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The Kiss of Death for “Living in Marital Union”: Strict Judicial Scrutiny of Department of Homeland Security Marital Fraud Procedures

Rachel Blitzer

Historically, the United States encouraged foreign immigration as a means of populating the nation.1 In the 1920s, however, Congress introduced an immigration quota system in response to both nativist and labor organization pressure.2 These quotas stood at odds with the primary policy goals of United States immigration: preserving family units and promoting family relationships.3 In order to reconcile this conflict, Congress enacted the Immigration and Nationality Act (“INA”)4 to help guide its limited naturalization policies.5 The INA provides favorable treatment to the immediate family members—including spouses—of United States citizens.6

1 B.A. 2002, Yale University; J.D. Candidate 2005, University of Chicago.
2 Id.
The INA, however, only allows for limited favorable treat-
ment. 8 USC section 1430(a) provides that an alien married to a
citizen can be naturalized if the couple has lived "in marital un-
ion" for a period of three years prior to the petition for naturali-
zation. This requirement aims to help the Department of Home-
land Security ("DHS"), formerly the Immigration and Naturali-
zation Service, detect illegitimate "sham" marriages entered into
merely to gain American citizenship.

Under the Constitution, regulation of naturalization is a legis-
latively function. Accordingly, the courts defer to Congress
when addressing legal challenges to section 1430(a) and other
naturalization legislation. Because of this deference, courts
generally have applied rational basis review in cases challenging
naturalization statutes and regulations. Under rational basis
review, courts only overturn statutes that are not rationally re-
lated to a legitimate state interest.

This Comment argues for a reevaluation of the proper stan-
dard of review that courts should apply when examining section
1430(a) in cases implicating the right to marry. Because the DHS
procedures impinge on the right to marry, a fundamental consti-
tutional right, courts should review these procedures using strict
scrutiny. Application of strict judicial review to section 1430(a)
cases would create consistency between the review of section

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7 8 USC § 1430(a) (2000).
8 The Homeland Security Act, 6 USC § 101 (2003), signed into law in November
2002, massively reorganized the nation's naturalization functions, dividing immigration
service functions and immigration enforcement functions into two separate agencies.
Immigration service functions were transferred from the INS to the DHS, and the INS
was abolished. See David A. Martin, Immigration Policy and the Homeland Security Act
Reorganization: An Early Agenda for Practical Improvements, 80 Interpreter Releases
9 Note, The Constitutionality of the INS Sham Marriage Investigation Policy, 99
Harv L Rev 1238, 1238 (1986).
10 See, for example, Zapp v District Director of Immigration and Naturalization, 120
F2d 762, 764 (2d Cir 1941) ("It is well established that the expulsion of aliens is a sover-
eign power necessary to the safety of the country, to be regulated by the legislative
department by such statutes as it deems wise policy to require.").
11 See, for example, Marcella v Bonds, 349 US 302, 311 (1955) (discussing the "long-
standing practice in deportation proceedings, judicially approved in numerous decisions
in the federal courts, and . . . the special considerations applicable to deportation which
the Congress may take into account in exercising its particularly broad discretion in
immigration matters").
12 See Fiallo v Bell, 430 US 787 (1977); Califano v Jobst, 434 US 47 (1977); City of
14 This Comment addresses the right to marry of the United States citizen spouse,
not that of the alien spouse.
1430(a) and the review of other laws that implicate fundamental rights. Part I explains how DHS regulations impinge on the fundamental right to marry. Part II describes the function of fundamental rights and details the courts' inclusion of the right to marry and the right to structure one's family in this group of rights. Part III summarizes the Supreme Court's jurisprudence regarding the standard of review for cases involving fundamental rights. Part IV explains the lower standard of review applied in cases involving the plenary power of Congress with a particular focus on naturalization cases. Part V articulates the limits on strict scrutiny set forth by the Supreme Court and presents a model for determining the proper level of scrutiny for fundamental rights cases. This Part also describes two different approaches that courts have taken regarding legislation that implicates both naturalization statutes and the right to marry. Part VI presents two lower court cases that have adopted a strict scrutiny standard for evaluation of such legislation. Part VII proposes an appropriate framework for DHS regulations in light of the preceding discussion.

I. THE DHS REGULATIONS

A. The Immigration and Nationality Act

The Immigration and Nationality Act grants preferential naturalization status to the alien spouses of United States citizens or permanent residents.\(^{16}\) Under section 1430(a), an alien can become naturalized if (1) the alien's spouse is a United States citizen; (2) the alien has resided within the United States for three years; and (3) the alien has lived in marital union with the citizen spouse for a period of three years prior to the petition for naturalization.\(^{16}\) The INA does not afford preferential status to alien spouses engaged in sham marriages—situations in which the couple has entered into marriage "for the purpose of evading the immigration laws."\(^{17}\) When an alien spouse applies for naturalization, the DHS conducts a marriage fraud interview to police the validity of the marriages of those aliens applying for naturalization under the INA.\(^{18}\) Based on the couple’s responses

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\(^{15}\) See INS Sham Marriage Investigation Policy, 99 Harv L Rev at 1239 (cited in note 9).

\(^{16}\) 8 USC § 1430(a) (2000).

\(^{17}\) Ferrante v INS, 399 F2d 98, 104 (6th Cir 1968).

in the interview, a DHS officer makes a determination as to whether or not the couple has lived “in marital union” for the three years preceding the petition for naturalization.

In order for an alien to marry a United States citizen and remain in the United States, the couple must conform to the DHS standard of “living in marital union.” This mandate violates the right to marry in two ways. First, the DHS does not accommodate marriages that differ culturally from the traditional definition of American marriage. Thus, the requirement forces the international couple to live in a prescribed manner—the manner recognized as valid by the DHS. A secondary problem emerges because the definition of “living in marital union” remains unsettled. The DHS does not recognize that many American marriages no longer fit the mold that it believes represents the traditional American family.

B. Forced Conformity to the DHS Standards

Both historically and currently, the DHS only acknowledges marriages that conform to the model of the standard American marriage. Under the DHS regime, the right to determine the nature of one’s own marital life achieves legal recognition only when it reflects a tradition founded in “the history and culture of Western civilization.” The DHS prerequisite that the international marriage fit the model of a traditional American marriage lacks logical support, given that international marriages by definition blend two different cultures, at least one of which is not American. The primary purpose for the DHS regulations lies in preserving family unity and promoting family relationships. In

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19 INS Sham Marriage Investigation Policy, 99 Harv L Rev at 1241-43 (cited in note 9) (describing the special interview and the possibility of “postmarital supervision” which typically involves visits by the DHS to the couple’s home and interviews with friends, neighbors, and coworkers).
20 See Matsumoto-Power, 15 U Haw L Rev at 70 (cited in note 3).
21 Id at 69-70 (cited in note 3) (“Whenever the couple does not conform to the INS standard of a proper marriage, the INS considers the marriage a fraud.”).
22 Compare In re Olan, 257 F Supp 884 (S D Cal 1966) (holding that a two and a half month separation is insufficient to sever the obligations and responsibilities of marriage), with United States v Maduno, 40 F3d 1212 (11th Cir 1994) (requiring that spouses actually live together to satisfy the “living in marital union” requirement). The court in Maduno distinguished Olan by focusing on the fact that in Olan, the husband continued to offer financial support to his wife, while the same was not true in Maduno, and that there was no “intent of permanent separation” in Olan. Id at 1215-16.
24 See INS Sham Marriage Investigation Policy, 99 Harv L Rev at 1239 (cited in note
practice, however, the DHS effectively marginalizes and discourages some families that its procedures intend to help.\textsuperscript{25}

