for family restoration in light of diminishing fertility rates, and multiculturalism. Finally, it offers policy principles for developing national immigration regulation, particularly toward building national stability through strong families. A comprehensive approach to family law and immigration policy is necessary, and possible. Providing principles for the formulation of strong family policy promoting national stability in the face of global mobilization of families is the key to building strong and stable future nations.

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Introduction

Stable nations and societies are largely based on stable family law and policy, and present an opportunity for building strong nations. Questions of family preservation and stability in immigration policy present new dimensions of legal intervention. From concerns of spousal immigration, to the best interests of children, legal immigration presents challenges to families, sometimes causing migrants to resort to illegal immigration for family preservation or restoration. Societies with moral obligations wishing to adhere to the rule of law generally also wish to operate within the bounds of global justice and national sovereignty. Balancing the tension between these principles with security concerns, economic concerns and legal policy concerns increase the challenges.

This article offers a review of the relevant literature, presenting the disputes in the context of family law and immigration policy. It will consider the latest developments in marriage and family immigration policy in the United States, the clash of family law and illegal immigration, and family law in the context of national stability. It will also consider how immigration law ought to protect children. Section I considers United States (U.S.) challenges, particularly regarding marriage definitions, Mexican migration, and the challenge of family preservation and restoration. Section II examines global concerns, national stability, the need for family restoration in light of diminishing fertility rates, and multiculturalism. Finally, section III offers policy principles for developing national immigration regulation, particularly toward building national stability through strong families.

A comprehensive approach to these challenges of family law and immigration policy is necessary and possible. The formulation of strong family policy in

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1 Family policy issues are extremely important because their consequences can be far-reaching. Generationally, economically, educationally, socially, morally, and in myriad other ways, family structure and relations have tremendous impact upon (and are reflective of basic values and aspirations of) individuals and society. They are important because the family is the “basic unit of society,”… Chesterton, G.K. in Dale Ahlquist, Dale G. (2005). ‘G. Chesterton’s “Uncommonly Sensible View on the Law”,’ Ave Maria L. Rev. 3: 685-700. ‘Public policy is a historical process and the icon of family is a beneficiary of the Judeo-Christian heritage which forms the basis of so much in American law.’ Wadlington, Walter and Raymond C. O’Brien (1998). Domestic Relations Cases and Materials 4th ed. 1. Westbury, NY: Foundation Press.

2 ‘…[t]he most important issues of American legal and social policy arising in the present period (turn-of-the-millennium)- the defining issues that shaped the identity of a society and revealed the vision of the nation – were family law issues, issues relating to the structure, status, rights, and responsibilities of family and quasi-family relations…[T]he fundamental policies concerning governmental preferences, permissions, and proscriptions …of family relations… are still in the formative (or, more precisely, reformative) stage.” Wardle, Lynn D. & Lawrence C. Nolan (2006). Fundamental Principles of Family Law 2nd ed. 20-21. Buffalo, NY: W.S. Hein Co.
immigration regulation promotes national stability in the face of global mobilization of families, preparing nations for a strong and stable future.

Section I. U.S. Challenges – Family Preservation and Restoration

A review of the literature reveals basic principles in immigration policy. A ‘preference for people who were related to or ethnically similar to citizens already’ present in the nation, ‘plus achievement of a certain level of education, have developed into recurring themes of’ American immigration laws. The United States Immigration and Nationality Act and Amendments of 1965 reflected two basic values: 1) promote the reunification of families by issuing visas to close relatives of U.S. citizens and permanent residents; and 2) admit skilled educated foreigners who would enrich the national community.

A succession of immigration regulations worked to accomplish these goals in the midst of increased mobilization. In 1986 the U.S. Congress tried to reduce illegal entry by outlawing the employment of aliens who had not obtained work authorization, and introduced procedures and penalties to reduce marriage fraud. In 1990 major changes in the non-immigrant and immigrant visa classification system sharply increased the amount of immigration permitted, with no limits on the number of immediate relatives permitted to enter, but it did subtract this number from the overall family-based limit of 480,000. In the face of growing global terrorism, however, Congress passed the Antiterrorism and Effective Death Penalty Act in 1996. This was revised and sometimes superseded by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, each of which attempted to significantly limit illegal immigration, eliminating many forms of individual relief and forming the primary basis for the current law set forth in the Immigration and Nationality Act (INA).

