

What Makes the Family Special?

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INTRODUCTION

It is tempting when considering an optimal admissions policy to focus on labor markets. After all, from the nation's perspective, an optimal immigration system will facilitate underperforming labor markets without artificially depressing wages. But any institutional design approach to immigration law must also take account of the existence of family-based immigration. Indeed, the United States currently has one of the most generous approaches to family-based immigration in the world. In 2011, four out of five immigrants given green cards established their eligibility as family members of US citizens or lawful permanent residents.¹

Scholars and policy analysts rarely think about family-based immigration as a potential gain for the nation.² Those in

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¹ For figures, see Office of Immigration Statistics, *Persons Obtaining Legal Permanent Resident Status by Type and Detailed Class of Admission: Fiscal Year 2011* (Department of Homeland Security (DHS)), online at <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2011/table7d.xls> (visited Feb 16, 2013). The numbers: 453,158 immediate relatives of US citizens; 234,931 family-sponsored residents; 139,339 employment-sponsored residents (but 74,071—over half—of these employment-sponsored visas went to family members of employees); 50,103 diversity (but 22,004 of these were to family members of diversity-lottery winners); 168,460 refugees and asylees (but 72,047 of these went to family members of refugees and asylees); and 16,049 other visas, including special humanitarian programs (1,447 of these went to family members). $453,158 + 234,931 + 74,071 + 22,004 + 72,047 + 1,447 = 857,658$ family-based immigrants; that number divided by the 1,062,040 total = 80.76 percent. This number may actually undercount family-based immigrants, as the eligibility requirements for cancellation of removal include family ties, but these visas are not identified in the reported statistics as family-based, and the program for Amerasians born in Vietnam during the period when American servicemen were there exists to give preferential status to children who likely had American fathers.

² See, for example, Gordon H. Hanson, et al, *Immigration and the US Economy: Labour-Market Impacts, Illegal Entry, and Policy Choices*, in Tito Boeri, Gordon Hanson,

favor of expansive family-based immigration generally speak in the language of rights—the rights of immigrants to be with their families, the rights of citizens who live here to bring them in.³ Family reunification, they argue, is enshrined as a key principle in international human rights law, and it is a right that should be recognized by the United States in the immigration law context through expansive admissions categories, generous cancellation-of-removal provisions, and the recognition of nontraditional and functional families.⁴ The claim made by these scholars is emphatically *not* that family-based immigration brings economic benefits to the country; to the contrary, family-based immigration is understood as “the soft side” of immigration while employment-based immigration is “more about being tough and strategic.”⁵

In contrast, those opposed to family-based immigration often speak in the language of fairness, efficiency, and national interests. Family immigration, they claim, steals spots from the immigrants we most want—those who possess desirable skills and those who would bring diversity to US culture because immigration from their home country is underrepresented.⁶ Thus,

and Barry McCormick, eds, *Immigration Policy and the Welfare System: A Report for the Fondazione Rodolfo De Benedetti* 170, 280–81 (Oxford 2002); *Hearing on the Role of Family-Based Immigration in the U.S. Immigration System before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the House Committee on the Judiciary*, 110th Cong, 1st Sess 4 (2007) (statement of Rep Steve King) (“Promoting Family Values and Immigration Hearing”); James Goldsborough, *Out-of-Control Immigration*, 79 Foreign Aff 89, 92 (Sept/Oct 2000).

³ See, for example, *Fiallo v Bell*, 430 US 787, 806 (1977) (Marshall dissenting) (“Congress extended to American citizens the right to choose to be reunited . . . with their immediate families.”).

⁴ See, for example, Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward a Functional Definition of Family that Protects Children’s Fundamental Human Rights*, 41 Colum Hum Rts L Rev 509, 512–13 (2010); Lori A. Nessel, *Families at Risk: How Errant Enforcement and Restrictionist Integration Policies Threaten the Immigrant Family in the European Union and the United States*, 36 Hofstra L Rev 1271, 1288 (2008).

⁵ *Promoting Family Values and Immigration Hearing*, 110th Cong, 1st Sess at 28 (cited in note 2) (statement of Professor Bill Ong Hing).

⁶ See, for example, Michael M. Hethmon, *Diversity, Mass Immigration, and National Security after 9/11—An Immigration Reform Movement Perspective*, 66 Albany L Rev 387, 395–96 (2003) (arguing that the US policy of favoring family reunification is “nepotistic” and that “nepotism and diversity are contradictory”); *Promoting Family Values and Immigration Hearing*, 110th Cong, 1st Sess at 4 (cited in note 2) (statement of Rep King):

In fact, of the entire pie chart of our immigration, we have testimony in prior hearings that demonstrates that as much as 89 percent and perhaps as much as 93 percent of our legal immigration is based on humanitarian reasons, and as little as 7 percent to 11 percent is based upon skills or merit. . . . We should

family-based immigration is grounded in rights, and employment-based immigration is grounded in economic rationality, a reprisal of the old family/market dichotomy that family law scholars have been deconstructing for decades.⁷

But what if family immigration is actually beneficial to the nation? This Article engages in a thought experiment. It asks: For what reasons might a nation like the United States decide to give an overwhelming number of its admission slots to family members of citizens and permanent residents? In considering this question, it not only looks to the (rather slim) evidence of what Congress actually *did* consider when enacting these provisions but also speculates more broadly about what the advantages of family-based immigration might be. The Article develops a taxonomy of reasons a nation might choose to privilege family-based immigration over other types. There is no normative agenda here: This Article is not an argument that the family *is* special, and therefore deserves the current number of slots, or more, or less. Rather, this is the first step in helping all of us—scholars, lawmakers, citizens, immigrants—to think more clearly about the system we have and the system we could have. And although this Article brackets the issue of human rights justifications for family reunification, no nation could make decisions about these issues without considering human rights as a part of the calculus. Here, however, the goal is only to better articulate what the non-rights-based considerations for family-based immigration might be and to provisionally think about their role in the design of our immigration system.

