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# Moral Economies of Family Reunification in the Trump Era

## Translating Natural Affiliation, Autonomy, and Stability Arguments into Constitutional Rights

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Family reunification has always been a central organizing principle of U.S. immigration law. Indeed, the vast majority of immigrants who acquire permanent residency in the United States each year do so not because of skills or labor market demands or refugee status but because of family ties (Abrams and Piacenti 2014). The presidency of Donald J. Trump upended this family primacy, exposing the lack of a central organizing theory of why governments should privilege family reunification. Although Joseph R. Biden’s administration is already undoing many of the Trump administration’s family separation policies, it is worth reflecting on the question of why it was so easy for a single president to dismantle a policy of family unity so quickly, as such a dismantling could easily happen again.

During his four years in office, President Trump pushed an aggressive anti-immigration agenda. Perhaps the most infamous manifestation of this agenda was his Department of Homeland Security’s (DHS) practice of separating parents from children at the U.S.-Mexico border and housing them separately in detention facilities. DHS conducted this mass separation of families pursuant to the Trump administration’s “zero-tolerance policy,” under which the Department of Justice prosecuted all adult aliens apprehended while crossing the border illegally and transferred their minor children to the custody of the Department of Health and Human Services (DHHS) during the pendency of their criminal proceedings (Kandel 2021). The number of families affected by this policy is still uncertain. Initial reports estimated that DHS had separated over two thousand children from their parents during the spring of 2018, and later reports by DHHS investigators suggest that thousands more may have been separated before the zero-tolerance policy had been officially announced.<sup>1</sup>

The separation of migrant families caused massive public outcry and inspired a series of demonstrations protesting the policy, united under the slogan Families Belong Together. The Families Belong Together protests reached their zenith on June 30, 2018, when a coalition of groups—including MoveOn, the American Civil Liberties Union, the Leadership Conference on Civil Rights, the National Domestic Workers Alliance, and dozens more—sponsored a “nation-wide day of action” to protest family separations by the Trump administration (Andone 2018). The coalition organized a march in Washington, D.C, as well as hundreds of sister rallies in other U.S. cities (Kirby and Stewart 2018). Across the United States, “families belong together” and phrases like it appeared on protest signs, in speeches, and in chants. Social media posts of the events used the tag #familiesbelongtogether (MoveOn 2018). The Families Belong Together protests are an example of the contemporary moralization of responses to family migration policies, as the vast majority of protesters relied on moral, rather than legal, arguments to oppose the zero-tolerance policy. Protesters appealed to notions of humanity, the harm done to children, and the love that family members feel for each other. Similar campaigns employing similar strategies can be found outside the United States, such as the Love Knows No Borders campaign in France (Amoureux au ban public 2017) and the Love Letters to the Home Office (2014) campaign in the United Kingdom.

The separation of parents from children at the border was far from the only Trump administration policy to affect family migration and family reunification. Early on, the president issued an executive order banning travel to the United States by individuals from specific countries (popularly known as the “travel ban” or “Muslim ban”).<sup>2</sup> He also called for an end to birthright citizenship, increased the evidentiary burden for demonstrating birthright citizenship (Pérez 2018), and decreased approvals of family-based visas (Rosenberg 2018).<sup>3</sup> As with the separation of parents from their children at the border, each of these policies generated significant resistance, and much of this resistance was couched in moral, rather than legal, terms. In response, the Trump administration frequently appealed to national security to defend its policies, arguing that too much deference to family reunification would lead to decreased border security and increased criminality (U.S. Department of Justice 2018).

President Biden reversed course on many of the Trump administration’s most high-profile anti-immigration policies in the first months of his presidency; already his administration has repealed the travel ban, ended the zero-tolerance policy, established a task force for reunifying separated families, and instituted restrictions and enforcement priorities for deportations.<sup>4</sup> However, the Trump administration’s policies and rhetoric demonstrated the vulnerability of family reunification rights and the lack of a coherent theory for articulating those rights in U.S. law. Those who opposed the Trump administration’s immigration

policies faced an uphill legal battle and would likely face similar difficulties if a future administration pursued similar policies. Most opportunities for family reunification in U.S. immigration law are contained within statutes or regulations, rather than U.S. constitutional law, meaning that the availability of family reunification exists largely at the whim of each Congress and presidential administration. Given the U.S. Congress's failure to enact immigration reform legislation and the Trump administration's hostile stance toward immigration, immigrant families and their advocates were often left with constitutional litigation as their last resort in arguing for family reunification rights. U.S. constitutional law itself has a relatively thin notion of family rights, and these rights are particularly circumscribed in the immigration context, where national security and foreign affairs interests often supersede individual interests in family unity.

Despite these challenges, the moral arguments made by commentators, journalists, individual citizens, and others at protests, in op-eds, and on social media were beginning to be translated into legal arguments in complaints, briefs, and court opinions. This chapter excavates and categorizes the primary moral arguments promoting family unity that emerged in response to the Trump administration's anti-immigration policies. Because the Trump administration's policies affected all forms of familial relations and brought heightened focus on family reunification beyond couples, this chapter will focus not only on marriage and partner migration but also on the right of parents to be reunited with their children. A survey of mainstream media, alternative media, and social media outlets reveals a seemingly extraordinary range of responses to the Trump administration's escalation of immigration enforcement and rhetoric.<sup>5</sup> Most of these moral arguments, however, can be divided into three broad categories: a *natural affiliation* argument, an *autonomy* argument, and a *social stability* argument. Furthermore, each of these arguments draws from its own history, tradition, and internal theory on the purpose and nature of the family. Each of the arguments also exists in contradiction—or at least in tension—with the others.

Although the Biden administration has undone many of the policies against which these arguments were levied, the arguments themselves deserve closer inspection, as they touch on the theoretical underpinnings of a right to family reunification, a right that is not yet widely recognized in U.S. courts. Understanding the theory behind this right can better equip advocates to translate these moral arguments into legal arguments in future litigation. The utility of these arguments in constitutional litigation will depend on the ability of advocates to adapt the arguments to relatively narrow jurisprudential frameworks. Finally, a close examination of two cases decided by the U.S. Supreme Court, *Obergefell v. Hodges* and *Kerry v. Din*, will help illustrate the difficulties that advocates face when invoking constitutional rights to challenge state action that keeps families apart.

### Natural Affiliation: “Families Belong Together”

By far the most common moral argument made against the Trump administration’s family immigration policies was a deceptively simple one, the idea that families naturally belong together. This notion has made its way into debates about immigration policy in a variety of ways, from an unspoken assumption that family ties are naturally rooted in biology to the very literal phrase “families belong together” that has become popular with pro-immigrant activists.

