All in the Constitutional Family:
Revisiting Definitions of Family Relationships in Immigration Law

I. INTRODUCTION

Each year, over one million people become legal permanent residents of the United States, or “green card” holders.¹ Nearly two-thirds of these individuals (680,799 out of the total 1,031,631 in 2012) achieve this status based on a family relationship with a U.S. citizen or another legal permanent resident, meaning they are immediate relatives of U.S. citizens² or “family-sponsored preferences.”³

Osserritta Robinson was not among them. Osserritta, a Jamaican citizen, married Louis Robinson, a U.S. citizen, in February 2003.⁴ Louis died in October of that year.⁵ Although the Robinsons had filed a visa petition for Osserritta soon after their marriage, U.S. Citizenship and Immigration Services (USCIS) terminated the request upon Louis’s death. USCIS argued, and the Third Circuit later agreed, that Osserritta was no longer an “immediate relative” under the

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³ DHS Yearbook of Immigration Statistics, supra note 1. In 2012, the cohort of new legal permanent residents classified as immediate relatives of U.S. citizens included 273,429 spouses, 124,230 parents, and 81,121 children (including 8,619 immigrant orphans adopted by U.S. citizens); the remaining new green card holders included 99,709 spouses and children of alien residents, 21,752 married sons and daughters of U.S. citizens (and who are not categorized under the statute as “children”), 20,660 unmarried sons and daughters of U.S. citizens (and who are also not “children”), and 59,898 siblings of U.S. citizens. Id. An additional 643 of the new legal permanent residents in 2012 were children born abroad to alien residents. Id. There are no statistics available on how many individuals would have been included in this count but for limitations in the INA.
⁴ Robinson v. Napolitano, 554 F.3d 358, 360 (3d Cir. 2009).
⁵ “Mr. Robinson died on October 15, 2003, in the Staten Island Ferry accident.” Id.
Immigration and Nationality Act (INA). In contrast, a surviving alien-spouse is a “spouse” under the INA in jurisdictions following the First, Sixth, and Ninth Circuits.

The Robinsons’ story is one that plays out each year under the INA’s definitions of family relationships, with some variation and with some tragic results. This Note explains why recent Supreme Court jurisprudence requires reconsideration of those provisions in order to better effectuate the statutory goal of family unity and to meet basic constitutional assurances of due process and equal protection. In short, the INA’s definitions are unconstitutionally restrictive because they envision and require a specific family composition and structure.

Part II of this Note describes problems created by the INA’s definitions of family and other close relationships. Part III discusses the Court’s analysis in the 2013 case United States v. Windsor, which required the Federal Government to recognize same-sex marriages that are protected by States based on federalism, substantive due process, and equal protection concerns. Part IV applies the Court’s reasoning in Windsor to the INA’s provisions, which raise similar constitutional issues. Part V concludes that, if Congress does not revise the statute, courts should apply heightened scrutiny to the INA’s definitions of marriage and family relationships, or take a hard look at those definitional provisions under rational basis scrutiny, particularly where those provisions conflict with State law.

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6 Id. Under 8 U.S.C. § 1151, USCIS would have recognized Osserritta as a “spouse” if the couple had been married for two years before Louis’s death. Cf. Ward v. U.S. Atty. Gen., 608 F.3d 1198, 1199 (11th Cir. 2010) (per curiam) (holding that “death of a primary-beneficiary parent extinguishes his child’s right to his status”).


8 Holder v. Martinez Gutierrez, 132 S. Ct. 2011, 2019 (2012) (emphasizing that “providing relief to aliens with strong ties to the United States’ and ‘promoting family unity’” are not the INA’s only goals).
II. FAMILY LAW, IMMIGRATION LAW, AND FOREIGN AND INTERNATIONAL LAW

The INA as enacted in 1952 reorganized the Nation’s immigration laws. It continues to provide the basic legal framework for immigration and naturalization. The INA allows individuals to become legal permanent residents of the United States through several pathways, including family relationships, employment, and refugee or asylum status.