One example of DHS bias is the DHS's search for documentation of commingling of finances during a marriage fraud interview.\textsuperscript{26} In some cultures, stable, successfully married couples do not customarily jointly own bank account or credit cards.\textsuperscript{27} Similarly, the DHS also looks to joint ownership of property to establish the authenticity of a marriage,\textsuperscript{28} though some non-American cultures rest property ownership rights in the husband alone.\textsuperscript{29}

Courts have not ignored this predicament completely. The Ninth Circuit, in \textit{Bark v INS},\textsuperscript{30} observed that the courts should not require alien spouses to have "more conventional or more successful marriages than citizens."\textsuperscript{31} \textit{Bark} involved consideration of an Immigration Judge's determination that an international marriage was a sham because the couple eventually separated.\textsuperscript{32} The Ninth Circuit rejected the Immigration Judge and Board of Immigration Appeals' logic, instead asserting that "[a]ny attempt to regulate [the couple's] lifestyles, such as prescribing the amount of time they must spend together, or designating the manner in which either partner elects to spend his or her time, in the guise of specifying a bona fide marriage would raise serious constitutional questions."\textsuperscript{33} The courts have further recognized that DHS regulations may not directly interfere with a couple's decision not to engage sexual activity.\textsuperscript{34}

\textsuperscript{25} Note, \textit{Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family}, 104 Harv L Rev 1640, 1655 (1991) (critiquing the functionalist approach to the legal definition of family, which legitimizes nontraditional families insofar as they share the essential characteristics of traditional family units).

\textsuperscript{26} 8 CFR § 204.2(a)(i)(B)(3).

\textsuperscript{27} Matsumoto-Power, 15 U Haw L Rev at 72 (cited in note 3).

\textsuperscript{28} 8 CFR § 204.2(a)(i)(B)(2).

\textsuperscript{29} Jeanmarie Fenrich & Tracy E. Higgins, \textit{Special Report: Contemporary African Legal Issues: Promise Unfulfilled: Law, Culture, and Women's Inheritance Rights in Ghana}, 25 Fordham Intl L J 259, 318 n 295 (Dec 2001) ("[U]nder customary law a woman has a duty to labor for her husband and does not acquire ownership rights to the property she works with him to acquire.").

\textsuperscript{30} 511 F2d 1200 (9th Cir 1975).

\textsuperscript{31} Id at 1201-02.

\textsuperscript{32} Id at 1201.

\textsuperscript{33} Id.

\textsuperscript{34} \textit{In re Peterson}, 12 I & N Dec 663 (BIA 1968) (upholding the validity of a marriage between two elderly individuals where the couple intended to refrain from sexual activity).
C. What Does "Living in Marital Union" Mean?

Moreover, even assuming the propriety of the conformity requirement, the DHS fails to recognize that the standard American marriage no longer mirrors the traditional American family. During the twentieth century, the United States Congress relied on an outdated definition of the American family: a working father and a stay at home mother together raising children. To day, however, this image does not reflect a number of American marriages. The most flagrant deviations from traditional ideals include those marriages in which the spouses do not reside together or where they participate in an open marriage—where one or both spouses engage in discrete romantic relationships with persons outside of the marriage.

A number of other variations on the traditional model that occur in many American marriages may result in a finding of lack of marital union by the DHS. For instance, some couples keep their legal and financial affairs separate. Elderly spouses commonly lack a sexual component to their marriages. Such couples’ responses to the DHS marriage fraud interview questions about finances and sex life might flag them as potentially fraudulent marriages. These examples illustrate that the DHS should not conclusively deny legal recognition of a marriage "when, as frequently occurs, the marriage does not include one or more of the features associated with the traditional American nuclear family, such as economic cooperation, common residence, sexual relations, and the potential for natural reproduction and childrearing within the relationship."
II. THE DOCTRINE OF FUNDAMENTAL RIGHTS

The DHS regulations become improper when they threaten a fundamental right. The American legal system recognizes certain implied fundamental rights in addition to those enumerated in the Bill of Rights. The concept of a fundamental right derives from the Fourteenth Amendment. The Fourteenth Amendment's Due Process Clause prohibits the federal government from depriving any person of life, liberty, or property without due process of law. The Supreme Court has interpreted the liberty guarantee of the Due Process Clause as granting a number of substantive rights, including the right to be free from bodily restraint, the right to marry, and the right to establish a home and bring up children. Substantive due process incorporates into the Constitution those rights inherent to the concept of liberty, yet not specifically guaranteed in the Bill of Rights.

A. The Development of the Doctrine of Fundamental Rights

The concept of a fundamental right developed from the recognition and the subsequent expansion of the right of privacy by the Supreme Court. The right of privacy forms the cornerstone

42 See W. Kent Davis, Answering Justice Ginsburg's Charge That the Constitution is "Skimpy" in Comparison to Our International Neighbors: A Comparison of Fundamental Rights in American and Foreign Law, 39 S Tex L Rev 951, 954-55 (1998) (describing the variety of definitions that have been offered for "fundamental rights").
43 See Viktor Mayer-Schonberger, Substantive Due Process and Equal Protection in the Fundamental Rights Realm, 33 Howard L J 287, 290 (1990) ("The modern fundamental rights doctrine has found such rights vested either in the equal protection or the due process clause of the fourteenth amendment.").
44 US Const Amend XIV § 1. See also United States v Cruikshank, 92 US 542, 554 (1876) (reiterating the guarantees of the Fourteenth Amendment).
45 See, for example, Griswold v Connecticut, 381 US 479, 487 (1965) (Goldberg concurring) ("[T]he Due Process Clause protects those liberties that are so rooted in the traditions and conscience of our people as to be ranked as fundamental.") (citation omitted); Meyer v Nebraska, 262 US 390, 399 (1923) (stressing the breadth of substantive due process, which protects and includes "privileges long recognized at common law as essential to the orderly pursuit of happiness by free men").
46 Meyer, 262 US at 399.
48 See Meyer, 262 US at 403 (invalidating a state law forbidding all grade schools from teaching subjects in any language other than English and establishing the privacy right to direct the education and upbringing of one's child); Pierce v Society of Sisters, 268 US 510, 534-35 (1925) (invalidating a state law requiring students to attend public
of substantive due process. The rights to marry, to have children, to direct the education and upbringing of one's children, to maintain marital privacy, to use contraception, to enjoy bodily integrity, and to have an abortion, all constitute elements of privacy.

Griswold v Connecticut represents a significant affirmation of the right of privacy. Griswold involved the convictions of the directors of two directors of medical clinics under a Connecticut statute forbidding the use of contraceptives. Specifically, section 53-32 of the General Statutes of Connecticut proscribed the use of "any drug, medicinal article or instrument for the purpose of preventing conception," and the lower court found that the directors had violated this statute as accessories. The Supreme Court began its analysis of the Connecticut statute by reaffirming the fundamental rights foundation developed in its prior caselaw. The Court then broadened the scope of fundamental rights by introducing the notion of privacy as a penumbral right of the Bill of Rights. The Court asserted that the right of privacy is "legitimate" and identified a "zone of privacy created by several constitutional guarantees." In reversing the defendants' convictions, the Court found the Connecticut statute repulsive to the notions of privacy that protect the marriage relationship.