Activists first adopted the phrase “families belong together” as the central slogan for protests following reports that DHS had separated over two thousand children from their parents.<sup>6</sup> During this period of public outcry, the natural affiliation argument appeared in several versions. The simplest version of the natural affiliation argument was an appeal to human empathy and decency. This version asserts that separating families is cruel, particularly toward the children affected, but does not offer further interrogation of the reasons—biological, psychological, or cultural—this might be true. Rather, this version of the argument relies on an implicit assumption that parents and children share a natural or special connection, the severance of which is painful.

Protesters advancing this version of the argument emphasized the emotional trauma that family separation inflicts on children and referred to Trump administration policies as “child abuse” (Hamilton 2018). Protesters carried signs bearing the slogans “Families belong together / Las familias merecen estar unidas,” “Separating families is cruel torture,” “Make America humane again,” and countless more (see, e.g., Murdoch 2018; Families Belong Together 2018; AJ+ 2018a, 2018b). Other signs bore evocative imagery of cages, outstretched hands, and crying children, designed to convey the emotional gravity of family separation. Protesters interviewed at the marches called for the Trump administration and its supporters to imagine the emotional distress inflicted on separated children (Lei 2018).

Advocates have used this simplest version of the natural affiliation argument to oppose the Trump administration’s other anti-immigration policies. Similar appeals to empathy and emotion appeared in response to the “travel ban,” an executive order that restricted certain categories of people from entry into the United States if they came from Iran, Libya, North Korea, Syria, Venezuela, Yemen, or Somalia. For instance, Mohamed Alahiri, a U.S. citizen waiting for a waiver for his Yemeni wife, told reporters that his eight-year-old daughter was “crying day and night”: “She wants her sisters and mother. She’s lost 10 pounds and bites her fingernails until the meat comes out” (Michaelson 2019). The argument has also been used to garner public support for “sanctuary” policies, wherein state and local governments decide as a matter of official policy to limit their cooperation with U.S. Immigration and Customs Enforcement (ICE). Activists and state politicians have presented sanctuary policies as “another way

to keep families together” (Washington 2018). For example, Sam Hammar, a Massachusetts State Senate candidate, called for the passage of a Massachusetts sanctuary bill by juxtaposing “stories about babies being ripped from their mothers’ arms” at the border and “stories of families being torn apart right here in Massachusetts.”<sup>7</sup>

This version of the natural affiliation argument has also been used to oppose the Trump administration’s policies regarding visas and citizenship rights for same-sex partners and the children of same-sex couples (on the difficulties that same-sex couples face in the U.S. immigration system, see Luibhéid, this volume). Under the Trump administration, the Department of State’s policy treated the children of same-sex, U.S. citizen couples born through techniques such as surrogacy and in vitro fertilization as being “out of wedlock” and therefore subject to higher requirements for transmission of U.S. citizenship.<sup>8</sup> The State Department also announced that it would require proof of marriage before issuing family visas to same-sex domestic partners of foreign diplomats or employees of international organizations, a practice that made obtaining a visa more challenging for couples native to countries that have not recognized same-sex marriage (*BBC News* 2018). Critics of these policies have appealed not only to antidiscrimination principles but also to the natural affiliation argument, by focusing on the love that family members feel for each other and the cruelty of keeping family members separated.<sup>9</sup>

A second version of the natural affiliation argument offers a religious explanation for why families share this natural connection. For example, the Interfaith Immigration Coalition—a partnership of faith-based organizations—issued a joint statement condemning family separations, using the hashtag #Families-BelongTogether. There, John McCullough, president of Church World Services, stated, “Human dignity is granted to us by our creator and strengthened by our familial bonds. The administration’s recent attacks against families are unconscionable and violate the sanctity of the family unit. . . . As we honor our faiths, so too must we honor the family” (Tramonte 2018). Rebecca Linder Blachly, director of the Episcopal Church Office of Government Relations, expressed a similar sentiment, stating, “Separating children from their parents is both inhumane and ineffective, and is at odds with the priority of families within the Christian tradition” (Tramonte 2018). Underlying these statements is the belief that the family unit is not only natural but also divinely ordained; conversely, the separation of that family unit is immoral—even sinful.<sup>10</sup>

A third version of the natural affiliation argument explicitly invokes science as the basis for decrying family separation, particularly where young children are involved. This version of the argument posits that the natural connection between family members is a product of human psychology and casts the trauma of family separation as a mental health or medical issue. During and after the Trump administration’s zero-tolerance policy, multiple health-care professionals

and researchers warned that family separation inflicts “toxic stress” on separated children and that exposure to such stress over time inflicts lasting damage on a child’s development (Santhanam 2018; Rienzi 2018; Shonkoff 2019). After touring a “tender age shelter” in South Texas, Collen Kraft, president of the American Academy of Pediatrics, remarked, “We know that separating parents from children is not a great idea, but science tells us this is actually child abuse, because we’re impacting the development of their brains” (Rienzi 2018).

This scientific version of the natural affiliation argument appeared prominently in the U.S. House of Representatives’ investigation into the zero-tolerance policy’s implementation. As part of its oversight duties over DHHS, the House Committee on Energy and Commerce called Jack P. Shonkoff, director of the Harvard Center of the Developing Child, to testify about the effects of toxic stress; Shonkoff (2019) commented, “From a scientific perspective, the forcible separation of children from their parents is like setting a house on fire. Prolonging that separation is like preventing the first responders from doing their jobs.” A month later, the concept of toxic stress appeared again when the House Homeland Security Committee questioned the then secretary of Homeland Security Kirstjen Nielsen on the zero-tolerance policy.<sup>11</sup> Representative Lauren Underwood opened her questioning by saying, “I’m not a lawyer, I’m a nurse. Madam Secretary, I want to be very clear about what the family separation policy is doing to children’s mental and physical health.” Underwood then proceeded to ask Nielsen if DHS was aware that family separation causes toxic stress in children, to which the secretary responded that she was “not familiar with that term” (PBS 2019).