This Article begins in Part I with a brief survey of the history of family reunification categories, showing that they were largely rooted in reflexive attitudes regarding the roles of husbands, wives, and children shared by many lawmakers in the nineteenth and early twentieth centuries. Parts II, III, and IV introduce three separate rationales for privileging the family: integration, labor, and social engineering. The Article concludes by offering some thoughts on how analyzing family immigration

not reserve so many of our immigrant visas for aliens whose only attribute is that they happen to be related to a U.S. citizen or permanent resident.

⁷ See, for example, Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv L Rev 1497, 1529 (1983); Janet Halley and Kerry Ritich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 Am J Comp L 753, 755 (2010).

using these rationales might affect the types of family migration lawmakers would privilege.

I. A HISTORY OF FAMILY IMMIGRATION RATIONALES

The preference for family members of US citizens and permanent residents was not a carefully thought-out decision on Congress's part. Instead, the family categories developed slowly over time, often as the result of values and goals that may no longer apply or that have been altered significantly. They began as part and parcel of coverture and now exist in conjunction with new human rights norms of family reunification.

In the late nineteenth and early twentieth centuries, the ability to relocate one's family was thought of as a male head of household's right.⁸ Under coverture, a man had the right to determine the domicile of his wife and children;⁹ the right to bring his wife and child with him when he immigrated was analogous.¹⁰ Most immigration was unrestricted, but even when Congress *did* restrict immigration—such as through the various Chinese exclusion acts¹¹—these acts were notably enforced in ways that still allowed a woman to enter if she was married to a man who was eligible for admission.¹² In one case, for example, a court explained,

[A] Chinese merchant who is entitled to come into and dwell in the United States is thereby entitled to bring with him, and have with him, his wife and children. The company of the one, and the care and custody of the other, are his by natural right; and he ought not to be deprived of either.¹³

The privileging of male headship was further reflected and expanded in the initial preference categories established in the Emergency Quota Act of 1921.¹⁴ The main purpose of this Act was to restrict immigration by establishing quotas based on national

⁸ This right was included in the English common law doctrine of coverture, under which a wife lacks legal existence during marriage. See Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 San Diego L Rev 593, 595–600 (1991).

⁹ See Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture's Diminishment, but Not Its Demise*, 24 N Ill U L Rev 153, 160–61 (2004).

¹⁰ See *id.* at 166.

¹¹ Chinese Exclusion Act, ch 126, 22 Stat 58 (1882); Revised Chinese Exclusion Act, ch 220, 23 Stat 115 (1884); Scott Act, ch 1015, 25 Stat 476 (1888).

¹² See Todd Stevens, *Tender Ties: Husbands' Rights and Racial Exclusion in Chinese Marriage Cases, 1882–1924*, 27 L & Soc Inq 271, 280–88 (2002).

¹³ *In re Chung Toy Ho*, 42 F 398, 400 (D Or 1890).

¹⁴ Pub L No 67-5, ch 8, 42 Stat 5.

origin,¹⁵ but it also was the first immigration law to specifically privilege certain family members over other immigrants. The Act included as “family members” wives, parents, brothers, sisters, children, fiancées of citizens, and fiancées of those who had applied for citizenship.¹⁶ Notably, the Act did not include husbands or male fiancés in its definition of “family.” Giving wives the opportunity to sponsor their husbands would have been nonsensical; under the Expatriation Act of 1907,¹⁷ a wife automatically *lost* her US citizenship upon marrying a foreigner, so there could be no such thing as a US citizen wife with an immigrant husband.¹⁸ Within the family categories it delineated, the Emergency Quota Act set forth a hierarchy of importance. Children of citizens under the age of eighteen were treated as nonquota immigrants, but other family members were “preference” immigrants only, subject to quotas but potentially able to gain admission before other, nonfamily members.¹⁹

This landscape was significantly altered just months later, when the passage of the Cable Act of 1922²⁰ largely undid derivative citizenship for married women.²¹ Wives of US citizens were now no longer entitled to automatic citizenship, which meant that they were no longer entitled to automatic admission. But the ideal of male headship and control over the family lived on. Despite the official requirement that they be now treated as “preference” immigrants and subject to the quota,²² this provision was not enforced. “As a matter of law, we may not admit her,” explained one official:

¹⁵ See Mae Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* 20 (Princeton 2004) (describing the act as setting a quota for each European country at “3 percent of the number of foreign-born of that nationality residing in the United States in 1910”).

¹⁶ Emergency Quota Act § 2(a), (d), 42 Stat at 5–6.

¹⁷ Pub L No 59-193, ch 2534, 34 Stat 1228.

¹⁸ Expatriation Act § 3, 34 Stat at 1228–29.

¹⁹ Because citizens, as well as those who intended to become citizens, could sponsor family members, wives were a necessary admissions category despite derivative citizenship. Wives of US citizens did not need an immigration category because they had automatic citizenship, but wives of those who intended to become citizens did. See Naturalization Act of 1855 § 2, ch 71, 10 Stat 604, 604.

²⁰ Pub L No 67-346, ch 411, 42 Stat 1021.

²¹ Cable Act § 2, 42 Stat at 1022. Some of the racial aspects of the 1855 and 1907 Acts persisted in, and even were exacerbated by, the Cable Act. See Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship through Marriage*, 53 UCLA L Rev 405, 433 (2005).

²² Cable Act § 2, 42 Stat at 1022.

[B]ut as a matter of fact, they all are admitted, because, thus far, no public officer has been found able to stand up under the everlasting hammering of hundreds of public officers and millions of American citizens who are shocked beyond expression at the thought that the wife of an American citizen should be denied admission.²³

The Immigration Act of 1924²⁴ (“National Origins Act”) solved the problem of wives and quotas by incorporating wives of citizens into the nonquota category that had formerly included only children under the age of eighteen.²⁵ The Act also set out “preference” categories for citizens’ husbands, parents, and children under the age of twenty-one, provided that the citizen was over age twenty-one.²⁶ These “preference” immigrants were to be given up to one-half of each country’s quota.²⁷ This provision created a disparity between the ability of male and female US citizens to bestow immigration status on their spouses. Male US citizens could be guaranteed swift arrival of their wives and children, whereas female US citizens could be reunited quickly with their children but not their husbands—and with their husbands only if the wives themselves were over twenty-one.²⁸

By 1924, then, Congress had already made several distinctions. First, both wives and husbands of US citizens were given a privileged status, but the immigrant wives of US citizens ranked higher than immigrant husbands of US citizens—the male headship model still reigned, if in a modified form.²⁹ Second,

²³ Candice Bredbenner, *A Nationality of Her Own: Women, Marriage, and the Law of Citizenship* 118–19 (California 1998), quoting *Memorandum from the Acting Secretary of Labor to the Commissioner of Naturalization* (Feb 2, 1924), reprinted in Harold Fields, *Shall We Naturalize Aliens Whose Wives Are Living Abroad?*, 1 *New American* 5 (Aug 1925).