Conversely, in the wake of the September 11, 2001 terror tragedy on the United

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6 INA § 101(b), not to fall below 226,000.


9 The INA is codified at 8 U.S.C. § 1101 et seq.
States, the *Homeland Security Act of 2002* (HSA) established the *Department of Homeland Security* (DHS), which includes the *United States Citizen and Immigration Services* (USCIS), and all functions of the previous *Immigration and Naturalization Service* (INS) was transferred to HSA.\(^1\) Since 2004 immigration reform has been attempted several times on the federal level, but without success. Instead, some states and municipalities are enacting their own immigration regulations with a focus on enforcement, making the entire system more complex.

The literature reveals the challenges confronting immigration since these developments. ‘The immigration law practice area is a fluid one, and its changes can be both rapid and retroactively applied... [and a] noncitizen[’]s ability to remain in the United States may be compromised by a separate family law matter.’\(^2\) A lack of clear family immigration policy can lead to troubling dangers for children.\(^3\) Such policies depend on definitions,\(^4\) and may offer a child no legal legal right to family reunification.\(^5\) One scholar suggests that when immigration law separates families, even unintentionally, this is an evocative deprivation of liberty, as the ‘constitutional rights of parents are not confined to citizens.’\(^6\) Further, the controversial rise of the children’s rights movement has hindered parental rights and a traditional emphasis on family preservation,\(^7\) and been exacerbated by the termination of undocumented immigrant parents’ rights, even though best interests considerations may justify these terminations.\(^8\)

Immigration policy that harms children harms the future of the state. ‘There are more than 5 million citizen children in [the U.S.] – and sadly, the likelihood that

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\(^2\) Ezer, Nicole Lawrence (2006). ‘The Intersection of Family Law and Immigration Law.’ *Fam. L. Q.* 40: 339-371. Separate family law matters include but are not limited to divorce, separation, custody, adoption, visitation, domestic violence or death of a parent during the immigration process.

\(^3\) *Id.* at 360-5.

\(^4\) INA § 101(a)(15)(V); 8 C.F.R. § 214.15. A “child” is defined in Title I and II of the INA as a person who is unmarried and under age 21, including some adopted, illegitimate, or step-children and orphans. See INA § 101(b).


\(^6\) Yablong-Zug, Marcia (2010). ‘Separation, Deportation, Termination.’ *Social Science Research Network.* Available at [http://ssrn.com/abstract=164899](http://ssrn.com/abstract=164899) (stating that ‘[i]mmigrant parents also have the right to the care and custody of their children’) at 10. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) the Court held that constitutional protections are ‘universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of …nationality…’

\(^7\) See Yablong-Zug. 35-37 (particularly noting the weakening of parental rights in the child welfare welfare system).

\(^8\) *Id.* at 49.
one or both of their parents will be deported is increasing.1 Breaking families apart is one consequence of a regulatory policy that needs reform. Undocumented immigrants who in the host nation have children, and being otherwise law-abiding citizens who are later deported and returned to a war torn or economically torn nation, can produce a severe detriment upon their children.2 Children left behind have in fact ‘become the new face of the campaign’ placing the focus on families in immigration reform.3 Some children left behind can become further victimized4 victimized in horrendous ways.5 Children benefit, however, when the family is preserved.