The use of the natural affiliation argument in advocacy echoes the arguments made by philosophers and political theorists who study the moral underpinnings of family reunification. For example, Martha C. Nussbaum names affiliation, including intimate family or personal relations, as one of the fundamental qualities that makes us human. So, too, does the experience of having been an infant, or other experiences of “extreme dependency, need, and affection” (Nussbaum 1995, 78). Iseult Honohan (2009, 772) expands on this concept, positing that “the fundamental human interest in and need for affiliation” demonstrates itself through the giving and receiving of care. Family members, she argues, have “certain special obligations to one another by virtue of their relationship” (Honohan 2009, 772). Caleb Yong (2016, 72–73) argues in a slightly different vein that it is those who are dependent on others—largely, but not exclusively, children—who have the strongest claim for a human right in association with an individual on whom they have become dependent, for not only material but also “attitudinal” care. These philosophical analyses supplement the basic affiliation argument in a different way than the religious and scientific versions of the argument do, through a recognition that interdependent, caring relationships are a feature of humanity and need to be supported and recognized in both culture and law. The nearest advocacy arguments have come

to articulating a care-based justification for natural affiliation has been in the context of breastfeeding mothers separated from children. There, the child is traumatized and endangered because of the sudden cessation of access to his or her mother's milk. But the mother suffers as well, both physically and psychologically, because she is unable to continue to fulfill the obligation of care that she has to her infant.<sup>12</sup>

The natural affiliation argument has strong emotional appeal and significant religious and scientific theories to support it. But how useful will it be in challenging family separation policies as a matter of law? In considering how well it would translate into a legal right, we should evaluate several aspects of it.

First, who would be the rights claimant? Or, put differently, which family members does the argument privilege? In most current iterations, although parents may have natural "rights" in the natural affiliation argument, the focus is squarely on the traumatized child who has been separated from his or her parents too early. Additional attention to the focus on caregiving as a necessary component of affiliation could strengthen rights claims by *parents*. Under this view, separation should be prevented not only to avoid trauma to the child but also to ensure that the parents are able to continue their "right to discharge special obligations" of care to their child (Honohan 2009, 772).

Next, what are the argument's politics? The natural affiliation argument can have a progressive or conservative tenor depending on how it is deployed. Although the argument was a favorite of progressives opposing President Trump's policies, it is easy to imagine it being used to oppose legal abortion, to punish criminally parents who abandon their children, or as an argument against tax subsidies or state sponsorship of childcare for working parents. Understanding the politics of the argument would be important for developing an advocacy strategy that could persuade conservative judges and also for thinking through the long-term policy implications of success in areas beyond the current dispute.

Finally, what is the argument's relationship to citizenship and national sovereignty? The natural affiliation argument in its purest form appears to be untethered to legal citizenship or geographic location. According to the inner logic of the argument, the citizenship or immigration status of the members of a family is irrelevant to the *moral* issue of whether its members can be separated, and the geographic location or legal jurisdiction also makes no difference.<sup>13</sup> In reality, of course, because the law is used to encourage and deter specific kinds of behavior, any legal application of the natural affiliation theory would need to take into account various options available to the members of the family and the choices they have made. The remedy available to a family asserting a right to live together, for example, will be different if there is only one country where that is possible. The structure of U.S. immigration law, in addition, distinguishes between those who are inside and outside the border and those who are in

various states of citizenship, membership, or nonmembership; all of these factors will matter in how the natural affiliation argument could emerge in specific cases.

### **Autonomy: Individuals Have the Right to Choose Their Families**

Although natural affiliation has been far and away the most popular advocacy argument, a distinct argument that emerged in some of the debates surrounding the Trump immigration policies is quite different. This second argument, one that focuses on autonomy, emphasizes the importance of individual choice in family formation. This argument expresses family separation not as a loss of connection but as a denial of the fundamental freedom of choice.

The autonomy argument has been deployed in a variety of contexts where immigration enforcement prevents parents, children, and spouses from freely living together, especially where at least one family member is a U.S. citizen. For example, members of the Libertarian Party have leveled such arguments at the Trump administration's decision not to renew temporary protected status (TPS) for immigrants from El Salvador, where nonrenewal will force nearly two hundred thousand American-born U.S. citizen children with TPS-recipient parents either to live without a parent or to leave the United States. These critics characterized the decision to end the TPS program for Salvadorans as an impermissible government interference with individual family decisions (Libertarian Party 2018).

Activists also leveled the autonomy argument against the travel ban. Sirine Shebaya, an attorney for the civil rights organization Muslim Advocates, called the travel ban "a ban on families being reunified in the United States [and] a ban on families and communities being able to live normally and freely just like everybody else in the United States" (Yu 2018). Najib, a naturalized citizen of Syrian origin who gave only his first name, described the frustration he felt when the travel ban blocked his petition for a family visa for his mother, saying, "I feel like a citizen that literally has reduced rights—it doesn't feel right" (Yu 2018). Shebaya's and Najib's comments use the autonomy argument to assert an associational right to live with one's family.

The autonomy argument has also appeared in response to a reported ICE practice of detaining spouses who appear at U.S. Citizenship and Immigration Services offices for marriage visa interviews. Under current immigration regulations, certain undocumented immigrants who marry a U.S. citizen may apply for a provisional unlawful presence waiver of inadmissibility, a mechanism designed to minimize the length of spousal separation during marriage visa processing.<sup>14</sup> However, under the Trump administration, immigration attorneys noticed "an unmistakable swell" of ICE detentions at marriage interviews, such that they could "no longer in good conscience encourage their clients to go to their marriage interviews" to pursue provisional waivers.<sup>15</sup>

Lilian Calderon, one of many spouses caught in this bind, used the autonomy argument in response to her detention, remarking:

I didn't understand. How could they do this to my family when I was just following regulations? Why was I being taken to an undisclosed location? . . . [A year after being released], my life is in limbo. . . . I am grateful to not be in detainment. But our laws are so broken that a Rhode Islander like myself can't love or live. Plainly, I'm not allowed to live up to my potential as a human being or citizen and as I write this I don't know if I will ever be.<sup>16</sup>

Calderon and her family certainly experienced emotional distress while she was detained, enough that she could make a natural affiliation argument that her "family belongs together." This part of her statement, however, makes a broader normative claim that immigration law should not interfere with her ability to love and live with whom she wishes.

Like the natural affiliation argument, the autonomy argument is not new. It is in fact quite firmly grounded in liberal political theory.<sup>17</sup> Matthew Lister (2010, 721), for example, considers family reunification as a subspecies of "the fundamental right to form intimate relationships of one's choosing," a right he understands as essential "in the development and exercise of what [John] Rawls calls 'the moral powers.'" Lister argues that this right, in turn, flows from a more general right to freedom of association, where intimate association deserves especially important status (Lister 2010, 733).<sup>18</sup>

Just as we considered how the natural affiliation argument would translate into legal language, we can evaluate the autonomy argument along the same axes. First, who are the rights claimants? Like the natural affiliation argument, the autonomy argument has been used in defense of the parent-child relationship. However, while the natural affiliation argument focused on children as rights claimants, the autonomy argument focuses primarily on parents' claims to a right to reunification. Only the parents have obtained the ability to exercise their autonomy as free adults. When applied to the spousal relationship, the argument confers autonomy interests on men and women, although historically, the argument has been one of husbands' rights to exercise citizenship by choosing and taking responsibility for their wives (Calvo 1991). Although the focus in the current debates has been on immediate family relationships, there is nothing inherent to the autonomy argument that would prevent it from being applied to extended family relationships. The exercise of autonomy, however, requires one to have legal status (e.g., adulthood) that allows one to make autonomous choices.