Since Griswold, the Supreme Court has expanded its notion of privacy to include a catalog of fundamental rights: the rights to marry, to procreate, to have an abortion, to rear one's children, and establishing the privacy right to direct the education and upbringing of one's child; Skinner v Oklahoma, 316 US 535, 541 (1942) (invalidating a state sterilization statute and establishing a privacy right to bodily integrity).

See, for example, Carey v Population Services International, 431 US 678, 685 (1977) (recognizing that intrusions on the fundamental right of privacy implicate substantive due process).

See Washington v Glucksberg, 521 US 702, 720 (1997) (listing cases that recognized these rights).

381 US 479 (1965).

Id at 483.

Id at 480.

Id.

Griswold, 381 US at 482-83. The Court emphasized two of its prior cases in particular: Pierce, 268 US 510, and Meyer, 262 US 390. In Pierce, the Court held that the First and Fourteenth Amendments include a right to educate one's children as one chooses. 268 US at 535. Meyer gives comparable protection to the right to study languages other than English. 262 US at 402-03.

Id at 484-86.

Id at 485.

Id at 486.
and to direct their education.\textsuperscript{59} Through the various holdings establishing these rights, the Court has fashioned a tradition-based analysis to determine which privacy interests deserve fundamental status. Specifically, the Court relies heavily on the constitutional amendments to evidence this tradition.\textsuperscript{60} The Court's analysis aims to determine which personal rights are "implicit in the concept of ordered liberty,"\textsuperscript{61} and then applies these immunities against both the federal and state governments.\textsuperscript{62} This inquiry looks at whether the asserted right is "deeply rooted in this Nation's history and tradition."\textsuperscript{63} Thus, only those liberties "so rooted in the traditions and conscience of our people" achieve fundamental status.\textsuperscript{64}

B. The Fundamental Right to Marry

Throughout American history, marriage functioned as an indispensable tool for the growth and preservation of the nation.\textsuperscript{65} As American caselaw developed, the Supreme Court continually evidenced a respect for the institution of marriage.\textsuperscript{66} As early as the 1880s, the Court stressed the importance of the

\footnotesize{\textsuperscript{59} See, for example, \textit{Loving v Virginia}, 388 US 1 (1967) (invalidating a state statute prohibiting interracial marriages and asserting the right to marry); \textit{Skinner}, 316 US at 535 (establishing the right to procreate); \textit{Roe v Wade}, 410 US 113 (1973) (invalidating state legislation making abortion criminal). See also \textit{Pierce}, 268 US at 535 (protecting child rearing and education rights); \textit{Prince v Massachusetts}, 321 US 158, 166 (1944) (discussing family relationships); \textit{Meyer}, 262 US at 390 (discussing education).

\textsuperscript{60} See \textit{United States v Carolene Products Co}, 304 US 144, 152-53 n 4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."). Justice Stone's "Footnote 4" is widely recognized as the origin of the strict scrutiny analysis. See, for example, Lewis F. Powell, Jr., \textit{Carolene Products Revisited}, 82 Colum L Rev 1087, 1088 (1982) ("This footnote now is recognized as a primary source of 'strict scrutiny' judicial review."). Justice Stone suggests that the Court's review of legislation would be more exacting when the legislation implicated the rights specified within the Bill of Rights and "embraced within the Fourteenth." \textit{Carolene Products}, 304 US at 152-53 n 4.


\textsuperscript{62} \textit{Benton v Maryland}, 395 US 784, 795 (1969) ("Once it is decided that a particular Bill of Rights guarantee is fundamental to the American scheme of justice ... the same constitutional standards apply against both the State and Federal Governments.") (citations omitted).

\textsuperscript{63} \textit{Moore}, 431 US at 503.

\textsuperscript{64} \textit{Griswold}, 381 US at 487 (Goldberg concurring).

\textsuperscript{65} \textit{Consider Zablocki v Redhail}, 434 US 374, 384 (1978) (discussing the role of marriage in promoting familial and societal stability).

\textsuperscript{66} See, for example, \textit{Lehr v Robertson}, 463 US 248, 256-57 (1983) ("The institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society.").
marital relationship, labeling it "the most important relation in life" and essential for civilization and progress. The Court asserted that the nation's most wholesome and necessary legislation served to maintain family, and the Court defined family as "consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony." More recently, the Court characterized the marital relationship as "intimate to the degree of being sacred." The Court stated that "[marriage] is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects."

In accordance with its recognition of the importance of marriage, the Court has acknowledged that the Fourteenth Amendment protects the right to marry. In *Meyer v Nebraska*, the Court recognized the right "to marry, establish a home and bring up children" as a central element of the Fourteenth Amendment. The Court reaffirmed this assertion in *Skinner v Oklahoma*. *Skinner* dealt specifically with a state sterilization statute and its implications for the right to procreate. In analyzing the breadth of the liberty guaranteed by the Due Process Clause, the Court stated that "[m]arriage and procreation are fundamental to the very existence and survival of the race" and labeled these activities as "basic civil rights of man." The Court formally established the fundamental right to marry in *Loving v Virginia*. *Loving* involved the invalidation of

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67 *Maynard v Hill*, 125 US 190, 205, 211 (1888).
68 *Murphy v Ramsey*, 114 US 15, 45 (1885).
69 Id.
70 *Griswold*, 381 US at 486.
71 Id.
72 262 US 390 (1923).
73 Id at 399.
74 316 US 535, 541 (1942) (defining marriage and procreation as a "basic liberty").
75 Id at 536.
76 Id at 541.
77 388 US 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."). See also Katherine Shaw Spahr, *Beyond Baehr: Strengthening the Definition of Marriage*, 12 BYU J Pub L 277, 280 (1998) (noting that *Loving* established a fundamental right to marry). It should be noted that not all academics read *Loving's* language to signify the endowment of fundamental status on the right to marry. See, for example, E. Todd Wilkowski, *Comment, In Defense of Marriage Act: Will It be the Final Word in the Debate Over Legal Recognition of Same-Sex Unions?*, 8 Regent U L Rev 195, 200 (1997) ("In *Loving*, the Court stopped short of designating the right to marry as a fundamental right.").
state miscegenation laws.\textsuperscript{78} At the outset of its right to marry discussion, the Court stated that “the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”\textsuperscript{79} Citing Skinner, the Court declared that “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”\textsuperscript{80}

In Zablocki v Redhail,\textsuperscript{81} the Court reaffirmed the fundamental status of the right to marry.\textsuperscript{82} Zablocki involved a Wisconsin statute requiring court approval of any marriage of a Wisconsin resident who had failed to pay child support.\textsuperscript{83} The Court included the right to marry “among the [personal] decisions that an individual may make without unjustified government interference.”\textsuperscript{84} The Court did not rely entirely on its holding in Loving. Instead, the Court independently reasoned that “it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.”\textsuperscript{85}

In accordance with its determination that the right to marry is fundamental, the Court applied strict scrutiny analysis to the Wisconsin statute and found it unconstitutional.\textsuperscript{86} The Court stated that statutory requirements affecting the right to marry could not be upheld unless “supported by sufficiently important state interests and . . . closely tailored to effectuate only those interests.”\textsuperscript{87} Though the Court conceded that the state had legitimate and substantial interests in erecting its law, the Court found it unconstitutional for the state to achieve these interests through an impingement on the right to marry—\textsuperscript{88} a clear acknowledgement that the right to marry is fundamental. In short, in order to avoid impinging on the fundamental right to marry,

