

# PEACEFUL PENETRATION: PROXY MARRIAGE, SAME-SEX MARRIAGE, AND RECOGNITION

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2011 MICH. ST. L. REV. 141

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## INTRODUCTION

Must two people be in the same physical place to marry? Should they be physically located in the state whose marriage laws they intend to invoke? These difficult questions lie at the heart of this symposium. The answers depend on a panoply of factors that vary from culture to culture, time to time, and place to place. Why do the intending spouses want to marry when they are apart, or invoke another jurisdiction’s laws? Is it for convenience? Is it to save money? Or is it an attempt to significantly change the nature of marriage itself?

This Essay aims to open up the debate on “E-marriage,” an idea developed by Professors Candeub and Kuykendall in their article *Modernizing Marriage*.<sup>1</sup> Candeub and Kuykendall propose a new form of marriage which they dub “E-marriage” that would make a state’s “marriage laws accessible to those beyond their physical boundaries.”<sup>2</sup> E-marriage would be particularly useful for same-sex couples, they claim, because it could lead to a “wider distribution of marriage’s status benefits” and

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1. Adam Candeub & Mae Kuykendall, *Modernizing Marriage*, 44 U. MICH. J.L. REFORM 735 (2011).

2. *Id.* at 741.

“enhance the visibility of same-sex marriage with a relatively low level of confrontation.”<sup>3</sup>

E-marriage, as Candeub and Kuykendall acknowledge, would be the latest instantiation of the ancient phenomenon of proxy marriage. Although the internet has been available for only a short time, people have long been able to marry even when they are not both in the same location as the officiant by having a “proxy” stand in for one of the spouses. In this Essay, I aim to complicate Candeub and Kuykendall’s claim that E-marriage would represent a positive step forward in the recognition of marriages by same-sex couples by providing a partial genealogy of proxy marriage in our country. In particular, the Essay offers some historical observations about how proxy marriage flourished for a time among immigrants to the United States and was then abolished by the National Origins Act of 1924. Of course—and this is part of my point—the circumstances of immigrant proxy marriage in the early twentieth century were quite different from those we face today. The “E-marriage” proposal would affect not only international marriages, but interstate ones as well, and even marriages between residents of the same state who want to access the laws of a different jurisdiction. E-marriage is likely to be of use primarily to people who are unable to marry in their home state (most likely same-sex couples) and people who are too far away from each other to marry conveniently (most likely couples where at least one of the pair is a member of the military). And E-marriage, if adopted by any of the fifty states, would not affect the federal ban on proxy marriage as a basis for immigration benefits.<sup>4</sup>

But there are some striking parallels between E-marriage and these earlier forms of proxy marriage, and my hope is that the historical examples will provide us with a richer backdrop for understanding the complex legal and cultural dynamics surrounding proxy marriage. The story of how proxy marriage became popular and was ultimately banned as a basis for immigration tells us a great deal about marriage’s cultural valence in times of social upheaval. The early twentieth century was marked by many tumultuous changes: entrenched industrialization, the arrival of immigrants from countries very different (or seemingly so) from those that had made up the early waves of immigration to the colonies and young republic, post-Civil War anxiety over race and class, the growth of the women’s suffrage movement and feminism, and the march towards the First World War. Marriage provided a convenient node for policing anxiety about these changes. Two

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3. *Id.* at 739, 746.

4. *See* 8 U.S.C. § 1101(a)(35) (2006) (stating that “[t]he term ‘spouse’, ‘wife’, or ‘husband’ do not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated”).

types of marriage proved particularly disturbing to lawmakers: Japanese picture marriage and Southern European proxy marriage.

I. JAPANESE PICTURE MARRIAGE: “PEACEFUL PENETRATION”

Picture marriage developed largely because of an agreement between the United States and Japan to end Japanese labor migration. Congress had previously banned Chinese labor migration, and, as a matter of domestic politics, it would have had no trouble passing a “Japanese Exclusion Act” to mirror the previous Chinese Exclusion Acts, given the virulent anti-Japanese sentiment flourishing on the West Coast and throughout the United States.<sup>5</sup> Japan’s victory in its war with Russia in 1905 made it a much greater power to contend with, however, and the Roosevelt Administration did not want to antagonize Japan by publicly embarrassing it with an Exclusion Act.<sup>6</sup> Instead, in 1908, the United States entered into a so-called Gentlemen’s Agreement with Japan.<sup>7</sup> The agreement itself was not a written document; rather, it was a compromise between the United States and Japan reached after a year and a half of negotiation and referred to in a series of notes exchanged between the two countries in 1907 and 1908.<sup>8</sup> Under the agreement, the Japanese government agreed to issue passports to the United States only to non-laborers or laborers who sought to return to a former domicile in the United States or join a parent, husband, or child already residing there.<sup>9</sup> Essentially, this meant that there would be very little new immigration of Japanese men, but that wives of Japanese men could still immigrate.

Many of the Japanese living in the United States, however, had no wives. And returning to Japan to acquire a wife was expensive and risky.

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5. See Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (repealed 1974); Act of May 6, 1882, ch. 126, 22 Stat. 58 (Chinese Exclusion Act) (repealed 1943); Act of Oct. 1, 1888 (Scott Act), ch. 1064, 25 Stat. 504 (repealed 1943); Act of May 5, 1892 (Geary Act), ch. 60, 27 Stat. 25 (repealed 1943); see also NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 145 (2000) (stating that the Gentlemen’s Agreement substituted for a Japanese exclusion law); FRANK F. CHUMAN, *THE BAMBOO PEOPLE: THE LAW AND JAPANESE-AMERICANS* 73-76 (1976) (discussing the “Yellow Peril”).

6. HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 31-32 (2006).

7. Roger Daniels, *The Politics of Prejudice: The Anti-Japanese Movement in California and the Struggle for Japanese Exclusion*, in 71 *UNIVERSITY OF CALIFORNIA PUBLICATIONS IN HISTORY* 44 (1962).

8. *Id.* (citing DEP’T OF STATE, *FOREIGN RELATIONS OF THE UNITED STATES*, 1924, at 339-69 (1939)).

9. *Id.* (citing letter from Japanese Foreign Office to the American Embassy (Feb. 18, 1908), in DEP’T OF STATE, *FOREIGN RELATIONS OF THE UNITED STATES*, 1924 at 365 (1939)); see also JOHN B. TREVOR, *JAPANESE EXCLUSION: A STUDY OF THE POLICY AND THE LAW*, H.R. DOC. NO. 68-600, at 5-6 (1925) (describing agreement).

Many Japanese immigrants became farmers, so it was very difficult to leave for long periods of time.<sup>10</sup> Between the voyage to Japan, the engagement period, wedding festivities, and the voyage back to the states, a farmer might lose months of crucial work.<sup>11</sup> In addition, the cost of the voyages and the traditional wedding ceremony could be high, and the groom risked being drafted into the Japanese military.<sup>12</sup>

In response to these difficulties, Japanese men resorted to “picture marriage,” also referred to as “photograph marriage” or *shashin kekkon*. In order to take full advantage of the terms of the Gentlemen’s Agreement, they married a woman in Japan by proxy without returning to Japan themselves.<sup>13</sup> Picture marriage was not the typical method of marriage in Japan, but it was not as radical a departure from the usual methods as might be assumed. Japanese marriages were not love-matches between individuals; rather, they were family transactions and arranged by the heads of households through intermediaries.<sup>14</sup> The future husband and wife might in some cases object to a particular match, but they had no expectation of becoming acquainted with each other prior to the marriage beyond a single chaperoned meeting, and they generally did not speak directly to each other before the wedding.<sup>15</sup> Much more important than personal attraction were genealogy, wealth, education, and health.<sup>16</sup> Although wedding ceremonies were often performed, they were not necessary. A marriage occurred when a bride’s name was inscribed into the husband’s family registry.<sup>17</sup> It was this inscription, and not the consent of the bride and groom, that made a Japanese marriage valid.<sup>18</sup>

If families were far away from each other and could not have a face-to-face meeting, they would exchange photographs of the prospective couple before their initial ceremonial meeting.<sup>19</sup> It was this variation on the

10. See Yuji Ichioka, *Amerika Nadeshiko: Japanese Immigrant Women in the United States, 1900-1924*, 49 PAC. HIST. REV. 339, 342-43 (1980) (summarizing picture-bride practices); RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 188-93* (1989) (discussing Japanese-American farming practices during the period).

11. See Ichioka, *supra* note 10, at 342.

12. *Id.*

13. See MARTHA GARDNER, *THE QUALITIES OF A CITIZEN: WOMEN, IMMIGRATION, AND CITIZENSHIP, 1870-1965*, at 37-49 (2005) (discussing reasons for picture marriage and American reactions); COTT, *supra* note 5, at 151-155 (discussing picture marriage and proxy marriage).

14. Midge Ayukawa, *Good Wives and Wise Mothers: Japanese Picture Brides in Early Twentieth-Century British Columbia*, BC STUDIES Spring/Summer 1995, at 103, 107.

15. Ichioka, *supra* note 10, at 342.

16. *Id.*

17. *Id.* at 343.

18. *Id.*

19. TAKAKI, *supra* note 10, at 47.

usual custom that developed into a common practice among the Japanese in America. In picture marriage, there was still an inscription ceremony in Japan, but the groom was absent from the ceremony.<sup>20</sup> Because the legality of the marriage depended not on consent of the individuals but on the consent of the heads-of-household and the registration of the bride's name, the groom's presence at the ceremony itself was not a prerequisite to a valid marriage.<sup>21</sup>

Between 1908 and 1924, 66,926 Japanese women took advantage of this exception in order to migrate to the United States.<sup>22</sup> Between 1910 and 1919, approximately 400 to 900 picture brides per year entered through Seattle and San Francisco.<sup>23</sup> Compared to the burgeoning populations of these cities as a whole, the "picture bride" migration was minor. Indeed, Japanese immigration generally did not result in large numbers of Japanese coming to the mainland United States. At its peak, the Japanese population in California was 2.1% of the total population, and in the continental U.S. it was 0.1%.<sup>24</sup>

Japanese women in America worked hard. This labor was consistent with what they were used to in Japan; there, they worked in coal mines, the textile industry, and construction.<sup>25</sup> In the States, they commonly worked in agriculture or shops, often alongside their husbands.<sup>26</sup> Most were spread out among the western states in rural areas: Wyoming (coal mines), Utah and Idaho (sugar beet fields), Pacific Northwest (lumber camps and mills), Alaska (salmon canneries), and California (all kinds of agriculture).<sup>27</sup> Those in urban areas worked in "laundries, bathhouses, bars, markets, restaurants, boardinghouses, and poolhalls," or as "servants, seamstresses, or cannery workers."<sup>28</sup>

To the Japanese, the Gentlemen's Agreement clearly allowed for the use of picture marriage. To the United States, however, the "picture-bride

20. Ichioka, *supra* note 10, at 342-43.

21. *Id.*; see also TREVOR, *supra* note 9, at 7.