Like the natural affiliation argument, the autonomy argument is politically flexible. It is also the argument most appealing to libertarians and has been embraced by libertarian philosophers and advocates (Van der Vossen and Brennan 2018; Babcock 2014).

Finally, unlike the natural affiliation argument, the autonomy argument is very much tethered to citizenship. Consider again Najib's claim that "I feel like a citizen that literally has reduced rights—it doesn't feel right." This tying of autonomy to the exercise of citizenship does not necessarily mean that the person exercising citizenship is someone who has legal citizenship status. The autonomy argument has been raised by individuals who lack legal citizenship but nevertheless consider themselves members of their communities. Consider Lillian Calderon's identification of herself as a "Rhode Islander" who "can't love or live" and is "not allowed to live up to [her] potential as a human being or citizen." Unlike other regimes, such as European human rights law, however, U.S. law has more explicitly tied the exercise of autonomy to those with formal status. This exercise of citizenship through family choice has been at the core of American identity from the conquest and settlement of the United States, to the creation of the family property systems that supported slavery in the American South, to the integration of former slaves into the polity following the Civil War (Cott 2002; Rana 2014).<sup>19</sup> As a result, successful translations of the autonomy argument into constitutional claims will be easier when a citizen or someone with durable legal status is the claimant.

### **Stability: Families Promote a Well-Functioning Society**

A third argument levied against the Trump family policies is one that emphasizes the good of the community. This argument contends that the family unit promotes social stability. As such, the government should foster healthy marriages and strong parent-child relationships and encourage families to live together. Conversely, if the government enacts policies that threaten family unity or make it harder for families to thrive, then society will become less stable and less safe. (This argument, as Saskia Bonjour and Massilia Ourabah's chapter in this volume makes clear, can also be used to exclude or denigrate family structures believed to be contrary to social stability, such as polygamy.)

Because of its focus on the benefits to American society, the stability argument has appeared most frequently where immigration policy threatens immigrant and mixed-status families—where some members are undocumented, while others are citizens or have lawful immigration status—who are already living within the United States. Two versions of the stability argument have emerged. The first understands families as good for society because the love and support of the family structure helps people succeed in life. As the historian Carly Goodman argued in an op-ed, "Reuniting families through the immigration system is not only humane—recognizing that for many people, families are a source of love and support—but also contributes to stability, prosperity and stronger communities: Having support networks increases the odds of people succeeding and contributing to their communities."<sup>20</sup> In other words, the

natural affiliation argument is not wrong, but there is also a societal interest in strong families. Conversely, so the argument goes, disrupting the family structure makes it more difficult for people to succeed and contribute to society. In another op-ed, Janet Murguía gives examples of how disrupting the familial support network is bad for the country, noting that children in disrupted families are less likely to succeed. Pointing toward toxic stress, school absenteeism, and financial hardship resulting from family separations, she asserts that the Trump administration's policies "could disrupt an entire generation of American children" by "chipping away at what makes this country great: the American family."<sup>21</sup>

Because the Trump policies attacked the parent-child relationship so directly, many of the narratives and images focused on by activists involved children. But the Trump administration also curtailed many forms of family reunification, including not only for spouses but also for grandparents and siblings. One of the objections to the travel ban, for example, was that it prevented U.S. citizens from being with extended families for important life events, such as weddings, graduations, and funerals, and litigants successfully challenged the administration's exclusion of "grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins" as people with a "bona fide relationship" to a person in the United States.<sup>22</sup> Additionally, the number of family-sponsored visas granted during the Trump presidency declined precipitously, from over 238,000 in 2016 to fewer than 20,000 in 2021; family-sponsored visas in the United States include visas for minor and adult children of permanent residents, as well as adult children and siblings of U.S. citizens (Anderson 2020). Extended families are often touted as one of the more stabilizing forces for immigrants, as they help one another to acculturate and provide financial stability (Abrams 2013b).

The second version of the stability argument posits that the fear of family separation can prevent families from thriving, thereby undercutting the benefit to society that the family unit would normally provide. This version of the argument is distinct but logically related to the first. Under this version of the argument, the *threat* of family separation disincentivizes families from living openly in society and availing themselves of societal benefits, even where they have not been physically separated. As a result, those families may struggle, and the benefits of familial love and support that the first version of the argument highlights are undone.

This version of the stability argument is notably one of the rationales behind the "sanctuary jurisdiction" movement. Advocates for sanctuary policies have argued that the cooperation of local police with ICE discourages undocumented immigrants and their family members from availing themselves of two key benefits of society: the protection of local police and access to the justice system. As a result, the family members affected become more vulnerable and less likely

to be productive members of society. For example, in promoting the Massachusetts Safe Communities Act, the Massachusetts Immigrant and Refugee Advocacy Coalition argued: “Many immigrants fear that calling 911 or speaking to police will lead to separation from family members—especially children—making them more vulnerable to domestic abuse, wage theft and other crimes. Barring state and local law enforcement and court personnel from asking people about their immigration status would send a strong message that in our Commonwealth, police protect us all” (MIRA Coalition 2019). In support of a similar sanctuary bill in California, governor Jerry Brown asserted that reducing cooperation with ICE would bring comfort to families living in fear and promote safer communities (Adler 2017).<sup>23</sup> Thus, sanctuary policies may be understood as seeking not only to reduce the number of families separated by ICE but also to allow immigrant and mixed-status families to stop living in fear and avail themselves of society’s protection.

Similar arguments have been made concerning other societal benefits such as school attendance and access to health care (Artiga, Damico, and Garfield 2018).<sup>24</sup> Advocates have noted that the threat of family separation by ICE has disincentivized mixed families from accessing health care, education, and public benefits such as Medicaid and SNAP (Supplemental Nutrition Assistance Program). Maria Hernandez, director of a Texas nonprofit serving children with special needs, spoke to parents who “feel like they can’t risk any attention from the government, even if that means losing badly-needed benefits for their kids” (Lopez 2018). She remarked that those parents were opting out of public benefits “out of fear of deportation . . . out of fear of having their children being penalized in some way and potentially losing a parent” (Lopez 2018). Once again, the implications of this fear effect is that affected family members, especially children, will go without social benefits and be less likely to become thriving members of society.