\textsuperscript{78} Loving, 388 US at 6-7.
\textsuperscript{79} Id at 12.
\textsuperscript{80} Id, quoting Skinner, 316 US at 541.
\textsuperscript{81} 434 US 374 (1978).
\textsuperscript{82} Id at 384.
\textsuperscript{83} Id at 375.
\textsuperscript{84} Id at 385 (citation omitted).
\textsuperscript{85} Zablocki, 434 US at 386.
\textsuperscript{86} Id at 377-82, 388.
\textsuperscript{87} Id at 388.
\textsuperscript{88} Id.
the statute needed to be more closely tailored to the state's interests.99

Recently, in *Turner v Safley*,90 the Court addressed the right to marry in the penal setting.91 The Court struck down a prison regulation limiting all Missouri inmates' right to marry by conditioning that right on the receipt of the prison superintendent's approval.92 The Court applied a reasonable relation standard of review to the regulation.93 The reasonable relation standard resembles the rational basis test in that it requires the court to examine whether there is a "valid, rational connection" between the regulation at issue and a legitimate government interest.94 The *Safley* reasonable relation standard, however, also requires the court to consider the presence or absence of alternative means, as well as any "ripple effect[s]" of an accommodation of the asserted right.95

The Court utilized this standard in place of strict scrutiny because of the need to "formulate a standard of review for prisoners' constitutional claims that is responsive both to the policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights."96 Despite the application of a lower level of scrutiny,97 the Court maintained that the sanctity of the right to marry overrode the state's interest in prison security.98 Thus, the Court legitimized the fundamental right to marry by emphatically granting it to criminals—a class of citizens whose liberty interests the state has already severely curtailed.99

91 Id at 81.
92 Id at 96.
93 Id at 89.
94 482 US at 89.
95 Id at 90.
96 Id at 85. It should be noted that this logic regarding the proper level of scrutiny does not apply to the American citizens' right to marry with which this Comment is concerned. The Court carefully noted that this low standard of review stemmed from the penal setting: "such a standard is necessary if prison administrators are to make the difficult decisions concerning institutional operations." Id at 89 (internal quotation omitted).
97 *Safley*, 482 US at 89. The Court established the following standard: "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Id (emphasis added).
98 Id at 97.
C. The Right to Structure One's Family

The right to marry is part of the larger right to structure one's family. As Justice Harlan articulated, "the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution." Accordingly, the scope of the right to structure one's family has developed through a number of cases, each recognizing a different aspect of the right.

In *Moore v City of East Cleveland*, the Supreme Court consolidated its various family rights holdings under the umbrella of "the sanctity of the family." Justice Powell, writing for himself and three other justices, stated that prior "decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in the Nation's history and tradition." Justice Powell quoted Justice Harlan's dissent in *Poe v Ullman* for further support:

[Here] we have not an intrusion into the home so much as on the life which characteristically has its place in the home. . . . The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right.

In accordance with fundamental rights jurisprudence, Powell stated in *Moore* that "[w]hen a city undertakes such intrusive regulation of the family . . . the usual judicial deference to the

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101 See, for example, *Wisconsin v Yoder*, 406 US 205 (1972) (recognizing the right of parents to assume the primary role in decisions concerning the rearing of their children); *Pierce*, 268 US 510 (1925) (recognizing the right of parents and guardians to direct the upbringing and education of children under their control); *Meyer*, 262 US 390 (recognizing parents' right to have their children instructed in a foreign language). For a more extensive list of cases addressing the scope of the right to structure one's family, see *Moore v City of East Cleveland*, 431 US 494, 499 (1977) (plurality).
103 Id at 503.
104 Id.
legislature is inappropriate." The Court subsequently has recognized this right of ordering familial relationships under other titles, such as "the right to maintain certain familial relationships" and "the right to structure family living arrangements."

This discussion of the right to structure one's family is designed to appease those who are skeptical about the existence or breadth of the fundamental right to marry. This Comment maintains that the DHS requirements impinge on the fundamental right to marry, but suggests that those requirements also impinge on the fundamental right to structure one's family.

III. FUNDAMENTAL RIGHTS JURISPRUDENC

Bestowing fundamental status on a given personal right carries considerable legal significance. Fundamental rights garner a particularly high degree of protection because an alleged encroachment on a fundamental right requires strict scrutiny by a court. When reviewing a state regulation, courts employ various standards of review, ranging from strict scrutiny to rational basis tests. Strict scrutiny, the most exacting level of scrutiny that courts implement, is reserved for two instances: (1) when legislation operates to the disadvantage of a suspect class; and (2) when legislation impinges on a fundamental right explicitly or implicitly protected by the Constitution. This second crite-

107 Moore, 431 US at 499.
108 Overton v Bazzetta, 123 S Ct 2162, 2167 (2003).
110 Fair Political Practices Commission v Superior Court of Los Angeles County, 25 Cal 3d 33, 47 (1979) ("When there exists a real and appreciable impact on, or a significant interference with the exercise of the fundamental right . . . strict scrutiny doctrine will be applied."). See also Griswold, 381 US at 497 (Goldberg concurring) ("Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.").
112 Miller v Johnson, 515 US 900, 920 (1995) (identifying strict scrutiny as "our most rigorous and exacting standard of constitutional review").
113 See, for example, San Antonio School District v Rodriguez, 411 US 1, 17 (1973), overruled in part by Edelman v Jordan, 415 US 651 (1974) (outlining the first element of Court's proper analysis: "whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny"). See also Rodriguez, 411 US at 31, quoting Shapiro v Thompson, 394 US 618, 642 (1969) ("The Court today does not pick out particular human activities, characterize them as "fundamental," and give them added protection. . . . To the contrary, the Court simply recog-
rion encompasses cases involving a “significant interference” with the exercise of a fundamental right. Under strict scrutiny, the regulation at issue will withstand judicial review only if it serves a compelling government interest and is narrowly tailored to serve this interest.

Accordingly, a court’s application of strict scrutiny requires the government to meet a particularly high burden. Courts have interpreted the “narrowly tailored” condition to require that the governmental regulation be “necessary, and not merely rationally related” to the accomplishment of the compelling interest. In practice, this requirement means that the statute must provide the least restrictive means for achieving the government’s interest. The necessity requirement of the “narrowly tailored” inquiry mandates that a court weigh the regulation against any proffered alternatives. In practice, government regulations will almost never survive a strict scrutiny analysis. The rigor of the strict scrutiny standard has inspired legal scholars to dub it “the kiss of death” for a challenged statute, as well as “strict’ in theory and fatal in fact.

nizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands.”

See Zablocki, 343 US at 388 (“When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”).

See Lawrence v Texas, 123 S Ct 2472, 2491 (2003) (“Our opinions applying the doctrine known as ‘substantive due process’ hold that the Due Process Clause prohibits States from infringing fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest.”).

McLaughlin v Florida, 379 US 184, 196 (1964). See also Griswold, 381 US at 497 (Goldberg concurring) (holding that the statute at issue must be found “necessary, and not merely rationally related, to the accomplishment of a permissible state policy”).

United States v Playboy Entertainment Group, Inc, 529 US 803, 813 (2000). See also Reno v ACLU, 521 US 844, 874 (2000) (“The [state’s] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.”).