Eligibility for a green card through a family relationship is limited to certain immediate relatives of U.S. citizens, green card holders, and individuals who fall into a few special categories, such as diplomats. There are other provisions related to immigration and naturalization of fiancées and adopted children.

Not all family relationships support eligibility for immigration and naturalization under the INA. State law or foreign or international law may be the first place to look to decide whether a marital or family relationship exists, but being married to or related to a U.S. citizen or legal permanent resident for the purposes of State or foreign law does not mean that an alien is “married” or related to that person for the purposes of federal immigration law. Certain types of marriages, such as marriages where the parties aren’t physically present together at the ceremony (often called “proxy” marriages) and some common law marriages, may not qualify. And, until very recently, same-sex marriages did not qualify either.

The INA’s general definitions are in section 101 of the Act, codified in section 1101 of Title 8. That section defines, among other things, marital and parent-child relationships the Federal Government recognizes for immigration purposes. These definitions can be

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11 See id.
determinative for whether an individual is allowed to live in the United States.\textsuperscript{13} The INA’s definitional provisions have been amended a number of times, but the textual evolution provides little additional information about congressional intent.\textsuperscript{14}

The overarching problem with the INA’s definitional provisions is that they not only envision a specific family composition or structure, but also require immigrants and their families to fit into that model. This raises issues in several types of cases. For example, a U.S. citizen and a foreign citizen may be married in a foreign country and move to a U.S. State that recognizes the marriage although the Federal Government does not for immigration purposes. (Or, there may be a parent-child relationship that is recognized by the State but that is not covered by the statutory definition in INA.) For example, section 1101(a)(35) defines “spouse,” “wife,” and “husband” to exclude remote or “proxy” marriages before

\textsuperscript{13} See, e.g., 8 U.S.C. § 1182 (describing inadmissible aliens and several exceptions for spouses and children of U.S. citizen and permanent residents).

consummation. In *Moussa v. INS*, the Eighth Circuit concluded that a proxy marriage is not valid for immigration purposes until the marriage is actually consummated—even where the parties lived together as husband and wife and consummated the relationship prior to marriage.

Along similar lines, some of the INA’s definitional provisions seem haphazardly cobbled together; the statute includes lengthy definitions for “child,” “parent,” “father,” and “mother,” and those definitions also vary depending on the use of those terms.

The Federal Government might need to recognize a relationship even if the State of residence does not. For example, a State might not recognize a same-sex marriage performed in another State under the remaining sections of Defense of Marriage Act (DOMA). USCIS has taken the position, through informal guidance on its website, that “[a]s a general matter, the law of the place where the marriage was celebrated determines whether the marriage is legally valid for immigration purposes.” USCIS also says that “[t]he domicile state’s laws and policies on same-sex marriages will not bear on whether USCIS will recognize a marriage as valid.”

However, the next Administration may take the opposite position through regulations or guidance, or Congress may revise DOMA or immigration laws to clarify the choice of law.

Finally, USCIS has considered whether a relationship exists in order to find a reason to exclude an alien even where the relationship at issue would not be valid to support that person’s