Like the autonomy argument, the stability argument is fundamentally grounded in political theory. Undergirding this social stability argument is a deep-seated belief that the family unit is a good way to organize society. Jean-Jacques Rousseau (1979) famously argued that the family is a microcosm of the state, in which children learn to love and become loyal to the state.<sup>25</sup> Contemporary theorists understand the family as important to stability because the family is our culture’s method of addressing “the fact of dependency” (Eichner 2010, 48).

How will the social stability argument translate into legal claims? Unlike the other two arguments, this argument focuses on society at large rather than on individual rights claimants. As such, it is less useful as the basis of a legal claim and more useful as supporting evidence for why the state should care. However, a version of the natural affiliation argument focused on the importance of caretaking relationships could be supplemented by arguments about how those relationships promote social stability.

Like the other arguments, the politics of the social stability argument are potentially wide-ranging (for a discussion of family migration and its perceived connection to the “national legal order, gender order, and identity order” in French political history, see Bonjour and Ourabah, this volume, 59). Social stability could have great appeal to conservatives who want to preserve the traditional family because they believe it supports a moral and organized society. It could also be appealing to progressives who believe that the state should supplement the caregiving families provide for each other through subsidies and other means.

Finally, the social stability argument does not have a clear connection to citizenship status. With regard to already existing families, it acknowledges their presence and argues that it is good for society that they remain intact. With regard to families that do not yet exist, it would encourage the formation of families. Because the social stability argument operates as evidence for the positive outcomes of recognizing rights under the other two arguments but not as a rights claim on its own, its tie to citizenship will rely in part on which of the other arguments it supports.

### **Translation of Moral Arguments into Constitutional Arguments**

How do these three moral arguments translate into constitutional claims? Although U.S. law has long privileged family unity to an extent rarely seen in other countries, this privileging of the family has taken place outside the context of constitutional law, so rights claims to family unity are very difficult to make. Despite this difficulty, litigants and courts began to articulate the moral claims made in response to Trump immigration policies in constitutional terms.

#### ***Statutory Family Rights***

To understand the context in which these constitutional claims arose, one must understand the two major mechanisms through which U.S. law has fostered family unity, both of which are extra-constitutional. The first is reflected through the common law of the family, which was reflected early on in state case law and later through state statutes. This body of law set up a hierarchical system where fathers, husbands, and masters possessed legal responsibility and control over children, mothers, and servants (or, in slave states, enslaved people). Volumes have been written on the history of the common law of the family, and in particular on the law of coverture, whereby married women “perform[ed] everything” under the “wing, protection, and cover” of their husbands (Blackstone 2016, 442). For our purposes, the important principle emanating from coverture was one of marital unity. Husbands had a legal and financial responsibility to their wives, and wives had a responsibility to serve their husbands. These mutual responsibilities required a shared domicile, the right of the husband to

establish the location of the family residence and the obligation of the wife to follow (Abrams 2013a).

Thus, coverture and similar doctrines concerning parent-child and master-servant relationships embodied a version of the autonomy argument that used hierarchical status categories, reified traditional gender roles, and supported white supremacy. But this version of the autonomy argument came not in the form of a federal constitutional right to family unity but instead a network of state case law, statutes, and state constitutional provisions that structured the relationships between family members in their everyday lives. In other words, husbands had the right to live with their wives not because the U.S. Constitution said so, but because it was the way that they fulfilled their legal obligation to provide and take moral responsibility for their wives; wives had no “right” to be with their husbands at all, but had a legal responsibility to serve them (Abrams 2013a).<sup>26</sup>

The second vehicle for family reunification in U.S. law comes through federal immigration statutes. Early immigration to the United States was largely unrestricted, but when Congress began to enact quotas in the early twentieth century, it included preferences for family members.<sup>27</sup> These preferences were amended and codified in the Immigration and Nationality Act (INA) in 1952 and retained in the Immigration Act of 1965, which did away with national origin quotas and instituted labor-based visas (Abrams 2013b).<sup>28</sup>

Like earlier common law and state statutory mechanisms for fostering family unity, the federal statutory approach implicitly endorses the autonomy argument for family reunification. The statute permits individuals who already have status, either legal citizenship or permanent residence, to exercise their freedom to choose with whom they will live by sponsoring family members to join them in the United States.<sup>29</sup> There is no corresponding right of a noncitizen or nonresident to join a U.S. citizen or resident family members. The statute makes no moral distinction between family reunification and family formation; U.S. citizens can sponsor their spouses for a visa the day after they marry or fifty years later. These features and others have led scholars to observe that modern immigration law reflects the earlier structures of coverture in U.S. common law (Calvo 1991; Balamwalla 2014). Just as under the doctrine of coverture a wife’s legal identity was subsumed by her husband’s, under contemporary immigration statutes the primary beneficiary makes the decision whether to sponsor his or her spouse; the spouse has no claim unless the primary visa holder chooses to sponsor his or her application.

### ***Constitutional Family Rights***

Although U.S. law treats the family as a central organizing principle in common law and privileges family unity over most other factors in its immigration statutes, family unity has not received broad protection in constitutional law. One important reason why is that the U.S. Constitution is fairly short and terse, and

the Supreme Court has often shied away from reading rights into it that are not textually present. To be sure, when the court has read the Constitution expansively, the rights in question have often involved the family. These instances, however, have been fairly infrequent, and the resulting opinions have been written in ways that curtail the scope of the right in question (Meyer 2000). They have also been framed almost exclusively using an autonomy model of the family: these are cases about the rights of *individuals* to make decisions about choices such as whether to use contraception, whether to obtain an abortion, how to educate a child, whether a child's grandparents can visit, or whether to marry. These have not been cases about the rights of a family as a unit (Lau 2006).

Recently, the U.S. Supreme Court had two occasions to consider family rights in a constitutional context. In *Obergefell v. Hodges*, the Supreme Court heard the cases of several same-sex couples who challenged various restrictions on same-sex marriage under state law in Ohio, Michigan, Kentucky, and Tennessee; in a landmark opinion, the court established a constitutional right to marry.<sup>30</sup> In *Kerry v. Din*, Fauzia Din, a U.S. citizen, challenged the U.S. government's denial of the visa application of her husband, Kanishka Berashk; Din and Berashk had filed a petition for a spousal visa, but the U.S. embassy in Islamabad, Pakistan, denied Berashk's visa application, informing him only that he was inadmissible to enter the United States under section 212(a)(3)(B) of the INA, the section of the statute that covers terrorist activities. The court established that a U.S. citizen has a due process liberty interest in his or her marriage to a noncitizen, although the court determined that Din's due process interest was not violated when the United States refused her husband a visa with very little explanation.<sup>31</sup> Both cases illustrate the perils of asserting a constitutional claim to family unity under U.S. law.