Peter J. Rubin, Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw, 149 U Pa L Rev 1, 14 (2000) (“This aspect of the narrow tailoring inquiry is not really about ‘fit,’ but about comparing the marginal benefits and costs of the use of a particular classification with those of some alternative if there is one.”).


IV. THE EFFECT OF PLENARY POWER AND THE LOWER SCRUTINY STANDARD

When selecting the proper standard of review for naturalization and DHS regulations, the courts consistently cite Congress's plenary power to regulate matters of naturalization. Yet, an investigation into Congress's plenary power and the courts' treatment of it supports the conclusion that when reviewing an impingement on a fundamental right, the court's use of any standard other than strict scrutiny is inappropriate.

A. The Source of Congress's Plenary Power

The Constitution does not explicitly grant Congress the power to regulate naturalization. Instead, the Constitution grants the power "to establish an uniform Rule of Naturalization." In The Chinese Exclusion Case, however, the Court cemented the authority of Congress to regulate all matters involving naturalization. The Court asserted that "[t]he power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution." The Court reaffirmed and strengthened this conclusion in Oceanic Steam Navigation Company v Stranahan. In reviewing a federal customs statute, the Court in Stranahan stated that "over no conceivable subject is the legislative power of Congress more complete than it is over [matters of immigration]."

B. Balancing Plenary Power Against Fundamental Rights

While the Supreme Court has shown deference to both Congress's power and fundamental rights, it has also explained their relation to each other and prioritized fundamental rights over plenary power. The Supreme Court has balanced fundamental rights against plenary power most explicitly when considering

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122 See, for example, Fiallo v Bell, 430 US 787, 792 (1977) ("[T]he power over aliens is of a political character and therefore subject only to narrow judicial review.") (quotation omitted).

123 US Const Art I, § 8, cl 4.

124 Chae Chan Ping v United States, 130 US 581 (1889).

125 Id at 609.

126 Id.


128 Id at 339.
fundamental rights claims against Congress's use of its plenary power to regulate commerce. In *Quill Corporation v North Dakota*, the Court unequivocally stated that Congress, in the name of regulating interstate commerce, "does not . . . have the power to authorize violations of the Due Process Clause." Similarly, in *ASARCO Incorporated v Idaho State Tax Commission*, Justice O'Connor explained this balancing another way: "this Court's 'threshold' for invalidating state legislation should be considerably higher under the Due Process Clause than under the Commerce Clause."

Consequently, Congress's plenary power should have no effect on the appropriate standard of scrutiny when reviewing a statute that impinges on a fundamental right. Still, caselaw regarding the DHS regulations affecting the right to marry evidences the courts' inappropriate deference to Congress. Although a fundamental right should take precedence over a plenary power, the courts have repeatedly applied a lower standard of scrutiny, as detailed in Part III C.

C. Fundamental Rights Caselaw Employing the Lower Standard of Review

In accordance with the Supreme Court's deference to the plenary power of Congress over naturalization, the courts have refused to review DHS regulations with strict scrutiny, regardless of these regulations' infringement on the right to marry. Instead, the standard used by courts has resembled the rational basis scrutiny employed in *Califano v Jobst* and *City of New Orleans v Dukes*. The Court's holding in *Fiallo v Bell* provides

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129 US Const Art I, § 8, cl 3 ("Congress shall have the Power . . . to regulate Commerce . . . among the several States.").
131 Id at 305.
133 Id at 350 n 14.
136 427 US 297 (1976). See also *Turner*, 482 US at 97 ("We conclude that on this record, the Missouri prison regulation, as written, is not reasonably related to these penological interests. No doubt legitimate security concerns may require placing reasonable restrictions upon an inmate's right to marry, and may justify requiring approval of the superintendent.").
an example of this deference to Congress’s plenary power. In *Fiallo*, the Court considered a federal statute denying preferential naturalization status to illegitimate children whose natural fathers were American citizens. The Court specifically rejected the claim that a naturalization statute should receive more rigorous scrutiny than that normally applied to such legislation simply because the statute impinged on the family relationship. The Court relied on its own historical recognition that the power to expel or exclude aliens rests with the executive and legislative branches, and remains largely immune from judicial control.

The most liberal reading of *Fiallo* would interpret its prescribed standard of review as a rational basis standard, which is what the progeny of caselaw adopting the *Fiallo* standard has done. The Court’s own language supports this interpretation. The specific language of *Fiallo* instructs that “congressional determinations such as this one are subject only to limited judicial review.” The Court affirmed the district court’s holding that the statutory provisions at issue were neither “wholly devoid of any conceivable rational purpose” nor “fundamentally aimed at achieving a goal unrelated to the regulation of immigration” — an implicit implementation of the rational basis test.

Following *Fiallo*, lower courts have exhibited the same deference to Congress’s plenary power in right to marry cases involving naturalization regulations. Two circuit court cases in particular, *Anetekhai v INS* and *Azizi v Thornburgh*, echoed

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138 Id at 789.
139 Id at 795.
140 Id at 792.
141 See Jennifer Englander, Casenote, *Tuan Anh Nguyen and Joseph Boulais v. Immigration and Naturalization Service*, 3 Loyola J Pub Int L 202, 208 (2002) (“In *Fiallo*, the Court recognized that Congress has exceptionally broad power to control the admission of aliens, allowing the Court only a ‘limited scope of judicial inquiry into immigration legislation.’ [*Fiallo*] laid the foundation for . . . a rational basis standard to grant Congress great discretion when reviewing [immigration legislation].”).
142 See *Azizi v Thornburgh*, 908 F2d 1130, 1133 n 2 (2d Cir 1990) (characterizing the proper standard of review as a “rational basis” standard); *Anetekhai v INS*, 876 F2d 1218, 1224 (5th Cir 1989) (upholding the constitutionality of a naturalization statute because “the distinction . . . between aliens who marry while involved in deportation proceedings and aliens who marry at other times . . . has a rational basis”).
144 Id at 791.
145 876 F2d 1218 (5th Cir 1989).
146 908 F2d 1130 (2d Cir 1990).
the logic of Fiallo when analyzing section 5 of the Immigration Marriage Fraud Amendments of 1986 ("Section 5"). Section 5 requires that an alien spouse, married during deportation hearings, reside outside the United States for two years before he can be considered an "immediate relative" for purposes of naturalization law. "Immediate relative" status, which exempts an individual from statutorily imposed naturalization quotas, is generally automatically granted to a spouse of a United States citizen.

In Anetekhai, a Fifth Circuit case, an international couple challenged the constitutionality of Section 5. The court rested its decision to apply limited judicial scrutiny on the Supreme Court's language in Fiallo. The court asserted that Fiallo squarely rejected the plaintiffs' argument for strict scrutiny based on the implication of a fundamental right, and accordingly the court engaged in no independent review of the merits.