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15 8 U.S.C. § 1101(a)(35); cf. 8 U.S.C. § 1101(a)(15)(K) (excluding from the definition of “immigrant” an alien fiancé or fiancée of a U.S. citizen who seeks to enter the U.S. solely to conclude a valid marriage within 90 days after admission).
16 *See Moussa v. Immigration & Naturalization Serv.*, 302 F.3d 823 (8th Cir. 2002).
17 *Compare* 8 U.S.C. § 1101(b)(1)-(2) (defining who is a “child,” “parent,” “father,” and “mother” for the purposes of the law’s general provisions and immigration provisions), with 8 U.S.C. § 1101(c)(1)-(2) (defining who is a “child,” “parent,” “father,” and “mother” for the purposes of nationality and naturalization provisions).
19 *U.S. Department of Homeland Security, Citizenship and Immigration Services, Same-Sex Marriages*, http://www.uscis.gov/family/same-sex-marriages (last visited March 10, 2014) (question and answer number 3); *see also* Hassan v. Holder, 604 F.3d 915, 925 (6th Cir. 2010) (“The validity of a marriage is determined by the law of the place of celebration.”) (citation omitted).
20 *Same-Sex Marriages, supra* note 19.
21 USCIS directs potential petitioners to “apply right away for benefits,” rather than “wait until USCIS issues new regulations, guidance[,] or forms.” *Id.* at Q4.
immigration or naturalization. In *Chiang v. Skeirik*, for example, USCIS denied the plaintiff’s request for a visa for his purported fiancée allegedly based on consideration of his “traditional” marriage to the same woman in China. The reviewing courts said USCIS’s rationale was “facially legitimate and bona fide,” and therefore unreviewable, even though the previous marriage might not have been valid for immigration purposes.

There is an emerging literature about how State and foreign family law interacts with federal immigration law. Commentators have largely focused on problems with specific provisions in the INA, such as DOMA or the proxy marriage limitation described above. This Note contributes to the development of the case law and literature by assessing the effect of recent Supreme Court jurisprudence on the INA’s definitional provisions more broadly.

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22 See *Chiang v. Skeirik*, 582 F.3d 238, 242-43 (1st Cir. 2009).
23 See id.
24 Relatedly, Professor Eugene Volokh has written generally about States’ incorporation of some aspects of foreign family law, and even some aspects of religious law as applied in foreign courts, for family law purposes. See Eugene Volokh, *Foreign Law in American Courts*, 66 OKLA. L. REV. 219, 227-31, 240-42 (2014) (describing American law’s incorporation of some aspects of foreign family law, but not discussing *Windsor*); Eugene Volokh, *Religious Law (Especially Islamic Law) in American Courts*, 66 OKLA. L. REV. 431, 438-40 (2014) (describing American law’s incorporation of some aspects of religious law, as applied in foreign courts, for family law and immigration law purposes, but not discussing *Windsor*). This selective incorporation indirectly affects outcomes under immigration law. Volokh gave as one example a Louisiana case where the State court recognized a marriage between first cousins performed in Iran, even though State law would not have permitted the marriage to be performed in the State itself, but noted that Louisiana law would have prohibited the court from recognizing a same-sex marriage performed outside the State. See Volokh, *Foreign Law*, at 227-31 (citing Ghassemi v. Ghassemi, 998 So. 2d 731 (La. App. 2008)); see also Ghassemi v. Ghassemi, 103 So. 3d 401 (La. App. 2012) (affirming family court’s judgment that the plaintiff and defendant were married). Volokh also notes that the question of whether a person is married or divorced under foreign law comes up “all the time in immigration law.” *Id.* at 240 (arguing against a legislative proposal that would limit the use of foreign law).
III. FEDERALISM, SUBSTANTIVE DUE PROCESS, AND EQUAL PROTECTION ISSUES IN WINDSOR

A. Case background

In United States v. Windsor, Edith Windsor sought a refund of estate taxes she had paid following the death of her wife, Thea Spyer. Windsor and Spyer had been married in Canada and resided in New York, which recognized the women’s same-sex marriage. However, the IRS refused to recognize the marriage, and therefore denied the estate tax refund, based on section 3 of DOMA. That section defined “marriage” and “spouse” for federal law generally as excluding same-sex partners.

The U.S. Supreme Court held that section 3 of DOMA was unconstitutional under the Fifth Amendment’s Due Process Clause. As detailed below, Justice Kennedy, writing for the Court, identified federalism issues, although those were not the basis for the holding in the case, as well as substantive due process concerns and equal protection concerns.

This Note describes the Court’s reasoning in Windsor and explains why that analysis requires reconsideration of the INA’s definitional provisions. Windsor is applicable beyond the same-sex context and indicates that courts should apply heightened scrutiny to remaining federal definitions of family relationships, or take a hard look at those provisions under rational basis scrutiny, especially when a federal definition excludes a relationship recognized by a State.