22. TAKAKI, *supra* note 10, at 46-47. Canada also entered into a "Gentlemen's Agreement" in 1908. Ayukawa, *supra* note 14, at 107. The "Lemieux-Hayashi Gentlemen's Agreement" limited the number of laborers entering Canada to 400 per year. *Id.*

23. Memorandum from Department of State (Dec. 11, 1919) (on file with the National Archives and Records Administration, Records of the Immigration and Naturalization Service, Subject and Policy Files, 1893-1957, Japanese Picture Brides, 1905-1930, RG 85, Entry 9, Box 550, Files 52424/1-52424/13-C, National Archives Building, Washington, D.C.) [hereinafter "National Archives, Entry 9, Box 550"].

24. Daniels, *supra* note 7, at 1-2.

25. TAKAKI, *supra* note 10, at 47-48.

26. EVELYN NAKANO GLENN, ISSEI, NISEI, WAR BRIDE: THREE GENERATIONS OF JAPANESE AMERICAN WOMEN IN DOMESTIC SERVICE 68-69 (1986).

27. Ichioka, *supra* note 10, at 348-49.

28. *Id.* at 349.

loophole” was an example of “Oriental treachery.”<sup>29</sup> It was a “clear violation of the intent of the agreement,” argued one anti-Japanese activist, because it allowed a woman to migrate as wife to a husband “who had no wife, and who was presumed, under the general acceptance of the intent of the agreement, to be entitled to bring over a wife only if he had left one behind him.”<sup>30</sup>

Immigration authorities responded to the concern that picture brides were not genuine wives by requiring Japanese couples to remarry upon the bride’s arrival.<sup>31</sup> These ceremonies were often done in groups at dockside or in hotels or churches soon after the bride’s arrival.<sup>32</sup> This policy did little to help the growing tensions between Japan and the United States. The Japanese did not like the remarriage requirement, because it implied that their marriages were invalid from the start. Even with a second dockside marriage with both parties present, Americans still found the picture bride practice deeply disturbing. The Asiatic Exclusion League accused the Japanese of using the picture bride system to import women “for immoral purposes,” claiming that the Japanese brought in “Jap women for sinister purposes, by so-called picture marriages under the guise of a marriage by proxy in Japan, [they are then] remarried here as a mere matter of form, and after a month or a year of so-called married life deserted, or cast into a crib.”<sup>33</sup>

In some cases, the requirement of re-marriage was more than just a burden; it was an impediment to immigration altogether. If, for example, a marriage was permissible in Japan but not in the United States, a couple could not be married in the United States, and their marriage would not be recognized for immigration purposes. For example, when Yoshida Kinu arrived in Seattle from Japan in 1906, she had been married under Japanese law, but needed to be “remarried” under American law.<sup>34</sup> She and her husband were first cousins, a degree of consanguinity prohibited under Washington State law.<sup>35</sup> Accordingly, Kinu was either a single woman, and inadmissible because she was “likely to become a public charge,” or, if she could find work, a laborer, and, therefore, inadmissible under the ban on Japanese labor.<sup>36</sup>

29. Daniels, *supra* note 7, at 44.

30. V.S. MCCLATCHY, JAPANESE IMMIGRATION AND COLONIZATION: SKELETON BRIEF, S. DOC. NO. 67-55, at 20 (1st Sess. 1921) [hereinafter MCCLATCHY BRIEF].

31. TREVOR, *supra* note 9, at 7; see also PAMELA HAAG, CONSENT: SEXUAL RIGHTS AND THE TRANSFORMATION OF AMERICAN LIBERALISM 115 (1999).

32. Ichioka, *supra* note 10, at 347.

33. ROGER DANIELS, GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRATION POLICY AND IMMIGRANTS SINCE 1882 136 n.80 (quoting ASIATIC EXCLUSION LEAGUE, PROCEEDINGS 14 (1910)).

34. GARDNER, *supra* note 13, at 22 & n.30.

35. *Id.* at 22 n.30.

36. *Id.* at 22-23.

The picture bride controversy reached a head in 1917 when Congress passed a new Immigration Act.<sup>37</sup> Most famously, the Act created an “Asiatic Barred Zone,” that made most Asians excludable, but exempted Japan for political reasons.<sup>38</sup> But the new Act also included what it termed an “illiteracy test.”<sup>39</sup> This test required all aliens over 16 years old who were physically capable of reading to be able to read some language or dialect.<sup>40</sup> The law included exceptions for some relatives of aliens; any admissible alien could “send for his father or grandfather over fifty-five years of age, his wife, his mother, his grandmother, or his unmarried or widowed daughter, if otherwise admissible, whether such relative can read or not.”<sup>41</sup> Built into the law were notions of likely dependency. Literacy was a prerequisite for informed citizenship and a possible predictor of economic success, so it was particularly important for a breadwinner to possess. Elderly men and women of all ages were considered dependents under the law, and, therefore, did not need to be literate.<sup>42</sup> An unmarried or widowed daughter was admissible without passing the test, presumably because responsibility for her economic well-being remained with or reverted to her (literate) father.<sup>43</sup> The test appears to have been effective in winnowing out laborers who might otherwise have slipped in as relatives of legal residents: the first deportee under the new rules was Tsunekichi Ishida, age 52, of Hiroshima, who arrived to join his son in Hawaii and failed the reading test.<sup>44</sup>

The literacy test requirement, and its exceptions, applied to all immigrants, not just Japanese. In fact, the test appears to have been principally aimed at restricting immigration from eastern and southern Europe.<sup>45</sup> But,

37. Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874.

38. § 3, 39 Stat. at 875-78; MOTOMURA, *supra* note 6, at 125 (discussing motivations for exempting Japan from barred zone).

39. Immigration Act of 1917, § 3, 39 Stat. at 875-78.

40. *Id.*

41. *Id.*

42. See COTT, *supra* note 5 at 142-43 (arguing that the literacy test was one of many examples in which a male immigrant was valued for his breadwinning abilities whereas a female immigrant was valued “in her role as a dependent rather than as a full citizen”).

43. The law became effective May 5, 1917. Letter from W.B. Wilson, Dep’t of Labor Sec’y, to the Sec’y of State 1 (June 27, 1917) (on file with the National Archives, Entry 9, Box 550, File 52424/13-B).

44. Letter from B.E. Haworth, to Anthony Caminetti, Comm’r-Gen. of Immigration (May 24, 1917) (enclosing Office of Naval Intelligence translation of telegram and other documents) (on file with the National Archives, Entry 9, Box 550, File 52424/13).

45. MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 19 (William Chafe et. al. eds., 2004). Mae Ngai has noted that Congress had passed a literacy requirement four times between 1890 and 1917, but it had been vetoed by Presidents Cleveland, Taft and Wilson. *Id.* When the 1917 Act was passed, Wilson again vetoed it, twice, but Congress overrode his veto. *Id.*; see also COTT, *supra* note 5 at 141 (noting that Senator Henry Cabot Lodge of Massachusetts, when introducing an earlier version of the literacy bill, argued that “the illiteracy test will bear most heavily upon the Ital-

its passage led to a reconsideration of the status of Japanese picture brides. If the brides were legally wives upon arrival, then they were exempt from the test, but if they were not, then they were subject to the test. Immigration officials, remember, could not exclude them as laborers, because under the Gentlemen's Agreement, *Japan*, not U.S. immigration officials, was responsible for denying visas to laborers, and Japan took the position that the picture brides were not laborers but wives. In crafting regulations in support of the new law, the Department of Labor wanted to avoid a circumstance where "an unmarried woman who c[ame] to a United States port and claim[ed] upon arrival that she ha[d] been sent for by a man in the United States who [was] desirous of marrying her" would qualify as exempt from the test.<sup>46</sup> Such an exemption would have applied to *all* immigrants, not just Japanese, leading potentially to an enormous loophole in the literacy test requirement for female immigrants. If the picture marriages were valid under Japanese law, then the U.S. would be required to recognize them by the terms of the Gentlemen's Agreement. After numerous conversations and correspondence between the Japanese Ambassador, the State Department, and the Department of Labor (of which the Bureau of Immigration was a part), the Department of Labor concluded that no marriage certificate would be required, because marriage certificates did not exist in Japan.<sup>47</sup> Rather, immigration officials were instructed to accept a certified copy of the record of the registrar supplemented by a certified copy of the notification to the registrar sent him by the party to the marriage living in the United States.<sup>48</sup>

Once the Department of Labor had conceded that a certified copy of the registration of the marriage in Japan was enough to demonstrate a *bona fide* marriage, it became clear that the custom of requiring a dockside marriage could no longer be legally required.<sup>49</sup> But this concession did not end the controversy. Two interlocking concerns continued to dominate the public response to the picture bride migration. First, many officials and activists complained that the picture brides were really laborers in disguise. The San Francisco Labor Council had previously petitioned President Wilson to exclude picture brides on the grounds that they are "in fact laborers" dis-

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ians, Russians, Poles, Hungarians, Greeks, and Asiatics, and very lightly, or not at all, upon English-speaking emigrants and Germans, Scandinavians, and French").

46. Letter from W.B. Wilson to the Sec'y of State, *supra* note 43.

47. See Letter from Aimaro Sato, Imperial Japanese Embassy, to Robert Lansing, Sec'y of State (July 25, 1917) (on file with the National Archives, Entry 9, Box 550, File 52424/13) (describing Japanese marriage by registry); Letter from Richard L. Halsey, Immigration Serv. Inspector in Charge, Honolulu, Haw., to Comm'r-Gen. of Immigration (July 6, 1917) (on file with the National Archives, Entry 9, Box 550, File 52424/13) (discussing Japanese marriage and divorce laws and customs).