In Azizi, the Second Circuit similarly emphasized Fiallo in its decision to employ limited judicial scrutiny. The plaintiff couple in Azizi faced the same dilemma as the plaintiffs in Anetekhai, and brought a very similar Section 5 claim to the court. Regarding the appropriate standard of judicial scrutiny, the court explained its inquiry as a balancing of "the fundamental nature of the right to marry" against the consideration that "control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature." The court rejected the Azizis' argument for strict scrutiny on the grounds that the "Court [in Fiallo] was not persuaded by the appellants' contention that a strict level of scrutiny must be

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147 8 USCS § 1154(g) ("Notwithstanding subsection (a) of this section . . . a petition may not be approved to grant an alien immediate relative status or preference status by reason of a marriage which was entered into during the period described in section 1255(e)(2) of this title, until the alien has resided outside the United States for a 2-year period beginning after the date of the marriage.").
148 See, for example, Anetekhai, 876 F2d at 1220-21 (upholding the constitutionality of the deportation of an alien spouse under this provision).
149 See id at 1219; 8 USC § 1151(b)(2)(A)(i).
150 Anetekhai, 876 F2d at 1220-21.
151 Id at 1222.
152 Id at 1221-22.
153 Azizi, 908 F2d at 1133 ("[Following Fiallo], we reject the Azizis' contention that a strict level of scrutiny must be adopted here because Section 5 affects their right to marry.").
154 Id at 1132.
155 Id at 1133.
adopted because the classification impinged on fundamental familial relationship rights of citizens and aliens.\textsuperscript{156}

D. Reliance on \textit{Kleindienst} and the Plenary Power of Congress

In applying a lower standard of review to cases involving the DHS regulations regarding marriage, the courts have deferred to the plenary power of Congress despite an infringement on a fundamental right.\textsuperscript{157} None of the cases discussed thus far has weighed independently these interests against each other. Instead, each of these cases relies on the 1972 Supreme Court case of \textit{Kleindienst v Mandel}.\textsuperscript{158}

In \textit{Kleindienst}, six American citizens challenged section 212(a)(28) of the INA, which denied a visa to Belgian journalist Dr. Ernest E. Mandel, an advocate of communism, because the Attorney General refused to grant a waiver authorizing Dr. Mandel's admission into the United States.\textsuperscript{159} Section 212(a)(28) barred entry into the country by those individuals who advocated or published on "the economic, international, and governmental doctrines of world communism," unless the individual received a waiver from the Attorney General.\textsuperscript{160} The American citizens bringing the suit were professors who had invited Dr. Mandel to speak or participate in colloquia with them.\textsuperscript{161} The American citizens claimed that the statute was unconstitutional on its face and as applied because it violated their First Amendment rights to hear and meet with Dr. Mandel.\textsuperscript{162}

After discussing the First Amendment interests at issue, the Court declined to apply strict judicial scrutiny to the case.\textsuperscript{163}

\begin{itemize}
  \item \textsuperscript{156} Id.
  \item \textsuperscript{157} See, for example, \textit{Azizi}, 908 F2d at 1133; \textit{Anetekhai}, 876 F2d at 1223.
  \item \textsuperscript{158} 408 US 753 (1972). See \textit{Fiallo}, 430 US at 792 ("We are no more inclined to reconsider this line of cases today than we were five years ago when we decided \textit{Kleindienst v. Mandel}."), \textit{Anetekhai}, 876 F2d at 1222 ("The Supreme Court made clear in \textit{Fiallo} that, in ruling on the constitutionality of a provision, we are to apply the same standard regardless of whether Fifth Amendment or First Amendment rights are asserted."), \textit{Azizi}, 908 F2d at 1133 ("The Court was not persuaded by the appellants' contention that a strict level of scrutiny must be adopted because the classification impinged on fundamental familial relationship rights of citizens and aliens. In the same vein, we reject the Azizis' contention that a strict level of scrutiny must be adopted here because Section 5 affects their right to marry.").
  \item \textsuperscript{159} 408 US at 756-59.
  \item \textsuperscript{160} Id at 755.
  \item \textsuperscript{161} Id at 759.
  \item \textsuperscript{162} Id at 760.
  \item \textsuperscript{163} \textit{Kleindienst}, 408 US at 769-70.
\end{itemize}
Court reviewed caselaw highlighting the broad scope of Congress's plenary power, and then considered the American citizens' First Amendment argument in detail. The Court did not suggest that First Amendment concerns could never prevail over laws made pursuant to Congress's plenary power; instead the Court found merely that the citizens' particular argument "prove[d] too much." The citizens' argument, as interpreted by the Court, would apply to almost every alien excludable under section 212(a)(28), since there probably would be an American citizen who would like to meet and speak with any alien seeking admittance to the United States. From a policy perspective, the Court preferred full deference to Congress's plenary power over a regime in which every section 212(a)(22) claim required a balancing of "the strength of the audience's interest against that of the government in refusing waiver to the particular alien applicant, according to some as yet undetermined standard."

_Fiallo_ and its progeny read _Kleindienst_ to hold that an impingement on a fundamental right is not sufficient to trigger strict judicial review of naturalization laws. These cases, however, have misread _Kleindienst_. _Kleindienst_ presents a very narrow holding:

_In the case of an alien excludable under § 212 (a)(28), Congress has delegated conditional exercise of this power to the Executive. We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant._

This statement evidences the Court's intent to apply its holding in this case specifically to section 212 of the INA and the First Amendment.
Amendment questions at issue. Thus, the specific language of the Kleindienst holding confirms that this holding is more restricted than courts later assumed in Fiallo and its progeny.

In addition, when considering the plenary power of Congress, the Court in Kleindienst took into account the implications of the citizens' First Amendment claims.\textsuperscript{170} The Court recognized the significance of the citizens' specific interest in "sustained, face-to-face debate, discussion and questioning."\textsuperscript{171} The Court, however, ultimately concluded that the citizens' specific First Amendment claim "would prove too much,"\textsuperscript{172} as explained above. Thus, the Court denied strict scrutiny analysis to avoid the "unsatisfactory results [that] would necessarily ensue" from its application in the Kleindienst case.\textsuperscript{173}

Fiallo and its progeny incorrectly rely on Kleindienst for the broad proposition that the plenary power of Congress takes precedence over an alleged infringement of a fundamental right. By investigating the First Amendment claim in depth and the wording its holding specifically,\textsuperscript{174} the Court in Kleindienst specifically avoided making a blanket statement to that effect.\textsuperscript{175} Additionally, the First Amendment slippery slope concerns evidenced by the Court in Kleindienst are not as evident in the marriage context. While any alien, and his citizen advocates, can make the argument that there are citizens who want to speak with him in the United States,\textsuperscript{176} certainly not all aliens could claim to be "immediate relatives" of American citizens or permanent residents for purposes of naturalization.\textsuperscript{177} Even allowing for the threat of sham marriages, the concern that using strict judicial scrutiny would provide an argument for every alien that seeks naturalization is unreasonable.

V. LIMITATIONS ON STRICT SCRUTINY

While Congress's plenary power should not limit a court's application of the strict scrutiny standard when the use of that

\textsuperscript{170} Id at 765-69.

\textsuperscript{171} Id at 765.

\textsuperscript{172} Id at 768.

\textsuperscript{173} Kleindienst, 408 US at 768.

\textsuperscript{174} Id at 770.

\textsuperscript{175} This Comment does not suggest that the Supreme Court does not have the authority to make such a blanket statement, only that it did not do so in Kleindienst.

\textsuperscript{176} Kleindienst, 408 US at 768.

\textsuperscript{177} Anetekhai, 876 F2d at 1219.
power implicates fundamental rights, there are other limitations on strict scrutiny. In *Zablocki*, the Court outlined a test that explains the appropriate circumstances under which to apply strict scrutiny.

A. *Zablocki* Test

In *Zablocki*, the Supreme Court introduced, by explicit statement and by example, a test to determine whether a given impingement on a fundamental right triggers strict scrutiny. In the context of the right to marry, the Court explained that "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." Hence, the Court indicated that it would permit some regulations on marriage. The Court expanded on this language to outline the parameters of a test for assessing the constitutionally of a given marriage regulation: only those regulations that "interfere directly and substantially with the right to marry" will face strict scrutiny.