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26 133 S. Ct. 2675, 2682 (2013).
27 Id. at 2683.
28 Id. at 2682.
29 Id.
30 See Windsor, 133 S. Ct. at 2692-93.
31 See id. at 2693; see also Douglas Nejaime, Windsor’s Right to Marry, 123 YALE L.J. ONLINE 219 (2013) (discussing due process aspects of Windsor and the “fundamental right to marry”). But cf. Windsor, 133 S. Ct. at 2707-08 (Scalia, J., dissenting) (noting that “[t]he majority never utters the dread words ‘substantive due process’”).
32 See Windsor, 133 S. Ct. at 2693.
B. Federalism

The Windsor Court began its discussion of the merits with broad language solidifying the primacy of States in regulating domestic relations, within constitutional limits, and States’ interests in the marital status of persons domiciled within their borders. The Court also found that the Federal Government had historically deferred to States in matters of domestic relations, (if it had any authority to regulate in that area to begin with). Specifically, the Court looked at the long history of States’ responsibility for defining and regulating marriages (“dat[ing] to the Nation’s beginning”) and found that “when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.” Although Windsor doesn’t rest on federalism grounds, these issues provided the context for the Court’s substantive due process and equal protection analysis.

C. Substantive Due Process

Windsor was decided at least in part on substantive due process grounds. The Fifth and Fourteenth Amendments’ Due Process clauses have produced a body of law on “substantive due process,” which protects certain rights so basic that the Federal Government or a State government can’t take them away without a strong rationale. Courts usually look only at

33 See id. at 2691 (quoting Sosna v. Iowa, 419 U.S. 393, 404 (1975), for the proposition that “regulation of domestic relations” is “an area that has long been regarded as a virtually exclusive province of the States,” and Williams v. North Carolina, 317 U.S. 287, 298 (1942), for the point that “recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens.”).
34 See id. (citing Haddock v. Haddock, 201 U.S. 562, 575 (1906); In re Burrus, 136 U.S. 587, 593-94 (1890)).
35 Id. (quoting Ohio ex rel. Popovici v. Agler, 280 U.S. 379, 383-84 (1930)).
36 The debate over whether the Constitution protects non-enumerated rights is longstanding. See generally Lochner v. New York, 198 U.S. 45 (1905); Slaughter-House Cases, 83 U.S. 36 (1873); Calder v. Bull, 3 U.S. 386 (1798) (describing implicit limits to congressional authority based on certain vital principles); id. at 398 (Iredell, J., dissenting) (asserting that there is no way of identifying those principles and that any attempt would be mere speculation, unworkable, and dangerous).
whether there was a “rational basis” for a law, but require stronger justifications for rules that place burdens on the exercise of “fundamental” rights.\textsuperscript{37}

The Court has also taken a hard look under rational basis scrutiny at laws that burden personal relationships, including non-family and non-biological intimate relationships. In \textit{Lawrence v. Texas}, the Court struck down a State statute that criminalized homosexual sodomy.\textsuperscript{38} Justice Kennedy, writing for the majority in that case as well, concluded that intimate conduct, including the criminalized conduct in the case, is a critical element of personal relationships and that “[a]t the heart of liberty is the right to define one’s own concept . . . of meaning . . . and of the mystery of human life.”\textsuperscript{39} In other words, courts should take a close look, even under the rational basis level of scrutiny, at laws that attempt to limit important aspects of personal relationships. Justice Scalia, dissenting, would have upheld the challenged law under the traditional rational basis standard.\textsuperscript{40} He noted that the majority applied “an unheard-of form of rational-basis review” even though they did not find that the liberty interest at stake was a “fundamental right” under the Due Process Clause.\textsuperscript{41}