48. Letter from Richard L. Halsey to Comm'r-Gen. of Immigration, *supra* note 47.

49. See Letter from W.B. Wilson to the Sec'y of State, *supra* note 43, at 8.

placing white farmers.<sup>50</sup> These arguments continued even after the cessation of dockside marriage. One anti-immigration activist described the picture bride as a “beast of burden up to the time of the birth of her child and, within a day or two at most, resumes her task and continues it from twelve to sixteen hours a day.”<sup>51</sup> In a memorandum written to the U.S. Labor Secretary, the Immigration Commissioner commented, “Of course it cannot be denied that the vast majority of these women are manual laborers; everyone at all familiar with the subject knows that after they have been landed and permitted to join their husbands, they usually work alongside the latter in the fields.”<sup>52</sup>

But even greater than the fear that picture brides were evading the ban on labor was the fear of the reproductive power of women and the possibility of a Japanese West Coast. One commentator remarked upon the “flood of brides” that “poured in through our gates to increase not only by their own numbers, our population, but through their children, to add to the complexity of the race problem in the United States.”<sup>53</sup> According to V.S. McClatchy, the publisher of the *Sacramento Bee* and a member of the Japanese Exclusion League of California, picture marriage was a carefully-plotted tool in a Japanese conspiracy to invade the United States through immigration.<sup>54</sup>

McClatchy termed Japan’s colonization strategy “peaceful penetration.”<sup>55</sup> Instead of attacking the United States directly by waging war, he claimed, Japan was sending immigrants who would then work for low wages to drive out white labor, buy or lease land, and then employ only Japanese labor.<sup>56</sup> Ultimately, Japan would colonize the United States by peacefully invading it from within.

McClatchy believed that the importation of women was crucial in effecting the peaceful penetration strategy. California and other western states had passed alien land acts that prohibited “aliens ineligible to citizenship” from owning land, so Japanese would be unable to colonize the United States through land ownership on their own.<sup>57</sup> But if they had children,

50. Letter from San Francisco Labor Council to Woodrow Wilson, President of the U.S. (Apr. 28, 1916) (on file with the National Archives, Entry 9, Box 550, File 52424/13).

51. Daniels, *supra* note 7, at 86 (quoting Cora Woodbridge, *Now’s the Time to Take a Stand against the Japs*, GRIZZLY BEAR, Oct., 1920).

52. Memorandum from Comm’r Gen., for the Sec’y, *In re Japanese Immigration*, (July 30, 1919) (on file with the National Archives Entry 9, Box 550, File 52424/13-B).

53. TREVOR, *supra* note 9, at 10.

54. *Says Agreement Fails to Keep Japanese Out: McClatchy Tells House Committee That ‘Excursion Brides’ are Now Arriving*, N.Y. TIMES, FEB. 10, 1922, at 1 (identifying McClatchy as publisher of *Sacramento Bee*).

55. MCCLATCHY BRIEF, *supra* note 30, at 14.

56. MCCLATCHY BRIEF, *supra* note 30, at 14.

57. See Keith Aoki, *No Right to Own?: The Early Twentieth-Century “Alien Land Laws” as Prelude to Internment*, 40 B.C. L. REV. 37, 37-38 & n.5, 46-47 & nn.32-33 (1998).

the children would be native-born U.S. citizens who could own land. Indeed, many Japanese immigrants did own land indirectly, despite the alien land laws, by buying the land in trust for their citizen children.<sup>58</sup> Japanese men were unlikely to father citizen children, however, if there were no Japanese women to marry. Miscegenation laws prohibited marriages between Japanese men and white women, and social mores might have also prevented these relationships from occurring even without the laws.<sup>59</sup> But if Japanese women could immigrate, then they could help to create Japanese-American citizens, loyal to Japan, who could buy up American land in the interests of the Japanese government. “[E]very [school] girl,” McClatchy claimed, was “thoroughly drilled in the doctrine that; should she become a ‘picture bride’ in America” she had a duty to the Emperor of Japan to “have as many children as possible” so that the United States could “become in time a possession of Japan.”<sup>60</sup>

Some of the damage had already been done. “Obviously,” McClatchy argued, the “natural increase” of the Japanese through “an extraordinary birth rate among those already located here” was unpreventable.<sup>61</sup> New arrivals, however, needed to be curbed, or within only “a few generations” the white population would suffer “inundation . . . in this country by the yellow race.”<sup>62</sup> This population increase, according to McClatchy, was the “announced intent” of Japan, and could only be prevented by the “rigorous exclu[sion]” of females as well as males.<sup>63</sup> Using census statistics, McClatchy argued that the fertility rate of Japanese in California outstripped even that of the Japanese in Japan and was four times that of white Americans.<sup>64</sup> The result over time would be the establishment in California of “a little Japan.”<sup>65</sup> Congress appears to have largely credited McClatchy’s arguments in voting for Japanese exclusion in 1924; McClatchy’s brief was

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58. *Id.* at 56.

59. *See, e.g.*, Cal. Civil Code § 60 (Deering 1909) (“all marriages of white persons with negroes, Mongolians, or mulattoes are illegal and void”); Cal. Civil Code § 69 (Deering 1909) (no marriage license may be issued authorizing the marriage of a white person with a negro, mulatto, or Mongolian”); *cf.* Roldan v. Los Angeles County, 18 P.2d 706, 707-09 (Cal. App. 1933) (citing sources that indicate “Mongolian” as used in 1909 Act included Japanese but excluded Malays); *see also* RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* 36 (2001) (discussing low out-marriage rates of Japanese immigrants compared with other groups).

60. MCCLATCHY BRIEF, *supra* note 30, at 43; *see also* TREVOR, *supra* note 9, at 10 (remarking on the “amazing fecundity” of Japanese women).

61. MCCLATCHY BRIEF, *supra* note 30, at 10.

62. *Id.* at 11.

63. *Id.*

64. *Id.* at 13.

65. *Id.* at 16.

entered into the record as a Senate document, and he testified numerous times in the years leading up to the 1924 Act.<sup>66</sup>

The legal recognition of picture marriage by U.S. officials did not lead to social respect for these relationships. Paradoxically, it was Japan's insistence in 1917 that the marriages of picture brides be considered valid that added fuel to the argument that Japan was attempting to circumvent the Gentlemen's Agreement. Instead, Japan's insistence on recognition was simply further evidence that broader legal action was needed to shut down Japanese immigration entirely.<sup>67</sup> Anti-Japanese groups continued to agitate about banning picture brides. In its 1919 platform, the California Oriental Exclusion League listed "Exclusion of 'Picture Brides'" as one of its five main goals.<sup>68</sup> And later in 1920, the Japanese Foreign Ministry caved to American pressure and began to deny passports to picture brides.<sup>69</sup> On February 29, 1920, in what has sometimes been referred to as the "Ladies' Agreement," Japan promised to terminate the emigration of picture brides altogether.<sup>70</sup>

But the abolition of picture marriage did not end the immigration of Japanese women to the states. A Japanese man domiciled in the U.S. could still return to Japan to obtain a bride. The danger for the man was conscription, but as long as he did not stay in Japan for longer than thirty days he was not subject to the draft.<sup>71</sup> According to some anti-Japanese activists, Japan began to allow immigrants ninety days to acquire a wife without fear

66. *Id.* at 1; see also Japanese Immigration: Hearings Before the H. Comm. on Immigration and Naturalization, 66th Cong. 206-15, 220-44, 281-84, 338-434 (1920) [hereinafter 1920 House Hearings] (statement of V.S. McClatchy); *Japanese Immigration Legislation: Hearings on S. 2576 Before the S. Comm. on Immigration*, 68th Cong. 3-38 (1924) [hereinafter 1924 Senate Hearings] (statement of V.S. McClatchy); CHUMAN, *supra* note 5, at 95-99 (arguing that McClatchy was unable to persuade Congress to exclude Japanese when he testified in 1921 but that by 1924 his arguments prevailed).

67. See, e.g., Memorandum from Comm'r Gen., for the Sec'y, *supra* note 52 (discussing the 1917 decision to recognize picture marriages as a roadblock to Senator Phelan's desire to limit Japanese immigration).

68. Daniels, *supra* note 7, at 84-85 (citing Exclusion League's Letterhead) (the others were: "Cancellation of the 'Gentlemen's Agreement'"; "Rigorous exclusion of Japanese as immigrants"; "Confirmation of the policy that Asiatics shall be forever barred from American citizenship"; and an "Amendment of the Federal Constitution providing that no child born in the United States shall be given the rights of an American citizen unless both parents are of a race eligible to citizenship").

69. Letter from Masanao Hanihara, Japanese Ambassador, to Charles E. Hughes, Sec'y of State (Apr. 10, 1924), in 1924 Senate Hearings, *supra* note 66, at 167, 168 (claiming that "[i]ssuance of passports to so-called 'picture brides' has been stopped by the Japanese Government since March 1, 1920"); see also letter from Charles E. Hughes, Sec'y of State, to Masanao Hanihara, Japanese Ambassador (Apr. 10, 1924), in TREVOR, *supra* note 9, at 45 (confirming that the Japanese Government modified the Gentlemen's Agreement to prohibit "picture brides").

70. TREVOR, *supra* note 9, at 7-8.

71. 1924 Senate Hearings, *supra* note 66, at 27 (statement of V.S. McClatchy).

of conscription in order to facilitate the peaceful penetration strategy.<sup>72</sup> With picture brides no longer available, Japanese men now began returning to Japan for short periods in order to marry and return to the United States.<sup>73</sup> This method of immigration was referred to as *kankodan* marriage (meaning marriage by excursion).<sup>74</sup>

Anxiety over the practice of *kankodan* marriage came to a head in the hearings on the 1924 immigration bill that ultimately became the National Origins Quota Act. The National Origins Act attempted to “freeze” the population’s racial and ethnic makeup by setting up quotas for the number of visas a particular country could receive based on population, using the percentage of the population for each national origin reflected in the 1890 census.<sup>75</sup> The result was to severely limit immigration from Eastern and Southern Europe.<sup>76</sup> Under the “Asiatic Barred Zone” created by the 1917 Act, natives or descendants of natives of continental Asian countries were already barred from admission to the United States; the act retained this provision.<sup>77</sup> But Japan had not been included in the 1917 Act, so a major issue to be decided in the debate over the 1924 Act was how to treat Japan.<sup>78</sup> Should it be added to the list of barred Asian countries, risking antagonizing Japan? Or should Congress instead apply the same quota provision that applied to other countries, such as Italy or Greece, which, based on the Japanese population reported in the 1890 census, would yield a very small number of quota slots per year for Japanese immigrants (a few hundred or a few thousand)?

Once again, it was the immigration of Japanese women that took center stage. Japan could not be trusted, V.S. McClatchy testified, because Japan had repeatedly violated the Gentlemen’s Agreement, first through picture brides and then again through *kankodan* marriage.<sup>79</sup> According to McClatchy, even with a very small quota, Japan would be able to continue its quest to colonize the United States. “She would not send over many adult male Japanese,” he insisted.<sup>80</sup> “She would send over the entire [quota] of brides, and those brides would promptly proceed to business with the

72. MCCLATCHY BRIEF, *supra* note 30, at 20; TREVOR, *supra* note 9, at 8 & n.17.

73. 1924 Senate Hearings, *supra* note 66, at 27 (statement of V.S. McClatchy).