Marriage regulation in immigration policy is a detriment or a benefit to family strength, as the literature indicates. Regulation ‘intrudes much more extensively into courtship than does state family law.’6 Scholars proffer that the state may legitimately favour some forms of association over others; marriage immigration creates ‘very public consequences concerning [a] nation’s understanding of human nature, of human sexuality, and of the nature of the family.’7 Other literature suggests that marriage is a fundamental right to be protected in immigration policy, regardless of its definition or framework, and spousal reunification should not be denied to same-sex partners.8 Political unrest over the definition of marriage and its basis for the family has prompted the current U.S. federal regime

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2 ‘The law recognizes that a higher authority ordains natural parenthood, and a fallible judge should should disturb the relationship thus established only where circumstances compel human intervention.’ Ex parte Sullivan, 407 So. 2d 559, 563-64 (Ala. 1981).
to cast off current definitions of marriage. In early 2011, the Department of
Justice determined it would no longer defend federal marriage laws.\(^1\) The
executive branch has some internal conflict in this regard, as the INA has ceased to
issue green cards for some homosexuals immigrating as married,\(^2\) with individuals
challenging this decision.\(^3\)

Marriage fraud is a vast immigration regulation concern. The literature and case
law reveals conflict over the fundamental right of marriage subject to strict
scrutiny that may also be limited to further a legitimate federal interest in
preventing immigration fraud.\(^4\) ‘While the INS may not be able to challenge the
viability of a marriage, other restrictions may apply to a person’s ability to
obtain an immigrant visa based on the marriage. ... the Immigration Marriage Fraud
Amendments also modified provisions of the statute which allow a person to obtain
lawful permanent resident status through “adjustment of status”.\(^5\) Presumptions
of fraud\(^6\) must be established by clear and convincing evidence that the prior

\(^1\)Federal marriage laws are mainly embodied in the federal Defense of Marriage Act (DOMA). Pub.
L. 104-199, 100 Stat. 2419 (Sept. 21, 1996). For a comprehensive review of the past and current
events surrounding DOMA, and State reactions to the federal law, see DOMA Watch. Available at
www.domawatch.org/about/federaldoma.html. See Savage, Charlie and Sheryl Gay Stolberg
www.nytimes.com/2011/02/24/us/24marriage.html. ‘President Obama, in a striking legal and
political shift, has determined that the Defense of Marriage Act — the 1996 law that bars federal
recognition of same-sex marriages — is unconstitutional, and has directed the Justice Department
to stop defending the law in court…. Attorney General Eric H. Holder Jr. announced the decision
in a letter to members of Congress. In it, he said the administration was taking the extraordinary
step of refusing to defend the law, despite having done so during [its] first two years…’
immigrants.’ Mar. 28. Available at http://www.washingtonpost.com/politics/federal=agency-halts-
green-card-decisions-for-
\(^3\) See, e.g. Johnson, Chris (2011). ‘DOMA Lawsuit Planned for Gay Bi-National Couples.’
Washington Blade. Mar. 3. Available at http://www.washingtonblade.com/2011/03/03/doma-
lawsuit-planned-for-gay-bi-national-couples/ Homosexual couples were challenging the marriage
immigration problem prior to Obama’s shift in position on marriage. See Sacchetti, Maria (2010).
http://www.boston.com/news/local/ma/articles/2010/10/16/gay.... Currently, fiancés and fiancées, via a K Visa, may enter the U.S. solely to conclude a valid marriage within 90 days,
and minor children may accompany. See INA § 101(a)(15)(K). The alien need not reside in the
U.S. when the petition is filed. The Legal Immigration Family Equity (LIFE) Act, Title XI of Pub.
\(^4\) See Banqura v. Hansen, 434 F. 3d 487 (6th Cir. 2006)(statute denying marriage visa did not
violate due process); Manwani v. INS, 736 F. Supp. 1367 (1990)(government burden on right to
marry is subject to strict scrutiny).
\(^5\) Boswell, at 503, discussing ‘adjustment of status,’ at 8 USC § 1255, sec. 245.
\(^6\) 8 USC sec. 1154(a)(2), Sec. 204(a)(2).
marriage was not entered into to evade immigration laws. For the most part marriage immigration is favoured, though highly scrutinized.