\textsuperscript{37} See also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 439 (2006) (noting that the Religious Freedom Restoration Act of 1993 requires courts to apply a “compelling interest” test to burdens established by the Federal Government on religious practices); Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) (holding that rational basis standard applies to a law that is facially neutral with regard to particular a religion and is generally applicable, meaning it doesn’t distinguish between religious and non-religious activity, even if the law burdens a person’s religious belief); Wisconsin v. Yoder, 406 U.S. 205 (1972) (applying strict scrutiny where State’s law threatened to expose Amish youth to schools’ secular nature); Prince v. Massachusetts, 321 U.S. 158 (1944) (identifying parental right under the Due Process Clause to give religious training, and child’s right to exercise freedom of religion, but rejecting plaintiff’s argument for strict scrutiny and holding that States have greater authority to regulate children’s activities than similar activities by adults).


\textsuperscript{39} \textit{Id.} at 574 (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)).

\textsuperscript{40} See \textit{id.} at 586 (Scalia, J., dissenting).

\textsuperscript{41} See \textit{id.} (contrasting a strict scrutiny standard); see also \textit{id.} at 605 (Thomas, J., dissenting) (noting that the law in question was “uncommonly silly,” quoting Griswold v. Connecticut, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting), and commenting that it should be repealed, but concluding it was not unconstitutional).
In *Windsor*, the Court said that section 3 of DOMA “violate[d] basic due process . . . principles applicable to the Federal Government.” Justice Kennedy, writing for the majority, did not explicitly identify any “fundamental” or “deeply rooted” right at stake. However, he did refer to *Lawrence* regarding the significance of private intimate relationships in forming enduring personal bonds and the constitutional protections for individuals’ “moral and sexual choices.” The Court saw the State-recognized marriage relationship underlying *Windsor* as an even more enduring personal bond than the alleged coupling in *Lawrence*.

D. Equal Protection

Finally, the *Windsor* Court concluded that section 3 of DOMA violated equal protection principles. Under the Fourteenth Amendment’s Equal Protection Clause, and the equal protection principles the Court has read into the Fifth Amendment’s Due Process Clause, a court reviewing a rule that classifies people based on particular characteristics must consider who is being treated differently, what is the purpose of the distinction, and how good is the fit between the differential treatment and the purpose of the classification.

In *Windsor*, the Court found that the challenged law “demean[ed] those persons who are in a lawful same-sex marriage.” The Court therefore held that section 3 of DOMA was an unconstitutional “deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.”

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42 *Windsor* 133 S. Ct. at 2693 (citing U.S. CONST. amend. V).
43 See id. at 2714-15 (Alito, J., dissenting) ("What Windsor and the United States seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right. . . .").
44 See id. at 2692, 2694 (finding that “States’ interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits").
45 See id. at 2694.
46 Id. at 2695.
47 Id.
partners “that their marriage is less worthy than the marriages of others.” The Court concluded that “no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State . . . sought to protect in personhood and dignity.” Justice Scalia, dissenting, complained that the majority was insufficiently deferential to congressional judgment and predicted that the majority’s underlying rationale (while distinguishable on grounds identified by the majority itself and by Chief Justice Roberts, who also dissented) would be applied to State legislation that similarly expressed a “bare . . . desire to harm” couples in same-sex marriages.

IV. FEDERALISM, SUBSTANTIVE DUE PROCESS, AND EQUAL PROTECTION ISSUES IN THE INA

A. Federalism Concerns

The rationale for deferring to States in the definition and regulation of marriages and other family relationships for the purposes of immigration law is similar to the Court’s position in Windsor but probably less strong than in that case.

As the Supreme Court noted in Windsor, the absence of a federal law of domestic relations means that courts generally look to State laws that create legal relationships. The Court has upheld federal laws regarding family relationships that point to State law, although that factor was probably not dispositive. For example, in Astrue v. Capato the Court upheld the Social Security Administration’s interpretation of a statutory definition of “child” that pointed to State law, which excluded posthumously conceived children.