*Obergefell* is instructive because the justifications the majority opinion uses to support a constitutional right to marry loosely track the moral arguments identified above. In *Obergefell*, the majority opinion identified four "principles" and "traditions" that "demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples."<sup>32</sup> The majority opinion leads with the autonomy argument: "A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy."<sup>33</sup> This notion of autonomy emphasizes choice and self-definition. "Choices about marriage shape an individual's destiny," the court explained. It then cites to the Supreme Judicial Court of Massachusetts's opinion in *Goodridge v. Dep't of Pub. Health*, which held that because marriage "fulfills yearnings for security, safe haven, and connection that express our common humanity, [it] is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition."<sup>34</sup>

The next *Obergefell* principle is a marriage-focused version of the natural affiliation argument. "The right to marry," the court explained "is fundamental

because it supports a two-person union unlike any other in its importance to the committed individuals.”<sup>35</sup> This argument appears somewhat tautological (“marriage is marriage because it is [insert definition of marriage]”), but a close look reveals that it has a similar basis to the biological, psychological, and religious bases that support other uses of the natural affiliation argument. The opinion cites to *Griswold v. Connecticut*, noting that the court in that opinion described marriage as “older than the Bill of Rights.”<sup>36</sup> The idea is that marriage is *pre-legal*, a natural coming together that the law should not impede, recognized by law precisely because it precedes it.

The social stability argument also shows its face in *Obergefell*, in another principle identified by the opinion: “this Court’s cases and the Nation’s traditions make clear that marriage is a keystone of our social order.”<sup>37</sup> Here, the court quotes from *Maynard v. Hill*, describing marriage as “the foundation of the family and of society, without which there would be neither civilization nor progress.”<sup>38</sup> Curiously, the *Obergefell* majority relies on social stability as a justification for the right to marry, not as a justification for state regulation of marriage as has been more typical in constitutional litigation.<sup>39</sup>

Finally, *Obergefell* included an additional principle supporting the right to marry: marriage “safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”<sup>40</sup> The implication here is that childrearing, procreation, and education are also protected constitutionally, perhaps for the same reasons marriage is.

Thus, in *Obergefell*, we see the three moral arguments made by activists effectively translated into a constitutional right to marry for same-sex couples. Despite the apparently broad reach of this right, it is of more limited use than might initially appear, especially in the context of immigrant families. The right is most useful in challenging laws that prohibit particular classes of people from marrying or that deny recognition of those marriages. It is less useful in challenging state action that keeps families apart.

To understand that difficulty, *Kerry v. Din* is instructive. This case, decided just days before *Obergefell*, addressed squarely an issue of family reunification. There, a U.S. citizen woman sought to sponsor her husband for an immigrant visa and the government denied the petition on grounds of counterterrorism. The government, however, gave Din almost no information about its reasons for denying the visa, either by specifying with more particularity the statutory grounds or by sharing purported facts about her husband’s activities. In contrast to *Obergefell*, in *Din* the court was untroubled by the denial of family rights. Four members of the court (dissenting) asserted that Din had a constitutional liberty interest in her spouse’s visa application. Three justices (Justice Antonin Scalia, authoring a plurality opinion joined by two others), asserted that she had no such interest. Two justices (Justice Anthony M. Kennedy, authoring a concurrence joined by one other), held that even assuming Din had such an interest, her due

process rights had not been violated, largely because of the government's interest in preventing terrorism.<sup>41</sup> The *Din* opinions highlight the tension between recognizing a constitutional right to family reunification and deference to the executive branch where national security concerns are raised. In summary, although six justices entertained the idea that *Din* had a constitutional right to family reunification, the majority of justices voted that the government's denial of her husband's visa on national security grounds, with little to no explanation, did not violate whatever rights she might have had.

The open question after *Din* is whether the court could recognize a constitutional liberty interest in family reunification absent the facts suggesting terrorist activity; claims of terrorist activity or threats to national security have long been mobilized to upend family unity (*Abrams* 2017). There are hints in Justice Kennedy's concurrence that the court might be more expansive in cases where terrorism is not an issue. Much of the opinion focuses on the importance of the state's interest in combating terrorism and the care with which Congress crafted the relevant section of the INA; it is only in the context of alleged terrorism that Congress is not required to provide an alien denied a visa with the "specific provision under which the alien is admissible."<sup>42</sup> The opinion suggests that the constitutional liberty interests of U.S. citizens in living with their families must be balanced against federal interests and that in the counterterrorism context ("this sensitive area"), Congress "evaluated the benefits and burdens of notice in this sensitive area and assigned discretion to the Executive to decide when more detailed disclosure is appropriate."<sup>43</sup> The implicit suggestion is that in other, less sensitive, areas, lodging all discretion to carry out this balancing in the executive might be inappropriate. The composition of the court, however, has shifted substantially since *Obergefell* and *Din*. Justice Kennedy, author of the *Obergefell* majority and controlling *Din* concurrence, has retired, and Justice Scalia, author of the *Din* plurality, and Justice Ruth Bader Ginsburg, who joined the dissent, have passed away. It is doubtful but not impossible that their replacements, Justices Neil M. Gorsuch, Brett Kavanaugh, and Amy Coney Barrett would have a more expansive view of family reunification rights than those of their predecessors.

Assuming for the moment that the court *would* recognize a constitutional liberty interest in family reunification in cases that do not involve allegations of terrorism, what would this right look like? Given previous case law, it is quite likely that it would be an autonomy right. Most U.S. constitutional cases have involved autonomy—parental decision-making about children's education, decisions about whether to use contraception or undergo an abortion, and decisions about whom to marry. *Obergefell* opens up this space a bit, by introducing the natural affiliation and social stability arguments side by side with autonomy. Without the autonomy argument, however, these other arguments are likely to flounder. In *Din*, the only reason that the court appeared to take seriously the

claim of a constitutional liberty interest was Din's status as a U.S. citizen. And when the Trump administration curtailed its initial travel ban, it was to remove application of the ban to individuals with permanent residency—individuals who, in other words, had already been granted a certain level of membership in the polity that guaranteed them some autonomy.