²⁴ Pub L No 68-139, ch 190, 43 Stat 153.

²⁵ National Origins Act § 4(a), 43 Stat at 155. The law also further solidified the distinction between citizens and noncitizens by doing away with sponsorship of relatives by noncitizens and limiting nonquota family immigration to only those wives and children whose citizen husband or father *resided in* the United States.

²⁶ National Origins Act § 6(a)(1), 43 Stat at 155. Wives were also included in the quota provisions, presumably because some citizen husbands did not reside in the United States, so their wives would not be nonquota immigrants under the Act.

²⁷ National Origins Act § 6(b), 43 Stat at 156. The only other preference category was for skilled agricultural workers and their wives and dependent children under the age of 16.

²⁸ See National Origins Act §§ 4(a), 6(a)(1), 43 Stat at 155.

²⁹ This privileging appears to have led to onerous backlogs for husbands of US citizen wives. From 1928 to 1952, Congress repeatedly gave immigrant husbands married to US citizen wives retroactive nonquota status if the marriage had been entered into before

citizens, but not immigrants, had the power to sponsor relatives. Third, citizens who resided in the United States were given a special privilege—nonquota status for their wives and children. Fourth, siblings and adult children, who had been given preference status in the 1921 Act, were removed from the 1924 Act—the nuclear family, and not the extended family, was the family singled out for immigration benefits.

Privileged status for family members was not an extension of new rights but a contraction from what had existed before. Prior to the Emergency Quota Act, there were no numerical limitations, only exclusion grounds, such as illiteracy, poverty, or disease.³⁰ So although the 1921 and 1924 Acts reflect generosity toward family members, this generosity existed in the context of a shift from relatively open immigration to strict quotas. For many immigrants, the family categories did little to help, because the quotas were so small that the number of family members seeking slots far outstripped the number available.³¹ The family preferences developed as a side note in a raging debate over the quotas themselves—which census should determine the quotas and, accordingly, what the *racial* makeup of the country would be. The institutional design questions that lawmakers were grappling with were primarily racial and cultural questions; the family preference aspects of these questions appear to have been decided reflexively, based on common understandings of family function and gender roles within the family, without much thought or discussion.

The national origins system lasted until 1965, but Congress did tinker with the substance of the family preferences. For example, the Immigration and Nationality Act of 1952³² (“McCarran-Walter Act”) codified the various immigration statutes into the modern Immigration and Nationality Act (INA). The 1952 Act also equalized the treatment of male and female citizens by giving them the same ability to sponsor their spouses outside

the date of the enacting legislation. See *Report of the Committee on the Judiciary Pursuant to S Res 137*, S Rep No 1515, 81st Cong, 2d Sess 464–65 (1950) (discussing the Acts of 1928, 1932, and 1948, and showing how granting nonquota status under these acts eased backlogs from Greece, Portugal, Romania, Spain, and Turkey).

³⁰ See, for example, Immigration Act of 1891 § 1, ch 551, 26 Stat 1084, 1084 (excluding, among others, “[a]ll idiots, insane persons, paupers or persons likely to become a public charge, [and] persons suffering from a loathsome or a dangerous contagious disease”).

³¹ See Charles C. Foster, *The Development of the United States Immigration Law Selection System and the Immigration Bar*, 5 *Houston J Intl L* 193, 204 (1983).

³² Pub L No 82-414, ch 477, 66 Stat 163, codified as amended at 8 USC § 1101 et seq.

the quota system.³³ These changes were urged by women's rights groups, which argued that family immigration produced better citizens and that restricting the right of female citizens to reunite with their husbands was unfair.³⁴ Perhaps the most significant changes were the addition, in 1952, of siblings and adult sons or daughters of US citizens, recognizing the extended family as an important aspect of family immigration, and the addition of spouses and children of lawful permanent residents, which recognized that the admission of noncitizens' relatives might be worthwhile.³⁵ But these categories, while symbolically important, may not have actually made much difference. The siblings and adult sons and daughters category, for example, was an official "preference," but unlike the other family preferences, it was given no guaranteed percentage of the quota for a given nation. Thus, siblings could apply for permanent resident status but might never get it if other, presumably more important, family-sponsored immigrants filled the quota first.³⁶

Our modern immigration law architecture comes largely from the Immigration and Nationality Act of 1965³⁷ ("Hart-Celler Act"), which did away with the national origins quotas.³⁸ Hart-Celler gave the vast majority of the permanent resident slots to family members of citizens or permanent residents.³⁹ This strong tilt in favor of family ties over skills may seem surprising in light of President Lyndon B. Johnson's initial emphasis, in proposing the bill, on skills. His proposed order of preference categories, unlike the final version of the Act, granted first preference to "those with the kind of skills or attainments which

³³ McCarran-Walter Act § 101(a)(27)(A), 66 Stat at 169 (defining a nonquota immigrant as "an immigrant who is the child or the spouse of a citizen"). See also Elwin Griffith, *Reforming the Immigration and Nationality Act: Labor Certification, Adjustment of Status, the Reach of Deportation, and Entry by Fraud*, 17 Mich J L Reform 265, 265 (1984).

³⁴ See S Rep No 1515 at 465 (cited in note 29) (noting that the reason for inequity was that "a husband has been traditionally considered to be the head of the household, and where he went, his wife would follow" but that now the "underlying principle should be to maintain the family unit, which could be accomplished by removing the inequality in the treatment of husbands of American citizens").

³⁵ McCarran-Walter Act § 203(a)(3)-(4), 66 Stat at 178-79.