74. TREVOR, *supra* note 9, at 8 (using term “Kankodan System”).

75. MOTOMURA, *supra* note 6, at 126-28.

76. *Id.*

77. See Immigration Act of 1917, Pub. L. No. 64-301, § 3, 39 Stat. 874, 875-78 (creating the “Asian Barred Zone”), *repealed by* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 403(a)(13), 66 Stat. 163, 279.

78. 1924 Senate Hearings, *supra* note 66, at 8-12, 30-31 (statement of V.S. McClatchy).

79. *Id.* at 26-27.

80. *Id.* at 31.

result that the population of this country would be very much increased.”<sup>81</sup> Pro-labor activists made a tortured argument that, because President Roosevelt had explained to the California Legislature in a February 9, 1909 telegram and in his autobiography that Japan agreed with him that it was “unwise” to permit the increase of Japanese population in the United States, the purpose of the Gentlemen’s Agreement had been to decrease the Japanese-American population, not simply to limit labor immigration.<sup>82</sup> The recent switch to *kankodan* marriage following the Ladies’ Agreement only highlighted Japan’s illicit motives. Yes, Japan had ended the picture bride practice, but in the year following, 2197 *kankodan* brides arrived in Seattle and San Francisco, according to McClatchy, were “every one of them destined to raise on the average a family of five.”<sup>83</sup> This new immigration, he argued, “was not an observance of the intent of the Japanese agreement, and did not indicate good faith on the part of Japan when she stopped the picture-bride system.”<sup>84</sup>

The Japanese ambassador insisted, correctly, that the population increase among Japanese Americans was due to births and that “[t]his has nothing to do with either the gentlemen’s agreement or the immigration laws.”<sup>85</sup> This, of course, missed the point. The births were a direct result of the picture bride exception to the Gentlemen’s Agreement, and the desire for an outright ban on Japanese immigration stemmed, at least in part, from a perception that this exception was in reality a gaping loophole due to Japanese women’s reproductive capacities. The Americans, at least by 1924, cared little about the literal terms of the Gentlemen’s Agreement but instead about what they believed to be its underlying purpose: to prevent the growth of the Japanese population, whether through immigration or through birth. In his report to Congress in 1925, John Trevor, a former military intelligence officer, rebutted the Japanese Ambassador’s contention that the births of Japanese-Americans had nothing to do with the Gentlemen’s Agreement: “This is a contention which is in fact controverted by the flood of brides which . . . poured in through our gates to increase not only by their own numbers, our population, but through their children, to add to the complexity of the race problem in the United States.”<sup>86</sup> *Kankodan* marriage was simply further proof that Japan would do anything to continue its plan for colonization through peaceful penetration.

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81. *Id.*

82. *Id.* at 36-37 (statement of California Department of American Legion, American Federation of Labor, the Grange, and Native Sons of the Golden West).

83. *Id.* at 27 (statement of V.S. McClatchy).

84. *Id.*

85. Letter from Masanao Hanihara to Charles E. Hughes, *supra* note 69, in 1924 Senate Hearings, *supra* note 66, at 167, 168; TREVOR, *supra* note 9, at 10.

86. TREVOR, *supra* note 9, at 10.

On May 15, 1924, Congress finally passed the National Origins Act.<sup>87</sup> The 1924 Act made immigrants ineligible for citizenship (which included the Japanese) inadmissible.<sup>88</sup> It also defined “wife” and “husband” for immigration purposes as not including wife and husband by reason of picture marriage.<sup>89</sup> The effect of the Act was a halt in the increase, and even a reduction, in the Japanese population. In Washington State, for example, the U.S. census shows the following figures for Japanese girls and women. The numbers in parentheses represent the number born in the United States.

1900: 185 Japanese women (21)

1910: 1,688 (347)

1920: 6,065 (2,117)

1930: 7,637 (4,308)

1940: 6,532 (4,234).<sup>90</sup>

Up until the 1920s, then, the population of female Japanese immigrants was dramatically increasing. It appears from the census data that even after the 1920s the birthrate continued to increase but that the lack of new immigrants led to an eventual decrease in the overall Japanese-American population, despite continued births. In short, the 1924 Act succeeded in its aim to put a stop to the “peaceful penetration” of the United States by Japanese women.

Japanese women, then, were seen as colonizers and infiltrators, and their method was marriage. By subverting the Gentlemen’s Agreement, first through picture marriage and then through marriage by excursion, Japanese women were able to enter the United States, work as laborers, produce children who were technically U.S. citizens but racially and culturally loyal to Japan, and participate in their country’s scheme to conquer America from within. Through marriage they entered, and by marriage, and the protections it offered them and their children, they conquered. Or so went the story told by exclusionists.

## II. EUROPEAN PROXY MARRIAGE: JUDICIAL ACTIVISM

A similar tale was told of immigrant women from Eastern and Southern Europe. Like the Japanese, these immigrants were imagined to be racially inferior and polluting. Like the Japanese, some of them were im-

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87. See Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153.

88. See § 13(c), 43 Stat. at 162.

89. See § 28(n), 43 Stat. at 169.

90. Gail M. Nomura, *Tsugiki, a Grafting: A History of a Japanese Pioneer Woman in Washington State*, in *WOMEN IN PACIFIC NORTHWEST HISTORY: AN ANTHOLOGY* 229 n.17 (Karen J. Blair ed., 1988) (citing U.S. CENSUS 304 (1940)).

aged to be infiltrators—anarchists from Italy were especially feared.<sup>91</sup> But, unlike the Japanese, these immigrants were not excluded under an agreement. The loopholes they discovered existed not in a Gentlemen's Agreement with the government but in the quota system established by Congress itself. European immigrants were able to use proxy marriage as a means of immigration by holding Congress to the letter of the law and using federal courts to vindicate their rights. But, the taint of "judicial activism" was ultimately their undoing, for the 1924 National Origins Act that banned picture marriage as a means of immigration banned all proxy marriage as well, and its legislative history indicates that the federal courts' decisions were a significant reason underlying the passage of the ban.

By the early 1900s, Eastern and Southern European immigration had begun to dominate immigration to the United States.<sup>92</sup> As discussed above, the literacy test required by the 1917 Act was intended to curb some of this immigration, but it was less effective than intended, as the majority of arriving immigrants were literate in their native languages.<sup>93</sup> World War I temporarily halted most immigration, but after the conflict ceased in late 1918, the numbers quickly rose again.<sup>94</sup> By the 1920s, anti-immigrant fervor had become undeniable, and Congress was determined to act.<sup>95</sup> It responded by passing the Emergency Quota Act in 1921,<sup>96</sup> followed by the National Origins Act in 1924. Under the 1921 Emergency Quota Act, annual quotas were imposed for the first time on European immigrants.<sup>97</sup> (Asians, exempting Japan, had been barred under the 1917 Act and Western Hemisphere immigration—including immigration from Mexico—was still unrestricted.)<sup>98</sup> The quotas made an enormous difference in European immi-

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91. See NGAI, *supra* note 45, at 19 (discussing the "strong antiradical current" that ran through postwar nativism, which "associated Jews with Bolshevism and Italians with anarchism") (citation omitted).

92. For example, in 1914, a peak immigration year in which over 1.2 million immigrants arrived in America, over 1 million of them arrived from Europe. Of these, only around 120,000 were from Great Britain, Ireland, or Scandinavia, with the vast majority from Russia and the Baltics (255,600), Italy (283,738) or Central Europe (313,886). Robert Barde et al., *Immigrants, by country of last residence – Europe: 1820–1997 Table Ad106-120*, in HISTORICAL STATISTICS OF THE UNITED STATES, EARLIEST TIMES TO THE PRESENT: MILLENNIAL EDITION (Susan B. Carter et al. eds., 2006), available at <http://hsus.cambidge.org/HSUSWeb/toc/showChapter.do?id=Ad>.

93. NGAI, *supra* note 45, at 19-20.

94. DANIELS, *supra* note 33, at 45 (stating that net immigration dropped to 150,000 in 1916, where it had been 900,000 in the last pre-war year); NGAI, *supra* note 45, at 19.

95. Daniels, *supra* note 7, at 19 (attributing post-War anti-immigration sentiment to wartime nationalism, a decrease in economic need for mass immigration, and the development of an international norm that gave primacy to the territorial integrity of the nation-state).

96. Act of May 19, 1921, Pub. L. No. 67-5, §§ 2(a)(6), 3, 42 Stat. 5, 5-6.

97. NGAI, *supra* note 45, at 17-21.

98. *Id.*

grants' ability to move to America. Under the 1921 Act, annual immigration from non-Asian, Eastern Hemisphere countries was limited to three percent of the "number of foreign-born persons of such nationality resident in the United States as determined by the United States census of 1910."<sup>99</sup>

Before the 1921 Act, marital status was often extremely important to an immigrant woman. Legislation passed in 1882 excluded any immigrant "likely to becom[e] a public charge."<sup>100</sup> "LPC," as immigration officials abbreviated the exclusion ground, was often the label attached to unmarried women. Women traveling alone, single women, or women who had left family behind were deemed LPC despite evidence of work skills.<sup>101</sup> Once the Illiteracy Test passed in 1917, marriage became even more important for some women. Illiterate women were admitted if they were the wives of aliens who had passed the test or arrived before the requirement had gone into effect.<sup>102</sup>

Now that the 1921 Quota Act was in place, however, marriage became crucial, even for women who could pass the literacy test and demonstrate they were not LPC. The number of spots available was tiny in comparison to demand. Immigration officials administered the quotas by setting a sub-quota for each month to each country.<sup>103</sup> The quotas were filled on a first-come, first-serve basis, which sometimes resulted in collisions as steamships raced to dock first.<sup>104</sup> The 1921 Act made children of U.S. citizens under the age of 18 exempt from the Act, and gave "preference" to some other relatives—"wives, parents, brothers, sisters, children under eighteen years of age, and fiancées" of aliens who had applied for citizenship.<sup>105</sup> As a practical matter, "preference" immigrants were often the *only* immigrants, for the subquotas were so small that families were sometimes divided, with some members gaining admission and others sent on the next ship back to their home country to try again another time.<sup>106</sup>

99. Act of May 19, 1921, §§ 2(a), 3, 42 Stat. at 5, 5-6.

100. Act of Aug. 3, 1882, ch. 376, 22 Stat. 214.

101. GARDNER, *supra* note 13, at 93.

102. Wives of U.S. citizens, in contrast, were automatically citizens under an 1855 Act that stayed in effect until 1922. Act of Feb. 10, 1855, ch. 71, § 2, 10 Stat. 604 (codified as amended at 25 REV. STAT. § 1994 (1878)); An Act Relative to the Naturalization and Citizenship of Married Women (Cable Act), ch. 411, § 2, 42 Stat. 1021, 1021-22 (1922).

103. ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 254 (2006).

104. *Id.*; see also ANN NOVOTNY, *STRANGERS AT THE DOOR, ELLIS ISLAND, CASTLE GARDEN, AND THE GREAT MIGRATION TO AMERICA* 127-28 (1971) (describing steamship collisions).

105. Act of May 19, 1921, Pub. L. No. 67-5, § 2(d), 42 Stat. 5, 6.

106. *Operation of Percentage Immigration Law for Five Months: Hearings Before the H. Comm. on Immigration and Naturalization*, 67th Cong. 994 (1921) (statement of W.W. Husband, Commissioner General of Immigration); see also *In re Keshishian*, 299 F. 804, 804-05 (S.D.N.Y. 1924) (where Cyprus quota closed, mother and three children were

As the threat of quotas loomed, proxy marriage began to be seen as a way around the quotas. For women who wanted to migrate, marriage was a way around the literacy test, and, once the first quotas were instituted in 1921, a way around the quotas as well. And, for some, proxy marriage was particularly appealing. A man already in the United States could marry a woman from his country of origin by proxy and avoid having to travel back to his home country to marry. This would avoid several pitfalls. Traveling back to the home country might be prohibitively expensive. It also might subject him to exclusion on his return. For example, men who initially immigrated prior to the 1917 literacy law might find themselves excludable if they went home, returned, and were unable to pass the literacy test.<sup>107</sup>

The Bureau of Immigration took a dim view of proxy marriage. In several cases, it denied women entry on the theory that their proxy marriages to resident aliens were not legitimate. But the federal courts looking at proxy marriage cases uniformly decided otherwise. Applying the “celebration rule,” whereby the validity of a marriage is judged by the law of the place where it was celebrated, the federal courts determined that if proxy marriage was recognized by the woman’s country of origin, then it was valid for immigration purposes. In *Ex parte Suzanna*, for example, a Portuguese woman was denied entry by immigration authorities in Providence, Rhode Island.<sup>108</sup> Sabina Suzanna was illiterate, and, therefore, under the 1917 Act she could not enter unless she was the wife of a lawfully present alien or citizen.<sup>109</sup> In January of 1924, a federal district court found the proxy marriage valid because it was valid in Portugal and would be recognized under the law of Pennsylvania, which is where Suzanna’s husband, Manual Gomes, was domiciled, and would therefore be the domicile of the marriage upon her arrival.<sup>110</sup>

In Suzanna’s case, the literacy test was the only bar to immigration status because the quota for Portugal had not been filled.<sup>111</sup> This was not true of Elodia Gisbert Lledo, an immigrant from Spain whose case was heard by another federal district court just a few days after the *Suzanna* case.<sup>112</sup> When asked why her husband did not return to Spain to marry her,

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admitted, but fourth child—a three year-old—was excluded along with her father because a helpless infant could not be excluded alone; mother and three children were then excluded as LPC because they had no breadwinner but the court granted their habeas petition).

107. The law exempted from the test any aliens “who have been lawfully admitted . . . and who have resided therein continuously for five years, and who return . . . within six months from the date of their departure.” Immigration Act of 1917, Pub. L. No. 64-301, § 3, 39 Stat. 874, 875-78.

108. 295 F. 713, 713 (D. Mass, 1924).

109. *Id.* at 714.

110. *Id.* at 714, 717.

111. *Id.* at 714.

112. U.S. *ex rel.* Aznar v. Comm’r of Immigration, 298 F. 103, 103 (S.D.N.Y. 1924).

Lledo explained, “Because we are poor, and it would entail great expense to us.”<sup>113</sup> Her husband, Jose Aznar Nadal, testified slightly differently, explaining, “I was also afraid of the quota; that I might not be able to return when I got ready.”<sup>114</sup> Lledo’s problem, unlike Suzanna’s, wasn’t illiteracy.<sup>115</sup> If Lledo wasn’t deemed to be married, then she was “LPC”—likely to become a public charge.<sup>116</sup> And, even if she could demonstrate that she was able to be self-supporting, Lledo had another problem—the quota.<sup>117</sup> Even as the wife of an alien, she would only get a “preference” under the quota.

But, some immigrants were exempt from the quota altogether. The 1921 Emergency Quota Act listed several categories of aliens who were exempt, including “professional actors, artists, lecturers, singers, nurses, ministers . . . , professors,” and—importantly for Lledo—“aliens returning from a temporary visit abroad.”<sup>118</sup> Two recent cases, *U.S. ex rel. Gottlieb* and *U.S. ex rel. Markarian*, had extended this exemption to the wives of exempt aliens. In *Gottlieb*, a rabbi had claimed that his wife and child had the right to enter without being subject to the quota.<sup>119</sup> Like the 1921 Act, the 1917 Act exempted several classes of immigrants from its requirements, including ministers.<sup>120</sup> Unlike the 1921 Act, the 1917 Act also exempted the “legal wives” and “children under sixteen years of age” of anyone exempted under the Act.<sup>121</sup> The *Gottlieb* court read the 1921 Act as an *addition* to the 1917 Act, and as therefore incorporating the 1917 Act despite the latter Act’s failure to explicitly include an exemption for wives and children.<sup>122</sup> Wives and children under the age of sixteen, then, were exempt from the quotas if their husbands or fathers were exempt, just as they were exempt from exclusion by virtue of being from the “Asiatic Barred Zone” under the 1917 Act.<sup>123</sup>

*Markarian* extended this logic still further. There, the husband was a merchant who had arrived in the United States in 1913, and traveled to Turkey in 1921 to marry.<sup>124</sup> He and his wife, Henazante Markarian, returned in 1922 but the Turkish quota was full and she was excluded.<sup>125</sup> The court

113. *Id.* at 104.

114. *Id.*

115. *Id.* at 103.

116. *Id.*

117. *Id.*

118. *Id.* at 105-06 (quoting Act of May 19, 1921, Pub. L. No. 67-5, § 2(d), 42 Stat. 5, 6 (amended 1922)).

119. *U.S. ex rel. Gottlieb v. Comm’r of Immigration*, 285 F. 295, 296 (2d Cir. 1922).

120. Compare Immigration Act of 1917, Pub. L. No. 64-301, § 3, 39 Stat. 874, 875-78, with Act of May 19, 1921, Pub. L. No. 67-5, § 2(d), 42 Stat. 5, 6.

121. § 3, 39 Stat. at 875-78.

122. 285 F. at 300.

123. *Id.*

124. *U.S. ex rel. Markarian v. Tod*, 290 F. 198, 199 (2d Cir. 1923).

125. *Id.*

overruled the exclusion.<sup>126</sup> George Markarian was an alien “returning from a temporary visit abroad,” which, under the 1921 Act, exempted him from the quota.<sup>127</sup> Therefore, under *Gottlieb*, his wife Henazante Markarian was exempt as well, since wives of exempted individuals were themselves exempt under the 1917 Act,<sup>128</sup> and these exemptions survived the passage of the 1921 Act.<sup>129</sup>

In Elodia Lledo’s case, the court used these two cases to find that she was exempt from the quota. If Aznar was exempt from the quota, the court reasoned, so was his wife, despite the statute’s failure to grant an explicit exemption to wives of exempt aliens.<sup>130</sup> The opinion is not at all clear about why Aznar himself was exempt. “He is a longshoreman,” the court noted.<sup>131</sup> “This would distinguish the case from . . . *Gottlieb* . . . but it would not distinguish the case from . . . *Markarian* . . . where the husband was a merchant.”<sup>132</sup> But, longshoreman, or for that matter laborers of any kind, were not exempted under the 1917 Act as merchants were. The court must have based its decision on the alternative holding in *Markarian*, where the wife was entitled to enter outside the quota because her husband was an alien “returning from a temporary visit abroad.”<sup>133</sup> But of course, Aznar was *not* returning from a temporary visit abroad; he had married Lledo by proxy precisely so he could avoid such a trip. Under the *Aznar* court’s theory, any wife of an alien who *could* have made a trip abroad had he desired to would be exempt from the quota; in effect, all wives, even those who had married by proxy.

A few days later, in March of 1924, Judge Learned Hand, sitting on the Southern District of New York, criticized the *Aznar* decision as contravening Congress’s clear intent.<sup>134</sup> The case before Learned Hand concerned an Italian wife, Michele Variano, who had married her husband when he returned to Italy from the United States.<sup>135</sup> The marriage took place in December of 1919, the husband returned to the United States in June 1920, and

126. *Id.*

127. *Id.*; Act of May 19, 1921, Pub. L. No. 67-5, § 2(d), 42 Stat. 5, 6.

128. 290 F. at 199. Markarian also claimed that his wife was exempt because, as a merchant, he was exempt from the 1917 Act. *Id.* This rationale was repudiated in *In re Keshishian*, 299 F. 804, 806 (S.D.N.Y. 1924).

129. 290 F. at 199. *Markarian* also implied that George Markarian’s status as a merchant under the 1917 Act made him exempt from the 1921 quota, and that this status could be imputed to his wife. *Id.* This rationale was later repudiated in *In re Keshishian*, 299 F. at 806.

130. U.S. *ex rel.* Aznar v. Comm’r of Immigration, 298 F. 103, 106 (S.D.N.Y. 1924).

131. *Id.*

132. *Id.*

133. 290 F. at 199; Act of May 19, 1921, Pub. L. No. 67-5, § 2(d), 42 Stat. 5, 6.

134. U.S. *ex rel.* Variano v. Curran, 297 F. 468, 469-70 (S.D.N.Y. 1924).

135. *Id.* at 468.

the wife did not arrive until after the 1921 quota law was in effect.<sup>136</sup> The husband took the position that his wife was exempt from the quota using the same logic used in the *Aznar* case.<sup>137</sup> Proxy marriage was not at issue in the case, for the husband had returned to Italy to marry.<sup>138</sup> The problem instead was the nature of the trip abroad. Judge Hand took a stricter view than the *Aznar* court of who would qualify under the 1917 and 1921 Acts as exempt from the quotas.<sup>139</sup> Mr. Variano would have to demonstrate that he really was an alien “returning from a temporary visit abroad,”<sup>140</sup> and thereby exempt from the quota in order for his wife to receive a derivative exemption.<sup>141</sup> “How long he stayed in Italy on his visit, and what were his purposes in leaving here, do not appear,” he wrote, remanding the case for additional fact-finding.<sup>142</sup>

Although the *Variano* opinion did not involve proxy marriage, Judge Hand took a swipe at the *Aznar* opinion.