Further challenging the marriage landscape are sex crime rings trafficking women who thought they were immigrating as wives. Victims of trafficking present another challenge to family immigration policy, though current regulations provide for a T Visa to accommodate severe trafficking and to protect a victim who would face a significant possibility of retribution or other hardship if removed from U.S. Additionally, victims of violence may be accommodated with a U Visa, designed to assist those who suffer substantial physical or mental abuse resulting from domestic violence. Congress’ general concern is to keep families intact.

Family reunification is a notion not without critics. Some scholars suggest national strength is weakened when particular ethnicities dominate immigrants. Efforts to reduce family immigration are evident in legislative trends, such as the Nuclear Family Priority Act, proposed in the U.S. Congress in 2007, which was designed to amend family immigration and the INA, “to make changes related to family-sponsored immigrants and to reduce the number of such immigrants.” It called for a reduction in family-sponsored visas, greatly reducing the preference allocation for spouses and children of permanent legal resident aliens to a

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1 Matter of Patel, 19 I & N. Dec. 774 (BIA 1988). Overcoming the presumption of fraud in marriage immigration allows for an exemption from the petition requirement in 1) death of the petitioner 2) battered spouse or children – where the subject of abuse may proceed on their own petition where the spouse or parent was a citizen or lawful resident. 8 USC sec. 1154(a)(1)(A)(iii)-(iv), etc... also added into the Violence Against Women Act (VAWA), a component of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1902-1955 (1994).
3 See Karen Yuen Fong Young v. Janet Reno, 114 F.3d 879, 881 (9th Cir. 1997). ‘...Congress’ general purpose in enacting [8 U.S.C. § 1153(a)(4) on sibling immigration] was to keep families intact...’ Id.
4 INA § 101(a)(15)(U).
5 See Deporting Our Souls: Values, Morality, and Immigration Policy. 119 (noting that ‘[o]nce Asian and Latin immigrants began to dominate the family immigration categories, the kinship system was attacked’).
6 See Hing, Bill Ong (2006). Deporting Our Souls: Values, Morality, and Immigration Policy. 119 (noting that ‘[o]nce Asian and Latin immigrants began to dominate the family immigration categories, the kinship system was attacked’).
worldwide level of 88,000 family-sponsored immigrants.\(^1\) That would have meant that family based immigration would be reduced to less than one fifth of the current half million per year, should this legislation have become law.\(^2\) Though euphemistically monikered, the *Nuclear Family Priority Act* would have minimized families drastically, and unconstructively affected the family fibre of American immigration. It and ideas like it weaken migrating families, thereby weakening the societies and nations to which they immigrate.

Immigration jurisprudence as functional family law is significantly more regulatory than state family law. One researcher suggests that courts and scholars ought to theorize about and construct the plenary power doctrine, and determine ‘whether the immigration provision in question is advancing core immigration policy goals or instead has ventured outside these goals into an area that has traditionally been within the province of the states.’\(^3\) Objectives could be driven by by principles focused on a desire to ‘least intrude on state family law’s policy objectives while still fulfilling the goals of federal immigration policy,’ allowing for minimal damage to be done to state law understandings of marriage in judicial interpretation of immigration regulations.\(^4\)

Recognizing that immigration legislation functions as family regulation is the starting point for addressing immigration challenges for the family. This is also the best wager to prevent immigration law from regulating the family unintentionally, or from weakening the nation that can be strengthened by immigration. Global challenges of national stability and multiculturalism thicken the plot against family restoration.

**Section II. Global challenges - Family restoration**

National stability, global human trafficking, and the need for family restoration in light of diminishing fertility rates and multiculturalism present formidable

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\(^1\) See *Nuclear Family Priority Act*, H.R. 938, 110\(^{th}\) Congress, 1\(^{st}\) Session, amending 8 U.S.C. 1151(c)(1)(A). Current law allows for 480,000, at INA § 101(b).

\(^2\) 480,000 in current law, at INA § 101(b).