The Court in *Zablocki* did not offer any explicit guidelines regarding the implementation of its "directly and substantially" test. The Court's analysis of the Wisconsin marriage statute in that case, however, read in conjunction with its earlier analysis in *Jobst*, elucidates those factors that weigh heavily in its test. Comparing *Zablocki* and *Jobst* is particularly instructive for two reasons: (1) the Court denied strict scrutiny analysis in *Jobst*, a right to marry case, and (2) the Court fashioned its holding in *Zablocki* to accommodate, rather than overrule, its holding in *Jobst*.

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176 *Zablocki*, 434 US at 386.
177 Id at 387.
179 *Jobst*, 434 US at 47.
180 Id.
181 *Zablocki*, 434 US at 387 n 12 ("The directness and substantiality of the interference with the freedom to marry distinguish the instant case from Califano v. Jobst.").
B. Distinguishing Jobst

Jobst involved the marriage of two cerebral palsy sufferers. The federal regulation at issue in the case terminated a dependant’s social security benefits upon marriage to anyone not also receiving benefits. Mr. Jobst, who suffered from cerebral palsy, qualified for disabled child’s insurance benefits after the death of his father. Mrs. Jobst, also a cerebral palsy sufferer, did not receive any social security benefits of her own, either before or after her marriage to Mr. Jobst. Consequently, Mr. Jobst lost his social security benefits when he married Mrs. Jobst, despite the fact that his spouse also suffered from a permanent disability.

The Court in Jobst found that the social security regulation did not significantly interfere with the decision to enter into a marital relationship. This finding proved to be the primary basis for differentiating the facts of Zablocki from the facts of Jobst. The Court in Zablocki stated that the social security legislation at issue in Jobst “placed no direct legal obstacle in the path of persons desiring to get married, and . . . there was no evidence that the laws significantly discouraged . . . any marriages.” Since the Court in Jobst found no significant interference with the exercise of a fundamental right, the Court refused to apply a strict scrutiny analysis. Instead, the Court applied the rational basis standard detailed in Jefferson v Hackney and Matthews v De Castro: the challenged statute is constitutional if it is “rational, and not invidious.” Dukes provides a more complete definition of the rational basis standard. In Dukes, the Court explained the rational basis standard as follows: “[u]nless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion or

184 Jobst, 434 US at 48.
185 Id at 48 and 54-55.
186 Id.
187 Id.
188 Jobst, 434 US at 48.
189 Id at 54 (“[T]he marriage rule cannot be criticized . . . as an attempt to interfere with the individual's freedom to make a decision as important as marriage.”).
190 Zablocki, 434 US at 387 n 12.
191 Jobst, 434 US at 54.
194 Jobst, 434 US at 54.
195 Dukes, 427 US at 297.
alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest."\(^{196}\)

While in *Jobst* the Court found that the regulation did not interfere with the right to marry, in *Zablocki* the Court found that the Wisconsin statute at issue interfered directly and substantially with the right to marry.\(^{197}\) *Zablocki* involved the rights of Wisconsin residents who were delinquent in their child support obligations.\(^{198}\) The statute provided that members of this group could not marry without first obtaining a court order granting them permission to marry.\(^{199}\) The Court held that this statute substantially interfered with the right to marry because, among other effects, it coerced some residents into forgoing their right to marry and forced others to suffer serious intrusions into their freedom of choice when exercising their right to marry.\(^{200}\)

The Court explicitly differentiated its holding in *Zablocki* from its previous holding in *Jobst*.\(^{201}\) The Court in *Jobst* stated that the marriage statute at issue did not interfere with the individual's freedom to make a decision on the important subject of marriage.\(^{202}\) The Court in *Zablocki* further explained this finding, reiterating that "[t]he Social Security provisions [in *Jobst*] placed no direct legal obstacle in the path of persons desiring to get married."\(^{203}\) Thus, the basis for the Court's differentiation between the two cases rested in the deterrent effects of the legisla-

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196 Id at 303.
197 *Zablocki*, 434 US at 387 n 12 (distinguishing *Jobst* on the grounds that the Social Security Act "placed no direct legal obstacle in the path of persons desiring to get married").
198 Id at 375.
199 Id.
200 Id at 387. It should be noted that, in addition to these burdens, the Court in *Zablocki* listed even more flagrant impingements on the right to marry:

Under the challenged statute, no Wisconsin resident in the affected class may marry in Wisconsin or elsewhere without a court order, and marriages contracted in violation of the statute are void and punishable as criminal offenses. Some of those in the affected class . . . will never be able to obtain the necessary court order, because they either lack the financial means to meet their support obligations or cannot prove that their children will not become public charges. These persons are absolutely prevented from getting married.

201 Id at 387 n 12.
tion, or, as the Court put it in Zablocki, how significantly the law discouraged persons desiring to get married. 204

VI. WHERE THE COURTS GOT IT RIGHT: THE MANWANI ALTERNATIVE

In Manwani v INS, 205 the Western District of North Carolina adopted a more appropriate balancing of fundamental rights and plenary power interests. In Manwani, the court addressed the same Section 5 issue that the Fifth and Second Circuits addressed in Anetekhai and Azizi. 206 Unlike those courts, the court in Manwani found that “the deferential standard of review applied in Fiallo and advocated by the government does not apply to the review of Section [5].” 207

The court in Manwani carefully distinguished the immediate case from Fiallo, which, as a Supreme Court case, amounted to binding precedent. 208 The court's first basis for differentiation lay in the distinction between substantive policy and procedural policy. 209 The court in Manwani found that Fiallo did not control because of “the crucial distinction enshrined in Fiallo (and numerous prior and subsequent decisions) between statutes that define categories of admissible aliens and statutes that deprive citizens or aliens of procedural rights.” 210 In substantiating this argument, the court relied heavily on the now-vacated holding of Escobar v INS, 211 a D.C. Circuit case dealing with an identical Section 5 claim. According to the court in Escobar:

[A] substantive provision is one that grants a status, whereas a procedural provision is one subordinate to the substantive grant and focusing on how or when a decision is to be made to award the previously authorized substantive status. A procedural provision is, in other words, one

204 Id.
206 Id at 1370.
207 Id at 1379.
208 Id at 1374-76.
209 Manwani, 736 F Supp at 1375-77 (“Fiallo requires the courts to maintain the distinction between statutory provisions that set forth categories of familial relationships and provisions that establish procedures designed to prevent circumvention of lawful admission requirements.”).
210 Id at 1375.
211 896 F2d 564 (DC Cir 1990), vacd without opinion, 925 F2d 488 (DC Cir 1991).
that does not take away the statutory entitlement but is aimed at the process by which the entitlement is gained.\textsuperscript{212}

Using this rationale, the D.C. Circuit found Section 5 to be procedural, and thereby freed itself from the \textit{Fiallo} framework.\textsuperscript{218} After granting a request for a hearing en banc, however, the D.C. Circuit withdrew the opinion,\textsuperscript{214} and later congressional action mooted the issue in the case.\textsuperscript{215}