### Conclusion

U.S. constitutional law has historically not been a space for the flourishing of family rights. The Supreme Court has identified and enforced constitutional family rights sparingly, and most family rights arise instead from state common and statutory law or federal statutory law. Nevertheless, there is some room to make claims for family reunification. The moral arguments made by activists and litigants—natural affiliation, autonomy, and social stability—all have precedents in constitutional family law. In order to mobilize these arguments in the new context of family reunification, litigants will need to find ways to couch these arguments in autonomy terms, even where the autonomy argument may not be the most natural fit. The proliferation of these moral arguments, however, may indicate that change is around the corner. The American people have transformed the meaning of their Constitution multiple times, not through amendments but through what Bruce Ackerman (1993) has termed “constitutional moments,” periods in history in which Americans are actively involved in the construction of the meaning of the Constitution. One cannot know with certainty if one is “in” a constitutional moment, but it is fair to say that the United States (and much of the world) is currently a state where many of our political norms—including a commitment to some form of welfare state, an openness to authorized immigration, and an understanding of the United States as having a leadership role internationally—are actively contested.

With the end of the Trump presidency, this moment might initially seem less urgent. Many of the Trump administration's anti-immigration policies have already been repealed, and, as a result, much of the litigation—and the arguments we have highlighted in this chapter—around those policies will not reach the Supreme Court. However, at the time of this writing, many of the families separated by policies like the travel ban and zero tolerance remain separated because of Trump-era COVID-19 restrictions on certain family-based visas, and some separated family members simply have not yet been located.<sup>44</sup> Furthermore, it is important to remember that Biden was able to reverse much of the Trump administration's immigration agenda so quickly because he could replace Trump's executive orders with his own, without the need for congressional action. Although the Biden administration and Democrats in the House of Representatives have proposed a series of immigration reforms, including eliminating some barriers in the family-based immigration system, it is quite possible

that the U.S. immigration system will remain subject to sweeping change by executive action for the foreseeable future, and even statutes can be undone.<sup>45</sup> This inherent instability underscores the relative lack of constitutional precedents supporting a right to family reunification in U.S. immigration law, a gap that advocates and litigants will have to bridge in the absence of statutory rights and shifting enforcement priorities. In other words, even if the end of the Trump presidency means that the immediate threats to family reunification have abated, the unstable nature of U.S. immigration law means that these arguments will be deployed in the near future with another series of executive orders. If, indeed, a future administration forces the issue, then we will be, as we were during Reconstruction and the New Deal, in a moment where our fundamental understanding of our Constitution could undergo radical change.

## NOTES

1. Philip Bump, "The Children Separated from Their Parents, by the Numbers," *Washington Post*, July 9, 2018, [https://www.washingtonpost.com/news/politics/wp/2018/07/09/the-children-separated-from-their-parents-by-the-numbers/?noredirect=on&utm\\_term=.264c5480e393](https://www.washingtonpost.com/news/politics/wp/2018/07/09/the-children-separated-from-their-parents-by-the-numbers/?noredirect=on&utm_term=.264c5480e393); Miriam Jordan, "Family Separation May Have Hit Thousands More Migrant Children than Reported," *New York Times*, January 17, 2019, <https://www.nytimes.com/2019/01/17/us/family-separation-trump-administration-migrants.html>.
2. "Protecting the Nation from Foreign Terrorist Entry into the United States," 82 Fed. Reg. 13209 (March 9, 2017), <https://www.federalregister.gov/documents/2017/03/09/2017-04837/protecting-the-nation-from-foreign-terrorist-entry-into-the-united-states>.
3. On Trump's call to end birthright citizenship, see Julie Hirschfeld Davis, "President Wants to Use Executive Order to End Birthright Citizenship," *New York Times*, October 30, 2018, <https://www.nytimes.com/2018/10/30/us/politics/trump-birthright-citizenship.html>.
4. "Proclamation on Ending Discriminatory Bans on Entry to the United States," White House, January 20, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-ending-discriminatory-bans-on-entry-to-the-united-states/>; "Memorandum to Prosecutors: Rescinding the Zero-Tolerance Policy for Offenses under 8 U.S.C. § 1325(a)," Office of the Attorney General, January 26, 2021, <https://www.justice.gov/ag/page/file/1360706/download>; "Executive Order on the Establishment of Interagency Task Force on the Reunification of Families," White House, February 2, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-the-establishment-of-interagency-task-force-on-the-reunification-of-families/>; "Memorandum: Interim Guidance: Civil Immigration Enforcement and Removal Priorities," U.S. Immigration and Customs Enforcement, February 18 2021, [https://www.ice.gov/doclib/news/releases/2021/021821\\_civil-immigration-enforcement\\_interim-guidance.pdf](https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf).
5. To be sure, not all responses have been negative ones. There have been many responses that applaud the Trump administration's approach. What is notable here, however, is the new emergence of moral arguments for an expanded right to family unity, which is why we focus on the negative responses to the administration's approach.
6. Bump, "Children Separated from Their Parents."