\(^3\) Abrams, at 1708, adding ‘The plenary power doctrine has been ...modified, criticized, and debated by courts, scholars, and lawyers for over a hundred years, but its tension with state control over family law has never before been explored.’ Plenary power of Congress means that Congress’s authority to regulate immigration is inherent in the U.S.’s sovereignty as an independent nation, and in its exercise of that authority. Congress (and, by delegation, the executive) is ‘buffered against judicially enforceable constitutional constraints.’ Lindsay, Matthew J. (2010). ‘Immigration as Invasion: Sovereignty, Security, and the Origin of the Federal Immigration Powers.’ *Harv. C.R.-C.L.L. Rev.* 45:1-41.

\(^4\) Abrams, at 1708.
challenges to immigration policy. Principles for just immigration policy, however, can build nations in the midst of these challenges.

Generational growth, for example, is at considerable risk in Europe. Significant decreases in birthrates and complicated immigration policy have rendered some western nations at an impasse on national growth, and protective of generativity in unique ways. Immigration can facilitate a nation’s growth, though migration for economic reasons may be counterintuitive for immigrants. At times well-intentioned efforts toward inclusion can seem ridiculous in application. For example, when nations seek to reduce domestic violence—a laudable objective to sustain family stability—by redefining gender in social rather than biological terms, this seems an obvious indicator of policy makers ‘divorced from reality.’ These types of moves create neither family strength nor national stability. Efforts toward accommodation can present other concerns.

Multiculturalism presents challenges of its own. The assimilationist expectation is often considered ‘oppressive, and many Western countries are seeking to devise new policies that are more responsive to persistent cultural differences.’ When the claims of minority cultures or religions clash with ‘the norm of gender equality

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1 See, e.g. Bucher, Johannes (2011). ‘Demography and Life: quo vadis, Europa?’ Demographic Research Institute (Moscow). May 23. Available at http://www.demographia.ru/eng/articles/index.html?idR=73&idArt=1908. ‘The replacement fertility rate is roughly 2.1 births per woman for most industrialized countries. The Total Fertility Rate (TFR) of a population is the average number of children that would be born to a woman over her lifetime. All of the European countries have a TFR less than the replacement rate of 2.1. The average is 1.53 and Lithuania records the lowest TFR at [] 1.22…’ Rickety (2009). ‘The Falling Fertility of Europe.’ Jan. 16. Available at http://www.rickety.us/2009/01/the-falling-fertility-of-europe/.


6 Okin, Susan Moller (2006). ‘Is Multiculturalism Bad for Women?’ Boston Rev. (originally published Oct/Nov 1997, Boston Review). ‘[M]any culturally-based customs aim to control women and render them, especially sexually and reproductively, servile to men’s desires and interests. Sometimes, moreover, “culture” or “traditions” are so closely linked with the control of women that they are virtually equated.’ Id. at 6.
that is at least formally endorsed by liberal states,’ women suffer. These troubling connections between gender and culture create conflicts between multiculturalism and equal treatment, and accommodation and liberty. They do not foster strong families or strong nations via immigration policy.

Consider the socio-legal trend toward applying the citizen’s sovereign when blocks of those citizens and their families have migrated together to particular neighborhoods. The application of foreign law in cases involving family issues with migrant citizens in the United States has been inappropriate for national sovereignty and harmful to strong family policy. When a State judge applies foreign rules, that State has voluntarily relinquished its own sovereignty. Sharia law, for example, has been applied in U.S. courts in at least seventeen instances in eleven states. The United Kingdom chose to provide for Sharia law in limited circumstances, but most notably in families. Sadly, though most likely unintentionally on the part of the host, the result has been oppression of women and children.

Decisions like these do not restore individuals or families. Rather, they weaken families, and the jurisdictions that apply such rules. Immigration policies for national and family stability are needed.

Section III. Immigration Policy: National stability through family strength

The objective of any nation formulating immigration policy principles should be to develop national strength through family stability. According to the literature, while America’s illegal immigration debate is alive and evolving, Europe’s debate over family immigration is historically closed, and has been for twenty years due to the jettisoning of family avenues to guest worker migrant family members.