While it may seem a somewhat idle requirement to say that an alien must leave and return in order to bring himself and his wife within an excepted class, it is scarcely possible that Congress should have intended presently to place all resident aliens in an excepted class, quoad their wives, merely because they might become such by a temporary visit. The result would be important, because there must be great numbers who cannot make such visits.<sup>143</sup>

For Judge Hand, it was the actual venturing abroad that triggered the exemption from the quota. This conclusion makes intuitive sense; the purpose of the exemption was likely to avoid double-counting a person who immigrated once, and then made a quick trip home and promptly returned. Treating the potential to travel as a status-conferring benefit—one that would enable a man to endow his immigrant wife with rights not otherwise conferred by the statute—seems to be a feature Congress is unlikely to have imagined. As Judge Hand pointed out in his opinion, the 1921 Act included wives of aliens who had declared their intent to become citizens as “preference” immigrants under the quota.<sup>144</sup> If every married immigrant woman could evade the quota based on her husband’s theoretical ability to make a temporary visit abroad, then the result would be a “*reductio ad absurdum*.”<sup>145</sup>

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136. *Id.* at 468-69.

137. *Id.*

138. *Id.* at 468.

139. *Id.* at 469-70.

140. Act of May 19, 1921, Pub. L. No. 67-5, § 2(d), 42 Stat. 5, 6.

141. 297 F. at 470.

142. *Id.*

143. *Id.* at 469.

144. *Id.*

145. *Id.*

*Variano* appears to have been the outlier in federal courts' treatment of immigrant marriage, and its dicta the outlier in their treatment of proxy marriage. While the courts were exempting immigrants from the quotas, the Senate Committee on Immigration was busy debating the language of a new quota act, which would eventually become the National Origins Act of 1924, or the Johnson-Reed Act.<sup>146</sup> The positions taken by the federal judges in *Gottlieb* and *Markarian* were of particular concern to the members of the committee. Henry H. Curran, the Commissioner of Immigration on Ellis Island, spoke at length about the case. *Gottlieb*, which held that the wife and child of a rabbi were exempt from the quota because the rabbi himself was exempt, was "bad law," Curran insisted, but "nevertheless that is the law today because the court so held."<sup>147</sup> *Markarian* was even more disturbing, because it expanded *Gottlieb* to include the wives and children of any immigrants returning from a temporary visit abroad.<sup>148</sup> Other cases were coming down the pike: Judge Winslow had recently held that a nun qualified as a teacher and was therefore exempt; merchants might next be determined to be exempt from the 1921 Quota Act because they were exempt in the 1917 Act, or even students.<sup>149</sup> These extensions would mean that virtually any immigrant was exempt from the quota. As Mr. Curran explained, "I have been a student and I have been a teacher; perhaps all of us have, or may become such. Then we come to the merchants. I suppose half of our immigrants from Europe are bona fide merchants, big or little. That destroys the quota law."<sup>150</sup>

Mr. Curran seemed certain that the loophole created by *Gottlieb* and *Markarian* had not been lost on wily immigrants seeking to evade the quota. The *Gottlieb* case had been accepted on a writ of certiorari for review by the U.S. Supreme Court; in anticipation of a possible reversal, Curran told the committee, "thousands of alien men, Italians, in this country have gone back to Italy and are bringing their wives and children back here, and they must be admitted because the man is returning from a temporary visit abroad, and therefore his wife and children share the exemption."<sup>151</sup> These numbers were not trivial: "In the last week or so we have already admitted about 2,000 such Italian families, and there are more on the way. We know they

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146. See Immigration Act of 1924, Pub. L. No. 68-139, § 11(a), 43 Stat. 153, 159.

147. *Selective Immigration Legislation: Hearings on S. 2365 and S. 2576 Before the S. Comm. on Immigration*, 68th Cong. 1st Sess. 60-61 (1924) [hereinafter *Selective Immigration Legislation Hearings*] (statement of Henry H. Curran).

148. *Id.* at 61.

149. *Id.*

150. *Id.* at 62.

151. *Id.* at 61.

are coming, because we know the Italian men who have gone back to get their families."<sup>152</sup>

The recognition of proxy marriages as valid marriages only made the problem worse. At least some immigrants still believed that they must return home to qualify as immigrants "returning from a temporary trip abroad."<sup>153</sup> But the *Aznar* case had just come down, extending the *Markarian* exception to all immigrants, regardless of whether they returned home to marry. "We now have proxy marriages legalized by the courts, and this also within the last two or three days," Curran explained to the Senate Committee.<sup>154</sup> "A friend of the alien here stands up with a woman on the other side of the water, particularly in Spain, and the woman comes over here as the alien's wife, and she is admitted as his wife and is exempt."<sup>155</sup> Curran analogized the practice to the "picture bride industry," and then to the practice of fraudulent adoption:

We have also the case of a man 25 years old who discovers that his sister's children, his two nieces, one 18 and the other 7, have been taken to Ellis Island as in excess of the quota. Their uncle, 25 years old, adopts both of them, by an interlocutory decree, and they demand admission as exempt from the quota. We are getting new adoptions every day.<sup>156</sup>

Taken together, Curran concluded, all of these loopholes made the quotas irrelevant. Or, as he put it, "Proxy marriages, picture brides, and the Ellis Island adoptions, plus Judge Winslow's decision have, gentlemen, in the vernacular, busted our quota law."<sup>157</sup>

These concerns animated the decision to bar the use of proxy marriage altogether in the 1924 Act. The National Origins Act mandated quotas for each Eastern Hemisphere country set at 2% of that nationality's total population in the United States according to the 1890 census.<sup>158</sup> Unmarried children under the age of eighteen and wives (but not husbands) of U.S. citizens who were residing within the United States were declared exempt

152. *Id.* The Italian immigrants were right to be concerned. In May 1924, the Supreme Court reversed *Gottlieb*, holding that the exemptions in the 1917 Act clearly applied only to those who would be otherwise excludable because they came from the Asian Barred Zone. *Comm'r of Immigration v. Gottlieb*, 265 U.S. 310, 313-14 (1924); *see also* GARDNER, *supra* note 13, at 127 (stating that following the *Gottlieb* and *Markarian* decisions, "steamship companies advertised widely in the foreign language press, informing foreign-born residents of the court's support for men returning from Europe with their alien wives and children, even though the quota for most countries was exhausted").

153. *Selective Immigration Legislation Hearings*, *supra* note 147, at 61 (statement of Henry H. Curran).

154. *Id.* at 63.

155. *Id.*

156. *Id.*

157. *Id.*; *see also id.* at 61 (discussing Winslow case in a which a nun was held to be exempt as a teacher).

158. Immigration Act of 1924, Pub. L. No. 68-139, § 11(a), 43 Stat. 153, 159.

from the quotas.<sup>159</sup> “Preference” within the quotas was to be given to unmarried children of aliens under the age of twenty-one, and fathers, mothers, husbands, and wives of citizens, and to skilled agriculturalists and their wives and children under the age of sixteen.<sup>160</sup> Marriage, then, was still a very important means of acquiring status. To prevent citizens from marrying aliens by proxy and circumventing the new, tighter, restrictions, Congress included the following definitions in the statute: “The terms ‘wife’ and ‘husband’ do not include a wife or husband by reason of a proxy or picture marriage.”<sup>161</sup>

Proxy marriage, then, played a small but important part in the history of the imposition of national origins quotas on immigrants to the United States. The dominant themes in the story are xenophobia, a yearning for the “good old days” when the “old stock” immigrants from Northern Europe predominated, and increasingly bureaucratized immigration controls. But the furor over picture brides and proxy marriage highlights some of the ways in which these racial and cultural fears were fueled by anxieties about what qualified as a proper marriage.

Even after passage of the 1924 Act, federal courts continued to recognize proxy marriages for immigration purposes when they could. In *U.S. ex rel Modianos v. Tuttle*, for example, a federal court in Louisiana overruled the immigration commissioner’s exclusion of Melahat Nazif to enter as the wife of a U.S. citizen.<sup>162</sup> She had married Mehmet Modianos by proxy in Turkey in 1922, although the case did not reach federal court until after the passage of the 1924 Act.<sup>163</sup> The court in *Kane v. Johnson*, which concerned the proxy marriage of a Portuguese immigrant and his illiterate Portuguese wife, followed *Ex Parte Suzanna* in finding the marriage valid.<sup>164</sup> Even in *Silva v. Tillinghast*, which concerned a proxy marriage that occurred *after* the passage of the 1924 Act, the court managed to recognize the marriage.<sup>165</sup> There, the American consul in Oporto, Portugal had given Silva a visa based on her marriage to Santos, a resident alien.<sup>166</sup> When Silva arrived in the United States, however, immigration authorities determined that the marriage she had relied on was formalized by proxy.<sup>167</sup> The court held that the immigration authorities had no power, despite apparent statutory author-

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159. § 4(a), 43 Stat. at 155.

160. § 6(a), 43 Stat. at 155.

161. § 28(n), 43 Stat. at 169.

162. 12 F.2d 927, 928-29 (E.D. La. 1925).

163. *Id.* at 927.

164. 13 F.2d 432, 432 (D. Mass. 1926).

165. 36 F.2d 801, 801-02 (D. Mass. 1929).