³⁶ As a result of this problem, backlogs developed, and amendments to the McCarran-Walter Act retroactively gave nonquota status to siblings who had been waiting for a requisite number of years. See Act of Oct 24, 1962 § 1, Pub L No 87-885, 76 Stat 1247, 1247.

³⁷ Pub L No 89-236, 79 Stat 911, amending INA § 201 et seq, codified as amended 8 USC § 1151 et seq.

³⁸ Hart-Celler Act § 1, 79 Stat at 911.

³⁹ Hart-Celler Act § 3, 79 Stat at 912-13, amending INA § 203, codified as amended at 8 USC § 1153.

make the admission especially advantageous to our society.”⁴⁰ He gave second preference to family members of citizens and permanent residents.⁴¹ He also emphasized in his initial message to Congress, and later in his signing speech, that immigrants should not be judged on their country of origin, but by what contributions they could make to the United States because of their skills—although he also emphasized that the national origins system worked to unfairly separate families and that the new amendments would aid in reuniting them.⁴²

But behind the scenes, some members of Congress were hoping that by emphasizing family ties, the 1965 Act would continue to privilege Northern European immigration. If family members were preferred, they argued, by definition most immigrants would come from the racial groups that already dominated the population. What they failed to anticipate was the speed with which relatively new immigrant groups could turn around and use family-sponsored immigrant categories and the relative lack of demand from national groups who had been in the country longer. Recent immigrants from, say, China had a great incentive to sponsor their family members. A sixth-generation American whose ancestors came from England had no family in England left to sponsor.⁴³

From 1965 to the present, family reunification has remained a cornerstone of the INA. From time to time, Congress has debated altering the family categories, and in 1990, it kept the basic categories but reworked the relationship between them.⁴⁴ Most recently, in 2007, Congress debated the proposed Nuclear Family Priority Act,⁴⁵ which would have reduced the number of family-sponsored immigrants by doing away with the sibling and adult sons and daughters categories.⁴⁶ The bill failed to

⁴⁰ President Lyndon B. Johnson, *Special Message to the Congress on Immigration*, 1965 Pub Papers 37, 38.

⁴¹ Id.

⁴² Id at 37–38; President Lyndon B. Johnson, *Remarks at the Signing of the Immigration Bill, Liberty Island, New York*, 1965 Pub Papers 1037, 1038.

⁴³ For further discussion of the dynamics behind the passage of the Hart-Celler Act, see Richard Alba and Victor Nee, *Remaking the American Mainstream: Assimilation and Contemporary Immigration* 175–76 (Harvard 2003) (explaining that while the drafters of the Hart-Celler Act anticipated that it would “ethnically recalibrate immigration,” it actually encouraged immigration surges from some countries); Aristide R. Zolberg, *A Nation by Design: Immigration Policy in the Fashioning of America* 328–36 (Harvard 2006).

⁴⁴ See, for example, Immigration Act of 1990, Pub L No 101-649, 104 Stat 4978.

⁴⁵ HR 938, 110th Cong, 1st Sess (Feb 8, 2007).

⁴⁶ Nuclear Family Priority Act § 2, HR 938 at 1–2 (cited in note 45).

pass, but it represents an important strain in the debate over family reunification dating back to the 1920s—whether adult extended family members are worth including in family reunification.

The history of family immigration, then, gives little indication of why Congress would affirmatively want family members. Early on, the rationale was a rights-based rationale, rooted in notions of male headship of the family. Later, the family categories were expanded, and Congress expressed ambivalence toward family members outside the nuclear family, such as siblings and adult children. In the 1965 Act, family immigration may have acted as a surrogate for an attempt to surreptitiously retain national-origin-based immigration. But none of the major immigration acts produced an extensive legislative history that analyzed whether family-based immigration was useful to the nation.

II. INTEGRATION

Putting aside rights-based rationales, why would Congress want to privilege the family? Perhaps the most obvious reason is that it may assist in the integration of immigrants into the larger society.⁴⁷ There are two iterations of this theory. The first is that an immigrant, standing alone, is more likely to integrate quickly if he or she acquires an American spouse or family because the American family members will help him or her to integrate into society more quickly.⁴⁸ If individuals develop ties to communities and nations relationally, then we would expect someone whose loved one bears an allegiance to a particular nation to be able to develop similar ties.⁴⁹ The second is that even without a citizen family member, immigrants are more likely to integrate if they have their families with them. There will be no citizen family member to help them to acquire American values

⁴⁷ For a helpful discussion of the term “integration” and other terms such as “assimilation,” see Adrian Favell, *Integration Policy and Integration Research in Europe: A Review and Critique*, in T. Alexander Aleinikoff and Douglas Klusmeyer, eds, *Citizenship Today: Global Perspectives and Practices* 349, 351–52 (Carnegie Endowment for International Peace 2001) (stating that the term integration “accepts some idea of permanent settlement and deals with and tries to distinguish a later stage in a coherent societal process”).

⁴⁸ See Adam B. Cox and Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 *Stan L Rev* 809, 854 (2007) (discussing family reunification as an “institutional design strategy in which family relationship serves as a proxy for a first-order immigration policy goal” such as assimilation).

⁴⁹ See Karen Knop, *Relational Nationality: On Gender and Nationality in International Law*, in Aleinikoff and Klusmeyer, eds, *Citizenship Today* 89, 115 (cited in note 47).

and culture, but they may be less likely to maintain significant ties to their country of origin and more likely to invest in their new country, emotionally and economically. They might also be more stable, less likely to commit crime, and more economically productive.⁵⁰

The first version of the integration rationale—that citizens help to integrate immigrant family members—may explain some features of current immigration policy. For example, the INA provision granting the spouse of a US citizen a naturalization opportunity after three years of continuous residence in the United States rather than the usual five seems to assume that an immigrant married to a US citizen will integrate, and be capable of citizenship, faster than other immigrants.⁵¹ It might also explain the theory behind giving spouses and children of US citizens “immediate relative” status, which allows them to bypass quotas. If the spouses and children of citizens are more likely to integrate quickly, then they are more valuable to the nation and worth pushing to the front of the line.