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1 Okin, at 6.
2 See (2011). ‘Sharia Law is Already Here’ American Thinker, Nov. Available at http://www.americanthinker.com/2010/11/shaira_law_is_already_here.html. A New Jersey trial court held that a man did not commit rape applying Sharia law to the mental state element of the crime of rape. On appeal the ruling was overturned. Id.
3 Id.
5 Id. ‘Under Sharia's civil code, a woman’s testimony is worth half of a man’s. A man can divorce his wife by repudiation, whereas a woman must give justifications, some of which are difficult to prove. Child custody reverts to the father at a preset age; women who remarry lose custody of their children even before then; and sons inherit twice the share of daughters.”
Immigration policy in Europe seems to have developed unintentionally nonetheless. ‘European states did not actively solicit the belated arrival of the spouses and children, not to mention the extended family, of its labor migrants. They had to accept family immigration, recognizing the moral and legal rights of those initially admitted. In this sense, European family immigration is unwanted immigration.‘

This ‘phenomenon of unwanted immigration reflects the gap between restrictionist policy goals and expansionist outcomes. Unwanted immigration is [] accepted passively by states, either for humanitarian reasons or in recognition of individual rights, as in asylum-seeking and family reunification of labor migrants, or because of the states’ sheer incapacity to keep migrants out, as in illegal immigration.‘ The immigrant simply hopes for family unity. ‘This approach has allowed European states to act humanely and generously toward those once admitted, while slamming the door to everyone else.’ The natural outflow of this is unintended consequences that greatly harm children and their families, but can be amended with an application of the best interests of the child doctrine to secure stable outcomes.

There should be no distinction based on gender in the application of immigration law, as applied to parents. For example, a Chinese father who sought asylum in the United States because his wife was forced to have an abortion under China's controversial family planning policy, was denied because the two were married when she was 17, too young to be legally married in China. Here, immigration regulation could be supported by comity to an extent that recognition of the marriage does not offend public policy, and the best interests of the child doctrine providing both parents for the child to thrive.

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1 Joppke, in *The Migration Reader*, at 538.
3 Joppke, at 539. It is possible that the European Declaration of Human Rights based in individual liberty may have formed the foundation for ‘unwanted’ family immigration, placing the priority on the liberty of the individual family member in desiring family restoration.
Basic immigration policy should hold the ancient moral tradition of ‘welcoming the stranger,’ and that aliens themselves may be an asset to the host nation, even to help those suffering. Immigration policy in fact aspires to be ‘a sign of a confident and successful nation.’ Citizens may sense a moral duty to protect those vulnerable individuals victimized by family circumstances.

Principles and objectives for a successful immigration policy understand that strong societies make for a strong nation, and yield the fruits of personal responsibility, national identity, and national accountability. Strong families make strong societies, requiring less public charge, greater worker economics, marriage and generativity toward state perpetuation and strength. Good immigration policy can serve to build nations, even when that nation is experiencing a lack of native generativity. Immigration policy should foster strong families, which in turn will foster a strong nation.

A comprehensive approach to these challenges of family law policy and immigration regulation is necessary, and possible. Providing for the formulation of strong families promotes national stability in the face of global mobilization of families. This is the future to building strong and stable nations, and indeed, ‘all [citizens] have an interest in how immigration law shapes the marriages [and families] of the immigrants who will make up the next generation of [] citizens.’

2 See, e.g. the parable of the Good Samaritan, where a traveler in a foreign land was the only one to stop and help a beaten man. Luke 10:25-37.
4 See, e.g., the Prophet Jeremiah’s charge to the Hebrews in Jeremiah 7:6 to ‘not oppress the alien, the fatherless, or the widow.’ For a comprehensive discussion of the biblical record with the challenges of immigration, see Hoffmeier, James K. (2009). The Immigration Crisis: Immigrants, Aliens, and the Bible. Wheaton, IL: Crossway Books.
5 See Chesterton, at 1, and Wardle, at 21.
6 Abrams, at 1708-09.