7. Sam Hammar, “Families Belong Together,” *Patch* (Malden, MA), June 18, 2018, <https://patch.com/massachusetts/malden/families-belong-together>.
8. Sarah Mervosh, “Democrats Urge Pompeo to End Policy Used to Deny Citizenship to Children of Gay Couples,” *New York Times*, June 6, 2019, <https://www.nytimes.com/2019/06/06/us/citizenship-immigrants-lgbtq.html>; Sarah Mervosh, “Gay U.S. Couple Sues State Dept. for Denying Their Baby Citizenship,” *New York Times*, July 23, 2019, <https://www.nytimes.com/2019/07/23/us/state-department-assisted-reproductive-citizenship.html>.
9. Mervosh, “Gay U.S. Couple Sues.”
10. Kurtis Lee, “Religious Groups and Leaders Call Trump’s ‘Zero Tolerance’ Immigration Policy Sad, Sinful and Immoral,” *Los Angeles Times*, June 15, 2018, <https://www.latimes.com/nation/la-na-trump-family-separation-religion-20180615-story.html>.
11. Alan Gomez et al., “Democrats Attack Trump Immigration Policy; Kirstjen Nielsen Grilled over Family Separations,” *USA Today*, March 6, 2019, <https://www.usatoday.com/story/news/politics/2019/03/06/trump-immigration-policy-under-attack-democrats-hearings-kirstjen-nielsen-daca-tps/3074583002/>.
12. Rachel Brown and Georgia Travers, “The Muslim Ban Expands the Cruel Policy of Family Separation,” *Washington Post*, July 3, 2018, <https://www.washingtonpost.com/news/global-opinions/wp/2018/07/03/the-muslim-ban-expands-the-cruel-policy-of-family-separation/>.
13. Who “counts” as a member of a family, however, is of course very much tethered to national identity, values, and law.
14. See “Waiver of Certain Grounds of Inadmissibility,” 8 C.F.R. 212.7(e) (2019); U.S. Citizenship and Immigration Services, Department of Homeland Security, Final Rule, “Expansion of Provisional Unlawful Presence Waivers of Inadmissibility,” 81 Fed. Reg. 50243 (July 29, 2016), <https://www.federalregister.gov/documents/2016/07/29/2016-17934/expansion-of-provisional-unlawful-presence-waivers-of-inadmissibility>; U.S. Citizenship and Immigration Services, Department of Homeland Security, Final Rule, “Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives,” 78 Fed. Reg. 536 (January 3, 2013), <https://www.federalregister.gov/documents/2013/01/03/2012-31268/provisional-unlawful-presence-waivers-of-inadmissibility-for-certain-immediate-relatives>.
15. Vivian Yee, “A Marriage Used to Prevent Deportation; Not Anymore,” *New York Times*, April 19, 2018, <https://www.nytimes.com/2018/04/19/us/immigration-marriage-green-card.html>.
16. Lilian Calderon, “My Turn: Lilian Calderon: A Year of Fear under Immigration Law,” *Providence (RI) Journal*, February 13, 2019, <https://www.providencejournal.com/opinion/20190213/my-turn-lilian-calderon-year-of-fear-under-immigration-law>.
17. See Justice Antonin Scalia’s dissent in *Troxel v. Granville*, arguing that “a right of parents to direct the upbringing of their children is among the ‘unalienable Rights’ with which the Declaration of Independence proclaims ‘all men . . . are endowed by their Creator.’” 530 U.S. 57, 91 (2001) (Scalia, J., dissenting). As this quotation suggests, like the natural affiliation argument, the autonomy argument can also be grounded in religious ideology. See various biblical pronouncements regarding wives’ duties to husbands and children’s duties to parents.
18. Lister insists that “in a conflict between the largely anonymous association of the state and the highly intimate association of the family, the more intimate association deserves the greater deference” (2010, 733).

19. Nancy F. Cott (2002) discusses connections between citizenship, family structure, and slave ownership; Aziz Rana (2014, 163) shows how men gained “independence and self-rule through homesteading and craft production” and that “marriage and the husband’s status as head of a household established civic attachment.”
20. Carly Goodman, “For 50 Years, Keeping Families Together Has Been Central to U.S. Immigration Policy; Now Trump Wants to Tear Them Apart,” *Washington Post*, December 17, 2017, <https://www.washingtonpost.com/news/made-by-history/wp/2017/12/17/for-50-years-keeping-families-together-has-been-central-to-u-s-immigration-policy-now-trump-wants-to-tear-them-apart/>.
21. Janet Murguía, “The American Family Makes This Country Great, and It’s in Danger,” *New York Times*, May 2, 2019, <https://www.nytimes.com/2019/05/02/opinion/trump-immigration-families.html>.
22. *Hawai’i v. Trump*, 871 F.3d. 646, 654–655 (2017).
23. “‘These are uncertain times for undocumented Californians and their families,’ [Governor Brown] said. . . . ‘This bill strikes a balance that will protect public safety while bringing a measure of comfort to those families who are now living in fear every day’” (Adler 2017).
24. A 15–35 percent disenrollment rate was estimated for citizen children in mixed-status families should the public charge rule take effect, resulting in 875,000 to 2 million citizen children dropping from Medicaid / CHIP (Children’s Health Insurance Program) coverage, as well as negative effects on “the health of children and their families’ financial stability” (Artiga, Damico, and Garfield 2018).
25. It is “by means of the small fatherland which is the family that the heart attaches itself to the large one” (Rousseau 1979, 363).
26. The one arguable exception to the lack of a right for wives occurred in divorce statutes that allowed a wife to sue for divorce on the basis of desertion or abandonment (see Abrams 2013a).
27. Emergency Quota Act, ch. 8, § 2, 42 Stat. 5, 5–6 (1921) (repealed 1952); Immigration Act of 1924 (“National Origins Act”), Pub. L. No. 68-139, ch. 190, 43 Stat. 153.
28. Immigration and Nationality Act, Pub. L. No. 82-414, ch. 477, 66 Stat. 163, codified as amended at 8 U.S.C. § 1101 et seq.; Immigration Act of 1965, Pub. L. No. 89-236, 79 Stat. 911, amending INA § 201 et seq, codified as amended 8 U.S.C. § 1151 et seq. For a discussion of some of Congress’s reasons for retaining family-based immigration categories, see Abrams (2013b).
29. INA § 201 et seq.
30. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).
31. *Kerry v. Din*, 135 S. Ct. 2128, 2133 (2015).
32. *Obergefell*, 135 S. Ct. at 2599.
33. *Obergefell*, 135 S. Ct. at 2599.
34. *Obergefell*, 135 S. Ct. at 2599 (citing *Goodridge v. Dep’t of Pub. Health*, 440 Mass. 309, 322, 798 N.E.2d 941, 955 (2003)).
35. *Obergefell*, 135 S.Ct. at 2599.
36. *Obergefell*, 135 S.Ct. at 2599, citing *Griswold v. Connecticut*, 85 S.Ct. 1678, 1682 (1965).
37. *Obergefell*, 135 S.Ct. at 2601.
38. *Obergefell*, 135 S.Ct. at 2601, citing *Maynard v. Hill*, 8 S.Ct. 723, 729 (1888).

39. Cf. *Singer v. Hara*, 11 Wash. App. 247, 260 (1974) (upholding denial of marriage to same-sex couples based on the state's interest in protecting marriage as a legal institution is based "primarily because of societal values associated with the propagation of the human race").
40. *Obergefell*, 135 S. Ct. at 2600.
41. *Obergefell*, 2128, 2139–2143 (Kennedy, J., concurring).
42. *Obergefell*, 2141.
43. *Obergefell*, 2141. For further discussion of the possible application of *Din* to family reunification cases, see Abrams (2018).
44. Sarah Parvini, "Biden Ended Travel Ban on Muslim-Majority Nations; But Separated Families Remain in Limbo," *Los Angeles Times*, February 10, 2021, <https://www.latimes.com/california/story/2021-02-10/biden-ended-muslim-travel-ban-us-families-remain-limbo>.
45. "Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize Our Immigration System," White House, January 20, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/>; Michael D. Shear, "Democratic Lawmakers Introduce Biden's Immigration Overhaul in House," *New York Times*, February 18, 2021, <https://www.nytimes.com/2021/02/18/us/politics/house-democrats-biden-immigration.html>.

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