The second version—that immigrant families are more likely to integrate even without a citizen family member—may underlie the rule that allows family members of a newly admitted permanent resident to legal status of their own if they are “accompanying or following to join.”⁵² As Professor Hiroshi Motomura puts it, “[I]t is hard for a lawful immigrant to feel that she can establish much of a life in America if her husband and children aren’t here.”⁵³ This was essentially the argument made by Professor Bill Ong Hing in his 2007 testimony before the House Judiciary Subcommittee on Immigration: “Reunification with family members gives new Americans a sense of completeness and peace of mind, contributing not only to the economic but also the social welfare of the United States.”⁵⁴ He argued: “Society benefits from the reunification of immediate families, especially because family unity promotes the stability, health and productivity of family members.”⁵⁵ This argument is a modern-day riff

⁵⁰ See Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law’s Conflicted Answers*, 32 Hofstra L Rev 273, 285–86 (2003).

⁵¹ INA § 319(a), 8 USC § 1430(a).

⁵² INA § 203(d), 8 USC § 1153(d).

⁵³ Hiroshi Motomura, *We Asked for Workers, but Families Came: Time, Law, and the Family in Immigration and Citizenship*, 14 Va J Soc Pol & L 103, 117–18 (2007).

⁵⁴ *Promoting Family Values and Immigration Hearing*, 110th Cong, 1st Sess at 24 (cited in note 2) (statement of Professor Hing).

⁵⁵ *Id.* See also *id.* at 7 (statement of Rep John Conyers Jr).

on the coverture-inflected arguments of 100 years ago, except that it is no longer that a husband and father has the right, as head of household, to the services and companionship of his wife and children but that *all* individuals do better if they exist in a stable family unit.

Notice under the INA two groups—the spouses and children of citizens and the spouses and children of newly arrived, lawful permanent residents—get immediate legal status, but the *newly acquired* spouses and children of already-established lawful permanent residents do not; they are subject to quotas and long waits.⁵⁶ Perhaps this is because long-term lawful permanent residents fall between the cracks of each version of the integration theory; they are not citizens, and therefore do not wield the integrative power of a citizen relative as in the first version, and they have already proven they can successfully integrate by coming *without* a family, so it no longer seems necessary to make family unification a high priority.

Congress, then, might think that family immigration helps to foster integration. But is it true? It probably depends largely on the family's circumstances. In some cases, the immigration of family members might actually keep immigrants more tied to their home countries than no family at all. A man sponsoring a wife from his country of origin who plans to live in an ethnic enclave and conceives of marriage as a breadwinner-dependent relationship (and can afford to) might gain very little in the way of integration assistance from his wife—she might be isolated in a fringe community, might not meet others outside her ethnic community through work, and might actually assist him in resisting integration. Contrast with that model a husband and wife with children where both parents work and live in a place where there are fewer immigrants from their nation of origin. In that case, it seems likely that having a spouse and children with the primary immigrant will help him or her to integrate—both spouse and children will mix with the general population, the children may learn a new language and culture more quickly than their parents, and there will be fewer ties to their old life. And in a third model, an immigrant family might live in an ethnic enclave and start its own small business. In this case, the family wouldn't be *assimilated* into American society, but it might be *integrated*—the family members would have an economic

⁵⁶ See INA § 203(a), (d); 8 USC § 1153(a), (d).

stake in their American life, would be making ties to their community, and, over time, might become the community itself. The “mom and pop” business model may facilitate immigrant integration within a generation or two.

In all of these scenarios, children may be a much more important factor in integration than spouses. It is commonly argued that parents help to integrate their children: as Representative John Conyers explained in defending family reunification, “The parents who have their children living with them can better inculcate them with American values in a supportive environment.”⁵⁷ But often, it happens the other way around. Children attend school and participate in extracurricular activities at a time in their lives when they are rapidly developing, emotionally and intellectually.⁵⁸ Their loyalties, preferences, and understanding of their place in the world will be largely shaped by their experiences with peers. Although their parents may be able to resist acculturation, doing so will be difficult for their children. Children bring American culture home to their parents.

III. LABOR

The existence of family-based immigration is often pitted against skills-based or, more generally, employment-based immigration as if the two are mutually exclusive. But of course, as a leading immigration law casebook reminds us, immigrants don’t arrive with H-1 or E-2 visa numbers stamped on their foreheads.⁵⁹ Most immigrants participate in labor, and most immigrants have families; simply because a person arrives using a family-sponsored visa does not mean that he or she will not engage in productive labor. The question from an institutional design perspective is how to attract the right people in the most efficient way. In many circumstances, family-based visas might be a more efficient way of attracting some kinds of labor migrants than employer-sponsored visas. In this Part, I will explore three types of labor migration that family visas might promote: market labor, nonmarket labor, and “gray” market labor.

⁵⁷ *Promoting Family Values and Immigration Hearing*, 110th Cong, 1st Sess at 7 (cited in note 2) (statement of Rep Conyers).

⁵⁸ For a discussion of the effects of schools and other non-familial activities on children, see Laura A. Rosenbury, *Between Home and School*, 155 U Pa L Rev 833, 841–46 (2007).

⁵⁹ Thomas Alexander Aleinikoff, et al, *Immigration and Citizenship: Process and Policy* 394 (West 7th ed 2012).

First, family-based immigration might be an effective means of screening for labor migration. High-skilled markets are more likely to involve semipermanent jobs with substantial salaries and benefits that might make employers willing to undergo the search costs associated with hiring immigrants if employers either have difficulty finding an adequate supply of qualified workers at home or if these workers are too expensive. In contrast, low-skilled labor tends to be seasonal (as in agricultural work) or temporary, due to nonseasonal fluctuations in the market, and may be less suitable for employer sponsorship. But low-skilled migrants may actually be more desirable in the long run. As one economist testified during the hearings on the proposed Nuclear Family Protection Act in 2007, low-skilled migrants may be more flexible than people with highly transferable skills in which they have invested heavily.⁶⁰ Low-skilled migrants are more likely to try new areas of employment should shortages arise because they are not “locked in” to a particular vocation.⁶¹

Of course, even if Congress wanted a low-skilled labor force, it's not clear that family-based immigration would be the best way to get it. Congress could expand the number of low-skilled EB-3 visas, expand the diversity program, or simply use a first-come, first-served approach. But to the extent that Congress wants a labor force that is truly flexible—both in terms of when its members work and under what conditions—family-sponsored immigration may provide a better mechanism for it. Family-sponsored immigration requires an “anchor” relative to be already in the country. Although employment-based immigration (including unauthorized migration for a particular job) often results from immigration networks, family-sponsored immigration provides a surer base for the new immigrant to operate from than a friendship or employment network.⁶² Family members may know more about each other than an employer knows about a potential (or current) employee. Perhaps using the family member to screen the immigrant makes more sense than using

⁶⁰ See *Promoting Family Values and Immigration Hearing*, 110th Cong, 1st Sess at 13 (cited in note 2) (statement of Professor Harriet Duleep).