166. *Id.*

167. *Id.* at 802.

ity, to overrule the decision of the consul “upon the ground that the visa presented was in their opinion mistakenly or improvidently granted.”<sup>168</sup>

The one exception to this trend occurred in a case authored by Judge Learned Hand, who had been unsympathetic to extensions of the statutory law in *Variano* and was similarly hesitant to extend recognition to an Italian proxy marriage where no evidence of its validity in Italy had been introduced.<sup>169</sup> Judge Hand appears to have objected to the bride’s instrumental use of marriage to achieve immigration status. The marriage was entered into “plainly to secure a status which should admit the alien.”<sup>170</sup> Furthermore, the court noted, the marriage “had not been consummated, in spite of the startling assertion in one of the plaintiff’s letters that it had been ‘consummated by proxy’; nor had the parties staked anything upon it which must be unravelled, if it was invalid.”<sup>171</sup>

Two issues left open by the 1924 ban on proxy marriage were the effect of consummation of the marriage and how to treat children born to couples married by proxy. In a 1950 case, *Matter of W---*, an Italian proxy marriage was held to be insufficient to grant non-quota immigration status to the wife because the marriage had not been consummated.<sup>172</sup> Apparently, marriages that were consummated were being recognized as valid for immigration purposes, despite the language in section 28(n) of the 1924 Act, which made no exception for consummated proxy marriages.<sup>173</sup> Authorities were unwilling, however, to extend this exception to marriages that were not consummated *after* the proxy ceremony, even if the couple had been sexually involved before the marriage.<sup>174</sup>

*Matter of W---* also introduced a second issue. There, the couple in question had a child conceived before the proxy marriage.<sup>175</sup> The petitioner, a U.S. citizen who was stationed in the U.S. Army in Trieste, Italy and lived with his girlfriend and her family there, did not find out that his girlfriend was pregnant with his child until after returning to New York.<sup>176</sup> The proxy marriage occurred ten days before the couple’s child was born.<sup>177</sup> Even though the court was unwilling to recognize the proxy marriage, it did note

168. *Id.* The court left open the possibility of an independent assessment if there was evidence that the visa was initially procured through fraud. *Id.*

169. *Cosulich Societa Triestina Di Navigazione v. Elting*, 66 F.2d 534, 536 (2d Cir. 1933).

170. *Id.*

171. *Id.*

172. *Matter of W---*, 4 I&N Dec. 209, 209-10 (BIA 1950).

173. *Id.* at n.1 (citing Op. Sol. of Labor, April 6, 1933, 4/3328).

174. *Id.* at 209-10.

175. *Id.*

176. *Id.*

177. *Id.*

that if the proxy marriage was considered valid in Italy, then the child would be recognized as legitimated, and would therefore be a U.S. citizen.<sup>178</sup>

In 1952, with the passage of the McCarran-Walker Act, Congress amended the proxy marriage provision to explicitly include consummated marriages.<sup>179</sup> But, once again, courts read “consummated” to mean sexual activity after the proxy ceremony. After all, if any sexual relationship could become a basis for immigration status based solely on a proxy wedding, the loophole created in the quota system would simply be too large, and too tempting, for would-be-immigrants to withstand. In *Matter of B---*, for example, the court held that despite pre-marital cohabitation, and the birth of three children to the marriage, a proxy marriage that was not followed by consummation could not form the basis of a marriage-based immigration status for the wife.<sup>180</sup> As in *Matter of W---*, however, the child was determined to be the father’s legal child because the proxy marriage would be recognized under Italian law even if it could not be for his wife’s immigration status, and the child was, therefore, his legal child and, in this case, eligible for a visa.<sup>181</sup>

Concerns about the use of proxy marriage to fraudulently acquire immigration benefits continue today. Just two years ago, the London *Daily Mail* reported that a court had recognized the proxy marriage of a Brazilian to a Pole living in the United Kingdom.<sup>182</sup> They could not marry within the UK because the Brazilian was on a temporary visa.<sup>183</sup> But, as the husband of a European citizen, he was entitled to a visa to live and work in the UK.<sup>184</sup> *The Daily Mail* presented the story as disastrous for British immigration control. Sir Andrew Green, chairman of Migrationwatch, was quoted as saying: “This is a ludicrous outcome. It drives a coach and horses through the Government’s efforts to prevent sham marriages. Those who

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178. *Id.* at 209.

179. Immigration and Nationality Act, Pub. L. No. 82-414, § 101(a)(35), 66 Stat. 163, 170 (1952) (stating that “[t]he term ‘spouse’, ‘wife’, or ‘husband’ do not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated”) (codified as amended at 8 U.S.C. § 1101(a)(35)).

180. *Matter of B---*, 5 I&N Dec. 698, 699 (BIA 1954).

181. *Id.*; see also *Moussa v. INS*, 302 F.3d 823 (8th Cir. 2002) (reversing BIA determination that a proxy marriage could be used to invalidate the automatic transmission of citizenship from a single father to his child even though the marriage had not yet been consummated on the date of the father’s naturalization).

182. Dan Newling, *The Wedding with No Bride and No Groom as Brazilian Marries Pole ‘By Proxy’ to Stay in Britain*, THE DAILY MAIL (Dec. 12, 2008), <http://www.dailymail.co.uk/news/article-1094306/The-wedding-bride-groom-Pole-Brazilian-marry-proxy-stay-Britain.html>.

183. *Id.*

184. *Id.*

succeed by this bizarre route can obtain a meal ticket for life at the British taxpayer's expense."<sup>185</sup>

### III. DOMA, E-MARRIAGE, AND BACKLASH

The E-marriage proposal made by Professors Candeb and Kuykendall is obviously quite different from the proxy marriages entered into by immigrants 100 years ago. The E-marriage proposal, while implicating international marriages, is focused on allowing residents of a particular state to access the ability to marry in another state using the internet. Thus, the advantage in choosing E-marriage over a traditional ceremony would not be that it created an immigration opportunity but precisely the opposite: E-marriage would allow same-sex couples (and others) to remain in their residence of choice without having to travel, temporarily or permanently, to marry elsewhere.

But look beneath the obvious differences and some interesting parallels emerge. Immigrants attempted to use proxy marriage not only as a way to be lawfully present in the United States, but also as a way to gain access to a particular community. Lawful immigration status meant the right to be in a particular physical place, but it also meant the right to be together as a family, and, for some, the opportunity to become citizens of the United States, with all of the rights and privileges that come with citizenship. The opposition to immigrants who used proxy marriage to obtain legal status was an opposition not only to the form of marriage they used but to the immigrants' attempt to become a part of the fabric of American culture. Proxy marriage was disturbing in and of itself; it conflicted, for example, with an American understanding of marriage as a consensual relationship based on love rather than as an economic agreement reached between extended families.<sup>186</sup> But the greater fear animating the crackdown on proxy marriage appears not to have been the dangers of proxy marriage *per se* but rather what it enabled immigrants to do. The people using proxy marriage to obtain legal immigration status had already been marked as undesirable, whether through the Gentlemen's Agreement or through the quota laws; their use of proxy marriage was offensive because it represented an attempt to evade quota restrictions or international agreements in order to gain access to a country rich in resources and opportunity. The fear of Japanese picture marriages, for example, was not only that they represented a kind of marriage in which individual consent was irrelevant but also that they would

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185. *Id.*

186. *See, e.g.,* COTT, *supra* note 5, at 150-51 (describing ideology of the "love match" and how picture brides and proxy marriages threatened this ideal); *see also* Haag, *supra* note 31, 103-10 (1999) (examining how the ideal of the "love match" conflicted with immigrants' ideas about marriage).

help Japan to colonize the west coast.<sup>187</sup> As stealth laborers, the picture brides would help their husbands to work the land and drive down the price of labor so that whites could not find work; as biological mothers they would produce a second generation of Japanese-Americans who would have birthright citizenship, which brought with it rights of land ownership and voting; as cultural mothers they would reproduce Japanese values in the United States and destroy the independent, democratic American spirit. Similarly, European immigrants were thought to be unhealthy, illiterate, and politically dangerous.<sup>188</sup> Proxy marriage allowed the poor, who could not afford to make the trip back to Southern Europe, to consume more quota slots that could have been given to desirable immigrants. Proxy marriage was thus seen as a tool of cultural and economic invaders who would destroy America from within through “peaceful penetration.”

The rhetoric used by opponents of same-sex marriage is strikingly similar to the rhetoric used by the immigration restrictionists of 100 years ago. The legislative history of the Defense of Marriage Act (DOMA) is particularly illuminating on that score.<sup>189</sup> Just as the Japanese were seen as an unassimilable people with a political agenda of colonization, the gay rights movement was understood by proponents of DOMA as an “orchestrated legal assault being waged against traditional heterosexual marriage . . . .”<sup>190</sup> Evidence of Japan’s intent to colonize had included articles translated from Japanese-language newspapers and analyses of Japan’s intentions as shown through its legalistic interpretation of the Gentlemen’s Agreement.<sup>191</sup> Similarly, the DOMA legislative history includes pages and pages of internal memoranda from the Lambda Legal Defense and Education Fund introduced to demonstrate that Lambda had “a strategy for the use of the full faith and credit clause for same-sex couples to go to Hawaii, to get married, and then come back to their home States and claim that their marriage is valid.”<sup>192</sup>

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187. See *supra* Part I.

188. See *supra* Part II.

189. DOMA is codified in two sections of the U.S. Code: 28 U.S.C. § 1738C (2006) (providing that no state would have to give full faith and credit to “any public act, record or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . .”) and 1 U.S.C. § 7 (2006) (providing federal law definitions of “marriage” and “spouse”).

190. H.R. Rep. No. 104-664, at 2-3 (1996) [hereinafter House Report].

191. See, e.g., 1920 House Hearings, *supra* note 66, at 208 (quoting an article from *Shin Sekai* (The New World), a Japanese newspaper in San Francisco); 1924 Senate Hearings, *supra* note 66, at 231 (referring to Japanese language articles attached as Exhibit L).

192. *Defense of Marriage Act: Hearing on H.R. 3396 Before the H. Subcomm. on the Constitution*, 104th Cong. 32 (1996) [hereinafter House Hearing] (statement of Rep. F. James Sensenbrenner); Memorandum from Evan Wolfson, Director, the Marriage Project, Lambda Legal Defense and Education Fund, Inc. (Apr. 19, 1996), in House Hearing, *supra*, at 9-31.

Like the 1924 Congress that banned proxy marriage, the 1996 Congress that passed DOMA imagined itself to be responding to activist judges who were facilitating the organized attack. The Hawaii Supreme Court, in *Baehr v. Lewin*, had recently declared it a violation of the Hawaii Constitution to deny marriage to same-sex couples.<sup>193</sup> Concerned that other states might have to recognize Hawaii same-sex marriages under the Full Faith and Credit clause, Congress attempted to foreclose this possibility by giving states the explicit power to choose nonrecognition.<sup>194</sup> Legislators repeatedly alleged that three unelected judges in Hawaii were on the cusp of redefining marriage for the entire country.<sup>195</sup> The very “court system” of Hawaii was “fashion[ing] a vehicle to direct a frontal attack on the institution of marriage in the United States of America.”<sup>196</sup> Just as the proponents of the 1924 Immigration Act hoped that a ban on proxy marriage would curtail the ability of judges to interpret the immigration statutes broadly, the proponents of DOMA hoped that it would protect individual states from activist judges who might “foist the newly-coined institution of homosexual ‘marriage’ upon an unwilling . . . public.”<sup>197</sup>

The similar allegations of judicial activism are not the only parallel. Proponents of the 1924 Act feared that Japanese and European immigrants were using marriage to obtain an important public benefit—legal immigration status—for which they would otherwise be ineligible. Likewise, the proponents of DOMA feared that same-sex couples were on the cusp of obtaining extensive public benefits based on marriage that were not intended for them. “We are talking about a lot of benefits,” explained Senator Don Nickles of Oklahoma.<sup>198</sup> “You are talking about survivors’ benefits, whether you are talking about veterans or Social Security, disability, and so on.”<sup>199</sup> When the 1924 Congress passed the National Origins Act, the ban on proxy marriage was intended to prevent the “wrong” immigrants from squandering scarce resources by using quota spots intended for someone else. In 1996, some members of Congress were instead worried that same-

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193. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *clarification granted in part* 852 P.2d 74 (Haw. 1993).