Though the \textit{Manwani} and \textit{Escobar} decisions do not form binding precedent, their interpretations of the law evidence a growing recognition among the courts of the importance of fundamental rights. For example, the court in \textit{Manwani} cited the First Circuit case of \textit{Abourezk v Reagan}\textsuperscript{216} in support of its observation that “[r]ecent judicial decisions have recognized that the Immigration Act may not penalize the exercise of a constitutional right.”\textsuperscript{217} \textit{Abourezk} involved the claim of several American citizens that they were deprived of their First Amendment right to associate with and hear the speech of the Interior Minister of Nicaragua, whose visa had been denied.\textsuperscript{218} The court held that the government “may not, consistent with the First Amendment, deny entry [to aliens invited to impart information and ideas to American citizens] solely on account of the content of speech.”\textsuperscript{219} \textit{Abourezk} instructs that the First Amendment, by protecting not only speech but also the right to receive information and ideas, imposes limits on the government’s power to exclude aliens.\textsuperscript{220}

At least one Supreme Court case, \textit{Reno v American-Arab Anti-Discrimination Committee},\textsuperscript{221} has implicitly qualified \textit{Fiallo}'s bright line rule, and has instead asserted that determination of the appropriate level of scrutiny depends on the flagrancy of the

\begin{itemize}
\item \textsuperscript{212} Id at 567.
\item \textsuperscript{213} Id at 568 (“The legislative history of Section 5 indicates that its primary aim was procedural. Its purpose was to deter aliens facing exclusion or deportation from entering into sham marriages in the first place.”).
\item \textsuperscript{215} Id at 1662 (“Congress largely mooted the issue in 1990, by creating a limited exception [in the Immigration Act of 1990] for couples who can prove the bona fides of their marriages.”).
\item \textsuperscript{216} 592 F Supp 880 (D DC 1984), revd and remanded on other grounds, 785 F2d 1043 (DC Cir 1986), affd by an equally divided Court, 484 US 1 (1987).
\item \textsuperscript{217} \textit{Manwani}, 736 F Supp at 1378.
\item \textsuperscript{218} \textit{Abourezk}, 592 F Supp at 881-82.
\item \textsuperscript{219} Id at 887.
\item \textsuperscript{220} Id at 886-87.
\item \textsuperscript{221} 525 US 471 (1999).
\end{itemize}
impingement on a fundamental right. In *American-Arab*, the Court stated that First Amendment claims in removal hearings may be viable where the prosecution reflects discrimination "so outrageous that the [plenary power] considerations can be overcome."\(^2\)

Another Supreme Court case, *INS v Chadha*,\(^2\) has maintained the guarantees of the Constitution despite Congress's plenary power. In declaring Section 244(c)(2) of the Immigration and Nationality Act\(^2\) unconstitutional, the Court stated that "[t]he plenary authority of Congress over aliens . . . is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power."\(^2\)

One scholar has even read *Fiallo* to suggest the possibility that naturalization provisions could be struck down by the courts.\(^2\) This implication derives from *Fiallo*’s statement that that Congress's plenary power was "largely immune from judicial control."\(^2\)

VII. THE APPROPRIATE FRAMEWORK FOR THE DHS REGULATIONS

The DHS regulations interfere directly and substantially with American citizens' and permanent residents' right to marry aliens, and therefore fall within the *Zablocki* framework. The Court's definition of direct and substantial interference, as presented in *Zablocki*, includes any obstacle that significantly discourages marriage or makes marriage practically impossible.\(^2\)

This definition is consistent with the Court's holding in *Jobst*, since the Court viewed the fact that the Jobsts married as strong evidence that the federal regulation did not interfere directly and substantially with their exercise of the right to marry.\(^2\)

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\(^2\) See id at 491 ("[W]e need not rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome.").

\(^2\) Id.


\(^2\) *Chadha*, 462 US at 940-41.


\(^2\) *Fiallo*, 430 US at 792 (emphasis added).

\(^2\) *Zablocki*, 434 US at 387 n 12.

\(^2\) Id, citing *Jobst*, 434 US at 48 ("Indeed, [in *Jobst*] the provisions had not deterred the individual who challenged the statute from getting married, even though he and his
The DHS regulations, however, create a direct obstacle to marriage. In order for an international couple to marry and remain in the United States, the couple must conform to the DHS standard of a traditional American couple. The DHS, in effect, mandates the lifestyle that the couple must live. Whether the couple decides to adhere to the DHS guidelines, move out of the United States, or give up on marriage entirely, the DHS requirements create a substantial impediment to international marriages. Further, those couples that pursue marriages in the United States risk deportation of the alien-spouse upon a DHS finding that their marriage constitutes a sham marriage.

The burdensome effects of the DHS regulations parallel those cited in Zablocki: some citizen spouses will forgo their right to marry and others will suffer serious intrusions into their freedom of choice when exercising their right to marry. Those American citizens wishing to enter into international marriages will suffer the same impingements on their fundamental rights, via application of the "living in marital union" standard, as those cited by the Court in Zablocki. Accordingly, consistent with Zablocki, strict scrutiny provides the proper standard of review for international marriage cases challenging the DHS's "living marital union" standard.

CONCLUSION

In the arena of international marriage law, the Supreme Court must weigh two important interests: the American citizenry's right to marry and Congress's plenary power to regulate naturalization. In its cases reviewing naturalization laws, the Supreme Court has deferred to Congress's plenary power to regulate naturalization. In practice, this policy upholds the validity of virtually all congressional legislation that touches on the field of naturalization. In the case of marriage between a citizen and non-citizen, this deference has even taken precedence over the

wife were both disabled."

231 See Part I B.
232 See Zablocki, 434 US at 387.
233 See, for example, Fiallo, 430 US at 792 ("[I]t is important to underscore the limited scope of judicial inquiry into immigration legislation.").
234 See Azizi, 908 F2d 1130 (upholding the constitutionality of a two year non-residency requirement for aliens who marry US citizens while subject to deportation hearings).
citizen spouse’s fundamental and constitutionally protected right to marry.\textsuperscript{235}

The Supreme Court adopted its policy of deference to Congress without sufficient consideration of the fundamental rights at issue in the cases it considered. The Court has read \textit{Kleindienst} in the broadest and most extreme light—a reading which the \textit{Kleindienst} text neither requires nor encourages.\textsuperscript{236}

This Comment urges a reevaluation of the decision to apply minimal scrutiny to all fundamental right to marry cases connected to DHS legislation. Instead, those cases that involve a legitimate impingement on the right to marry, or any other fundamental right, should receive the same strict scrutiny generally afforded to fundamental rights claims.\textsuperscript{237} \textit{Manwani} offers a framework from which to develop a more appropriate balancing of fundamental rights and plenary power interests. In \textit{Manwani}, the Western District of North Carolina acknowledged that strict scrutiny should apply to naturalization cases that implicate fundamental rights.\textsuperscript{238} Now that the lower courts have outlined the proper analysis, the Supreme Court should take the next steps: acknowledging that strict scrutiny can and should apply to naturalization laws, and subjecting naturalization regulations that restrict fundamental rights to the \textit{Zablocki} direct and substantial standard.\textsuperscript{239}

\textsuperscript{235} See \textit{Anetakhai}, 876 F2d 1218 (upholding the constitutionality of a two year non-residency requirement for aliens who marry US citizens while subject to deportation hearings).
\textsuperscript{236} \textit{Kleindienst}, 408 US at 770.
\textsuperscript{237} \textit{Griswold}, 381 US at 497 (Goldberg concurring).
\textsuperscript{238} \textit{Manwani}, 736 F Supp at 1379-80.
\textsuperscript{239} \textit{Zablocki}, 434 US at 387.