⁶¹ See *id.* See also *id.* at 32–33 (statement of Professor Hing); *id.* at 41–42 (statement of Stuart Anderson, Executive Director, National Foundation for American Policy) (stating that family-based immigration fosters small business growth).

⁶² See Carmenza Gallo and Thomas R. Bailey, *Social Networks and Skills-Based Immigration Policy*, in Harriet Orcutt Duleep and Phanindra V. Wunnava, eds, *Immigrants and Immigration Policy: Individual Skills, Family Ties, and Group Identities* 203, 205–07 (Jai 1996).

the employer. In addition, an employer-sponsored immigrant can always leave his job without giving up permanent residency, leaving him potentially unsupported. But a family sponsor must promise to support the new family member at 125 percent of the poverty line,⁶³ and it's not just an empty promise—she must show that she actually can by demonstrating a minimum amount of assets and income.⁶⁴ This showing makes it more likely that the incoming immigrant will be able to weather fluctuations in the employment market successfully since he has a family member who has promised to support him regardless of his economic success.

Imagine, for example, a lawful permanent resident who wants to sponsor a relative to help him run his small business. He has ten siblings in his country of origin, but can only afford to sponsor one. He is likely to choose the one whom he believes will be the most diligent, industrious, and able to integrate—and he might do a much better job of this than an employer who has no knowledge of the ten siblings beyond their qualifications on paper.

Second, it is not only market labor that might justify family preferences. Many economists, most prominently Professor Gary Becker, have posited that extensive, economically valuable care work goes on inside the family that is largely unrecognized when we measure the economic output of people as individuals.⁶⁵ Some family-based immigration is likely to increase the amount of care work, including housework, child care, and elder care, that goes on in immigrant households—especially through immigration of wives, siblings, or parents, who may engage in homemaking or as

⁶³ INA § 213A(a)(1)(A), 8 USC § 1183a(a)(1)(A).

⁶⁴ Affidavits of support are enforceable—at least in theory—in a number of contexts. First, a state support agency might refuse to give support to an otherwise eligible individual if it is aware that there is an existing affidavit of support that requires a family member to support that person. Second, a state can sue for reimbursement if it does inadvertently give welfare benefits to someone covered by an affidavit of support (although most states have not actively pursued this avenue). Third, the immigrant can bring a private lawsuit against the sponsor to enforce the support obligation, an option that is increasingly being exercised by immigrants, especially in divorce proceedings, as the support obligation survives divorce. See Veronica Tobar Thronson, *Til Death Do Us Part: Affidavits of Support and Obligations to Immigrant Spouses*, 50 Fam Ct Rev 594, 595–602 (2012).

⁶⁵ Gary S. Becker, *A Treatise on the Family* 30–79 (Harvard 1991). See also Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 Nw U L Rev 1, 27–79 (1996); Hila Shamir, *What's the Border Got to Do with It? How Immigration Regimes Affect Familial Care Provision—A Comparative Analysis*, 19 Am U J Gender Socy Pol & L 601, 608–11 (2011).

child-care supplements to single-parent or dual income-earning families. Economists and sociologists who have considered the value of this work find it to be significant; some have estimated it to produce anywhere from 24 to 60 percent of GDP.⁶⁶ Even immigrants who never participate in wage labor, then, may actually be contributing in economically valuable ways by contributing unpaid care work in the homes of relatives who are participating in market labor, sometimes even making such market participation possible. Many legal scholars have critiqued legal doctrine as not adequately accounting for the value of unpaid housework.⁶⁷ Immigration law may be the exception—through the family preferences, it implicitly recognizes nonmarket care work as valuable.

Family-sponsored immigration, then, might serve as a proxy for a particularly robust and reliable kind of labor immigration or as a proxy for nonmarket, but nonetheless valuable, labor immigration. It may also serve a third purpose. Our current immigration system makes employment-based immigration very difficult for workers in particular kinds of jobs—in particular, market domestic labor. When the kind of nonmarket labor typically performed in the home is instead performed for a wage, it is often unregulated, part of a gray market in which workers receive no employment protections and go without health insurance, social security, workers' compensation, or other pension programs.⁶⁸ The current immigration system largely ignores this kind of work as an official matter; the employment-based system, requiring a lengthy labor certification process, is ill-equipped for a market that involves private employment by families, often part-time or last-minute in nature. This gap has been largely filled by undocumented workers who engage in child care and other domestic work “under the table,” both in the sense of

⁶⁶ See Silbaugh, 91 Nw U L Rev at 3, 17 (cited in note 65).

⁶⁷ See, for example, *id.* at 25; Nancy C. Staudt, *Taxing Housework*, 84 Georgetown L J 1571, 1572–73 (1996).

⁶⁸ See Pierrette Hondagneu-Sotelo, *Doméstica: Immigrant Workers Cleaning and Caring in the Shadows of Affluence* 210–43 (California 2001) (analyzing the limitations of current legal regulation of domestic labor and offering a program for reform). Similar gray markets occur in industries such as the construction industry, which are insulated from prosecution for immigration law violations by rules that immunize contractors from immigration violations committed by subcontractors. See Richard Sullivan and Kimi Lee, *Organizing Immigrant Women in America's Sweatshops: Lessons from the Los Angeles Garment Worker Center*, 33 Signs: J Women Culture & Socy 527, 528–29 (2008).

avoiding tax and social security consequences of the work and also in the sense of working without legal authorization.⁶⁹

But it is not only the undocumented who engage in this kind of labor; it is also likely that immigrants using family-sponsored categories provide some of this labor force. The family-sponsored categories are disproportionately used by female immigrants,⁷⁰ and female immigrants are especially unlikely, given global inequalities in access to education and skilled work, to be qualified for a variety of jobs involving skilled labor. They are more likely, also because of the gendered ordering of care work both internationally and in the United States, to be qualified—and understood by potential employers as qualified—for paid care work and domestic labor than many male immigrants. The United States might want to privilege family-sponsored migration because it understands that this underground economy exists, because there is no political consensus on how to provide adequate child care to American families, and because the family categories can help to silently, and relatively uncontroversially, fill the gap. These are the factors in play when thinking about the economics of market domestic labor.