194. 28 U.S.C. § 1738C.

195. See, e.g., *The Defense of Marriage Act: Hearing on S. 1740 Before S. Comm. on Judiciary*, 104th Cong. 7, 13 (1996) [hereinafter *Senate Hearing*] (statement of Sen. Don Nickles); *id.* at 21 (statement of Gary Bauer, President, Family Research Council); *id.* at 23 (statement of Gary Bauer, President, Family Research Council) (“We cannot afford to let judges usurp any more power and tyrannize an already besieged moral code.”); *id.* at 59; House Hearing, *supra* note 192, at 2 (statement of Rep. Charles Canady, Chairman, H. Subcomm. on the Constitution).

196. House Hearing, *supra* note 192, at 37 (statement of Rep. Bob Barr).

197. House Report, *supra* note 190, at 6.

198. Senate Hearing, *supra* note 195, at 5 (statement of Sen. Don Nickles).

199. *Id.*; see also House Report, *supra* note 190, at 8 (discussing various public benefits available to married couples).

sex couples would bankrupt Social Security by taking marital benefits intended for heterosexual couples.<sup>200</sup> In order to protect the federal government against this onslaught, DOMA defined marriage, for federal law purposes, to mean “only a legal union between one man and one woman as husband and wife,” and the word “spouse” to refer “only to a person of the opposite sex who is a husband or a wife.”<sup>201</sup>

Underlying the anti-Japanese and anti-Southern European rhetoric in the 1924 debates were assumptions about the desirability and assimilability of certain immigrants. The Japanese were considered unassimilable; the Southern Europeans were thought to be genetically inferior and weak. The Japanese would destroy the country through colonization from within; the Europeans by diluting the genetic pool and introducing competing political commitments to anarchism and communism that were incompatible with democracy.<sup>202</sup> Similarly, underlying the rhetoric of invasion and theft of public benefits in the DOMA debates was a vision of a stark distinction between traditional, heterosexual marriage and same-sex marriage, in which same-sex marriage would provide a potentially tempting alternative that might fundamentally alter the fabric of society. Or, as one Congressman put it, “[t]he very foundations of our society are in danger of being burned. The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of our society: the family unit.”<sup>203</sup>

The 1924 hearings show that proxy marriage was not the central item of importance in the passage of the 1924 Act. Forefront in the minds of lawmakers was how to impose quotas on some countries (such as those in Southern Europe) and ban immigration altogether from others (such as Japan). They were concerned about the unassimilability of certain immigrants, and particularly concerned about the perceived desire of Japanese immigrants and their offspring to aid in the colonization of America by Japan. Likewise, the debate over same-sex marriage in recent years, as exem-

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200. See House Hearing, *supra* note 192, at 32 (statement of Rep. F. James Sensenbrenner) (“The Social Security Medicare Trust Fund is going broke—according to the trustees, very soon. Sometime in the next century there is going to have to be a fix-up of the Social Security Old-Age Pension and Survivors’ Fund, and I think we ought to know what the impact of broadening these benefits will be before that becomes the law as a way of protecting the benefits that are being paid to those who have earned them and who are presently receiving them.”); see also *id.* at 35 (statement of Rep. Patricia Schroeder) (noting that the surplus in Social Security Trust Fund existed because of working spouses who pay into the system but do not receive money back under their own names but as dependents and stating that “Social Security would really be in trouble if we didn’t discriminate against married couples . . . the Federal Government makes money on married couples through the Tax Code and the Social Security Code”).

201. 1 U.S.C. § 7 (2006).

202. See NGAI, *supra* note 45, at 18-19.

203. 142 CONG. REC. 17,070 (1996) (statement of Rep. Bob Barr).

plified in the DOMA hearings, is not a debate about proxy marriage—at least not yet. But proxy marriage *did* become an important issue in the debate over exclusion, even if it was not the issue driving the desire for exclusion. The historian Nancy Cott has described proxy marriage's role as follows: "If marriages produced the polity, then wrongfully joined marriages could be fatal. The presence of such marriages and their perpetrators might infect the whole body politic."<sup>204</sup> Proxy marriage gave activists and lawmakers evidence of the perfidy and cunning that they suspected the Japanese harbored. Court decisions upholding proxy marriages as valid gave legislators an excuse for legislative action in response to usurping, activist judges.

Today, there is likewise a possibility that E-marriage could become a controversial and potentially polarizing symbol in the debate over same-sex marriage. Those states that already perceive themselves as under siege might imagine that the use of E-marriage further threatens their autonomy. It could be construed as a "back door" way of getting around the protections set forth in DOMA and by their own anti-same-sex marriage legislation and constitutional amendments. This could result in an unfortunate backlash against the very people who would want to use proxy marriage to obtain benefits.

Indeed, backlash has been the subject of much of the recent scholarship on same-sex marriage. The legal historian Michael Klarman has argued that the Massachusetts Supreme Court's decision in *Goodridge*, in which the court ruled that same-sex marriage was constitutionally required, generated extensive backlash against same-sex marriage throughout the country.<sup>205</sup> William Eskridge has cautioned advocates to devote themselves to social change through the political process, rather than relying on courts, in order to keep those on all sides of debates over social change politically engaged.<sup>206</sup> Although I do not intend to take a position here on the accuracy of either Klarman or Eskridge's accounts of backlash or the role of courts in generating it, it does seem prudent to consider how efficacious E-marriage would be in meeting the goals of those who seek marriage rights of same-sex-couples in light of the political reaction it might engender.<sup>207</sup>

Looking to the history of proxy marriage cannot tell us with any certainty what to do about E-marriage. We cannot be certain if proxy marriage

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204. COTT, *supra* note 5, at 155.

205. Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 460-62 (2005).

206. See William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1294 (2005).

207. For a critique of Klarman and Eskridge's positions, see Robert Post & Reva Siegl, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 391-401 (2007).

was responsible to any large extent for Japanese exclusion. We can think of this in terms of a counter-factual: what would have happened if Japan had not interpreted the Gentlemen's Agreement to allow the immigration of picture brides? Certainly the picture brides added fuel to the fire and gave Congress an excuse to legislate, but it was already engaged in sweeping immigration legislation in the 1920s and it might well have excluded the Japanese in any case. Of course, there would not have been nearly so many Japanese-Americans living in the United States had the picture brides not immigrated and given birth to citizen children, so the picture brides did give the exclusionists something to fulminate about. But how can we know whether this anti-Japanese sentiment would not have been equally strong without them? Perhaps some picture brides acted as ambassadors, clearing the way for tolerance and understanding. Without them, many Japanese men would have been single, less likely to assimilate and exercise their citizenship through family life. Prejudice against the Japanese might have been worse without the picture brides.

Similarly, in the case of E-marriage is it difficult to tell in advance how such marriages would affect the debate over same-sex marriage. It is possible that E-marriage could be perceived as an attempt by same-sex couples, in states that have explicitly forbidden same-sex marriage, to nevertheless co-opt the name "marriage" for themselves and to attempt to receive benefits from marriage. Granted, benefits will be difficult to come by. States with constitutional amendments will not recognize out-of-state marriages for purposes of divorce or state-based benefits, and under DOMA, neither will the federal government.<sup>208</sup> But some benefits might follow. Employees of major corporations that grant benefits only to "spouses" of employees and not "domestic partners" might become eligible for benefits based on an E-marriage even if their state of residence would not recognize their marriage.<sup>209</sup> Furthermore, the mere act of referring to each other as "husband and husband" or "wife and wife" on a daily basis has the potential to change hearts and minds; some people who have never had the experience of living near, working with, or befriending a married same-sex couple might experience a change in attitude because of proximity and because marriage is, at least in part, what Kuykendall and Candeub refer to as a "status good."<sup>210</sup>

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208. This could change, however. In February 2011, the Obama Administration announced that it would no longer defend Section 3 of DOMA (referring to the federal definition of "marriage" and "spouse") against constitutional attack because it believed it to be unconstitutional. See Press Release, Department of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>.

209. Thanks to Marc Poirier for making this observation.

210. Candeub & Kuykendall, *supra* note 1, at 738.

On the other hand, E-marriage could provoke significant outrage. If the threat of “three judges in Hawaii” forcing marriage on other states was significant enough to inspire DOMA, imagine how threatening it would be if state legislatures began to reach out and attempt to define marriage outside their own borders. The *Baehr* decision that inspired DOMA made no attempt to recruit other states into its view on marriage but merely defined what marriage should mean in Hawaii. E-marriage, by its very terms, is intended to offer a different form of marriage to residents of other states. This form of lawmaking could be seen as even more illegitimate and invidious than judicial activism: instead, it threatens the federal system itself. It also could be perceived as an effort by activists and legislators to engage in an end-run around the political process. Couples married through E-marriage could be painted as sly and conniving, as engaging in “fake” marriages in order to push their own political agendas, knowing full-well that their marriages are not valid.<sup>211</sup>

These risks may be worth it. No risk, no reward. But the history of proxy marriage as a legal strategy followed by a crackdown on the very people it was intended to help suggests that lawmakers should tread with care. Important questions need to be asked and answered about E-marriage before optimistically jumping in with both feet. Is it worth the resources required to pass laws allowing E-marriage, creating systems for entering into them, and litigating their validity? Given the substantial likelihood that E-marriage will result in outrage and the charge that some states are attempting to usurp the autonomy of others, it might be more fruitful for legislators to focus their energies on the well-being of LGBT people in their own states and for activists to focus on rights that will likely be recognized.

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211. There is already ample evidence that same-sex marriages are seen by many as “fake” or “counterfeit.” I do not mean to endorse this view, but rather to suggest that E-marriage could unintentionally play into this stereotype. See Courtney Megan Cahill, *The Genuine Article: A Subversive Economic Perspective on the Law’s Procreationist Vision of Marriage*, 64 WASH. & LEE L. REV. 393 (2007).