IV. SOCIAL ENGINEERING

In addition to using family-based immigration to facilitate integration and as a surrogate for labor immigration, there are a handful of other reasons that a nation might want to privilege the family that all fall into the somewhat broad category of “social engineering.” The Supreme Court has enshrined several family-oriented rights in its jurisprudence, including rights to determine when and whether to bear a child; rights to the care, custody, and control of one’s children; and the right to marry the person of one’s choice. The government cannot force people to procreate, force them to marry, or force them to adopt children—even if doing so would be desirable for the national community as a whole. In addition, family law as a field is primarily limited

⁶⁹ For a discussion of how the underground domestic labor economy bolsters female US citizens’ exercise of equal citizenship while simultaneously denying immigrant women access to citizenship, see Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* 102–21 (Princeton 2006).

⁷⁰ For more information regarding these statistics, see Office of Immigration Statistics, *Persons Obtaining Legal Permanent Resident Status by Broad Class of Admission and Selected Demographic Characteristics: Fiscal Year 2011* (DHS), online at <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2011/table9.xls> (visited Feb 16, 2013).

to the states; Congress does not have the power to dictate the law of marriage and divorce to individual states. Instead, it must operate obliquely, for example, by conditioning federal money on establishing child support guidelines or paternity acknowledgment.⁷¹ Encouraging family-based immigration could function as a way around some of these limitations, allowing Congress a means of at least influencing family structure, birthrates, and marriage rates.

First, by privileging marriage-based immigration, Congress can give marriage an exceptional and important status even as its role in the lives of many Americans is declining. Privileging marriage encourages immigrants with certain normative commitments—those who want to marry or are willing to marry—to migrate here. Immigrants might want to immigrate to seek better marriage markets,⁷² and granting explicit marriage-based immigration entitlements to US citizens would encourage these immigrants to do so. In turn, privileging marriage also expands the marriage options of US citizens. Citizens who are undesirable in the US marriage market, or who do not like their marriage options at home, could use the existence of marriage-based immigration options to gain access to other marriage markets.⁷³

In deciding which families will be recognized, the federal government can subtly encourage some kinds of families over others. Right now, for example, same-sex couples are excluded from marriage-based immigration, even if they are legally married.⁷⁴ Thus, even though Congress cannot dictate to the individu-

⁷¹ See 42 USC § 666 (requiring states to adopt child support guidelines); 45 CFR § 303.5 (setting forth details of a paternity acknowledgment program). For an analysis of how federal immigration law functions as a form of family law, see Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 Minn L Rev 1625, 1634 (2007).

⁷² See Laura E. Hill, *Connections between U.S. Female Migration and Family Formation and Dissolution*, 2 Migraciones Internacionales 60, 68 (2004) (discussing how female migrants “may be motivated to migrate by a desire to find better marriage markets or to improve quality of their marriage or even to have the freedom to escape a dissatisfying marriage”); Douglas S. Massey, Mary J. Fischer, and Chiara Capoferro, *International Migration and Gender in Latin America: A Comparative Analysis*, 44 Intl Migration 63, 73–75 (2006) (discussing family structure conditions under which women emigrate).

⁷³ For an interesting analysis of the conflicting goals of immigrant “mail-order brides” and their US citizen husbands, see Hung Cam Thai, *Clashing Dreams: Highly Educated Overseas Brides and Low-Wage U.S. Husbands*, in Barbara Ehrenreich and Arlie Russell Hochschild, eds, *Global Woman: Nannies, Maids, and Sex Workers in the New Economy* 230, 248–51 (Owl Books 2002).

⁷⁴ See Defense of Marriage Act (DOMA) § 3(a), Pub L No 104-199, 110 Stat 2419, 2419 (1996), codified at 1 USC § 7 (defining marriage as “a legal union between one man and one woman as husband and wife”). DOMA’s constitutionality was the subject of litigation in several circuits and is now pending Supreme Court review. *Windsor v United*

al states whether they may allow same-sex marriage, it can prevent the growth of numbers of these families by banning their immigration. (And this could just as easily go the other way: Congress could extend immigration benefits to same-sex couples, thereby allowing immigrants married to US citizen spouses to obtain lawful residence even if the state they ultimately settled in did not recognize their marriage.) This federal regulation of the family is not limited to the position of same-sex couples. The affidavit of support,⁷⁵ for example, creates a binding obligation that survives divorce and can be entered into among all sorts of relatives, creating a system that entrenches and recognizes family relationships much more extensively than family law itself.

Family structure is not the only aspect of society Congress might choose to regulate through immigration; even more ambitiously, it might seek to regulate the demographics of the population. The US population is aging and our birthrate is not high enough to provide enough younger workers to care for that aging population.⁷⁶ This gap might be remedied through immigration (although the problem would likely replicate itself when yet another generation experiences long life spans). Immigrants in general have a higher birthrate than the native born.⁷⁷ Much of the work of caring for the elderly is traditionally performed by women,⁷⁸ either in the form of privatized domestic care work or more formal, institutional versions of it. Given that women disproportionately use the family categories to immigrate, and for all the reasons discussed above that family-sponsored immigration may provide a more flexible labor force, we might want to

States, 699 F3d 169 (2d Cir 2012), cert granted, 133 S Ct 9 (2012); *Golinski v Office of Personnel Management*, 824 F Supp 2d 968 (ND Cal 2012); *Massachusetts v Department of Health and Human Services*, 682 F3d 1 (1st Cir 2012); *In re Levenson*, 587 F3d 925 (9th Cir 2009).

⁷⁵ See note 64 and accompanying text.

⁷⁶ Consider Lindsay M. Howden and Julie A. Meyer, *Age and Sex Composition: 2010 2* (Census Bureau May 2011), online at <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf> (visited Feb 16, 2013).

⁷⁷ See Jeffrey S. Passel and D'Vera Cohn, *U.S. Population Projections: 2005–2050 8* (Pew Research Center Feb 11, 2008), online at <http://www.pewhispanic.org/files/reports/85.pdf> (visited Feb 16, 2013) (reporting that if current trends continue, by 2050 82 percent of the increase in population will be due to immigrants arriving from 2005 to 2050 and their American-born descendants).

⁷⁸ See Kristin Smith and Reagan Baughman, *Caring for America's Aging Population: A Profile of the Direct-Care Workforce*, *Monthly Labor Rev* 20, 21 (Bureau of Labor Statistics Sept 2007), online at <http://www.bls.gov/opub/mlr/2007/09/art3full.pdf> (visited Feb 16, 2013) (stating that 89 percent of the direct-care workforce is female).

maximize this kind of immigration so that there will be a large, young, female population of potential care workers for the elderly.⁷⁹

Congress might also want family-based immigration to the extent that lawmakers think that gender parity in immigration, and in the population at large, is a goal worth pursuing. Substantial social science evidence indicates that societies with a shortage of women are more violent and less productive than those with a relatively even gender ratio.⁸⁰ If we moved to a high-skilled immigration system, the ratio of women to men would likely plummet because there would simply be far too few women whose families and home countries' educational systems had invested in them enough to make them desirable workers.⁸¹ Even if we moved to a system that cut out the family preferences and privileged both low- and high-skilled work, we would likely end up with a system that disproportionately admitted men, unless we amended the laws to facilitate paid care work as a recognized category of employment.⁸²

Family-based immigration, then, could provide an avenue for government influence over family structure, fertility rates, commitment to traditional (or nontraditional) marriage or family values, and gender parity, or some combination of these factors. Because immigration admissions are not subjected to the same level of scrutiny as other Congressional actions, social engineering through immigration is easier and less likely to lead to successful constitutional challenges than through other means.⁸³

⁷⁹ For a version of this argument, see Bill Ong Hing, *Deporting Our Souls: Values, Morality, and Immigration Policy* 28–29 (Cambridge 2006).

⁸⁰ See, for example, David T. Courtwright, *Gender Imbalances in History: Causes, Consequences and Social Adjustment*, 16 *Reproductive BioMedicine Online* 32, 35 (Mar 2008), online at <http://download.journals.elsevierhealth.com/pdfs/journals/1472-6483/PIIS1472648310603975.pdf> (visited Feb 16, 2013).

⁸¹ See Department of Economic and Social Affairs, *The World's Women 2010: Trends and Statistics* 48–52 (United Nations 2010), online at http://unstats.un.org/unsd/demographic/products/Worldswomen/WW_full%20report_color.pdf (visited Feb 16, 2013).

⁸² Some countries are now experiencing more out-migration of women than men, largely because of the need for care work in industrialized countries with aging populations. See Rhacel Salazar Parreñas, *The Care Crisis in the Philippines: Children and Transnational Families in the New Global Economy*, in Ehrenreich and Hochschild, eds, *Global Woman* 39, 39 (cited in note 73) (stating that two-thirds of Filipino migrant workers are women, who engage predominantly in care work).

⁸³ Contrast *Moore v City of East Cleveland, Ohio*, 431 US 494, 506 (1977) (holding a housing ordinance with a limited definition of family to be unconstitutional), with *Fiallo v Bell*, 430 US 787, 799–800 (1977) (holding that the provision of the McCarran-Walter Act that excluded the relationship between an illegitimate child and his natural father from preferential treatment was not unconstitutional).

CONCLUSION

In short, there are myriad reasons why a government might want to privilege family-sponsored immigration over other types, even absent a concern for human rights. Of course, that doesn't mean that recognition of human rights might not *also* be an important government interest. The United States might determine that human rights are a priority for ethical reasons, might want to take the lead in promoting them even if doing so is contrary to its economic interests, or might calculate that recognition of family reunification rights brings with it tangible economic benefits because it helps its bargaining position with other nations or elevates its moral status in global politics. But my point has been that even without any of these interests in play, there still could be other rational reasons for giving extensive immigration benefits based solely on family ties.

Notice that the three values identified in this Article—integration, labor, and social engineering—do not necessarily go hand in hand. Sometimes they augment each other, but sometimes they may be in direct conflict. In addition, some of them bolster some family categories but not others. Some of these values would push us in the direction, for example, of privileging marriage over extended family, but others would push us the other way.

For instance, the family's role as a place for the privatization of dependency and non-market care work might actually point toward expanding extended family relationships, where those relationships can be shown to be functional caretaking relationships, and toward decreasing relationships such as new marriages that may very well be more about personal fulfillment and choice in marriage markets than they are about these other interests. Similarly, we might want to think harder about what it is about marriage that makes it so special that it creates an entitlement not just for family *reunification* but family *unification*. If I choose to sponsor my sibling, I may have to wait ten or twenty years for the sponsorship to come to fruition, but I can marry someone new tomorrow and give him nonquota, immediate relative status.⁸⁴ If marriage is privileged within the family hierarchy because it causes better economic outcomes, then privileging it might make sense. But if Congress is privileging

⁸⁴ See INA § 201(b), 8 USC § 1151(b). This status would be subject to the limitations on conditional permanent residency under INA § 216, 8 USC § 1186.

it because we think it is a proxy for care work within the home, or better outcomes for children, it seems that the marriage-based categories are somewhat obsolete. Marriage does not begin to cover many of the circumstances in which adults have children, and we could get at those cases more easily by allowing adults to sponsor the parents of children with whom they are co-parenting.

What makes the family special, then, depends on which family members we are talking about. The “family” is not a uniform concept that can be tossed around in opposition to concepts such as labor, skills, or employment-based immigration. The concept of family is capable of doing all sorts of work, much of which is economically productive and potentially complementary to labor immigration.