48 Id. at 2696.
49 Id. at 2706 (Scalia, J., dissenting).
50 See id. at 2695-96 (majority).
51 See id. at 2696 (Roberts, C.J., dissenting).
52 Id. at 2709 (Scalia, J., dissenting).
53 See id. (quoting Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992); De Sylva v. Ballentine, 351 U.S. 570 (1956)).
However, the Constitution clearly gives the Federal Government a strong role relative to the States in regulating immigration. Article I grants Congress the power “To establish an uniform Rule of Naturalization.”55 In Arizona v. United States, the Court acknowledged that the Federal Government has “broad, undoubted power over the subject of immigration and the status of aliens.”56 The Court struck down several of the State’s laws, which created State offenses and authorized warrantless arrests based on federal immigration requirements, because they created “obstacle[s] to the accomplishment and execution of the full purposes and objectives of Congress.”57 In addition, the Court has held that Congress may preempt a State law—even one which is based on federal requirements—when Congress provides explicitly for preemption, when Congress intends to displace State law, or when State law conflicts with federal law.58

The Court also highlighted in Windsor that “Congress has the power both to ensure efficiency in the administration of its programs and to choose what larger goals and policies to pursue.”59 The majority in Windsor noted that “limited federal laws that regulate the meaning of marriage in order to further federal policy” could be constitutional,60 and gave as one example that “[i]n addressing the interaction of state domestic relations and federal immigration law Congress determined that marriages ‘entered into for the purpose of procuring an alien’s admission [to the United States] as an immigrant’ will not qualify the noncitizen for that status,

56 Arizona, 132 S. Ct. at 2498.
57 Id. at 2501; see also Plyler v. Doe, 457 U.S. 202 (1982) (holding unconstitutional a State law that refused free public education for undocumented alien children).
58 See Arizona, 132 S. Ct. at 2500-01 (“The intent to displace state law altogether can be inferred from a framework of regulation so pervasive . . . that Congress left no room for the States to supplement it or where there is a federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”) (citations and quotation marks omitted).
59 Windsor, 133 S. Ct. at 2690.
60 Id. (distinguishing the significantly broader reach of section 3 of DOMA). But see Reynolds v. United States, 98 U.S. 145, 164 (1878) (upholding federal law that banned polygamy in the Territory of Utah on the grounds that it did not prohibit the free exercise of religion because the challenged law reached “actions only, and not opinions”).
even if the noncitizen’s marriage is valid and proper for state-law purposes." In other words, the Federal Government isn’t bound by State officials’ choices in deciding for immigration purposes whether to provide federal benefits based on a sham marriage. Otherwise, States could easily create obstacles to federal immigration policy.

However, these principles don’t allow Congress to demean or delegitimize otherwise valid relationships. Congress has constitutional authority to tax, but that did not require the Windsor Court to defer to the Legislative Branch’s choice of how to exercise that authority. Provisions of immigration law that refuse to recognize authentic marriages or other relationships which are protected by States can harm the interests of the State and the persons involved, raising the same federalism, substantive due process, and equal protection issues addressed in Windsor. So, the Federal Government can establish uniform immigration rules, preempting State law, but, as in other situations, those rules may still point to State law and are probably still subject to the procedural and substantive due process principles and the equal protection principles of the Fifth Amendment (at least as applied to U.S. citizens and legal permanent residents, if not also for the alien partners in these relationships).

63 Compare Sugarman v. Dougall, 413 U.S. 634 (1973) (quoting Graham v. Richardson, 403 U.S. 365, 372 (1971), as observing that aliens as a class “are a prime example of a ‘discrete and insular’ minority” and that classifications based on alienage are “subject to close judicial scrutiny”)), with Demore v. Kim, 538 U.S. 510, 522 (2003) (“[T]his Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens.”); Mathews v. Diaz, 426 U.S. 67 (1976) (upholding federal law that distinguished U.S. citizens and aliens who had continuously resided in the United States for five years from aliens who did not meet the statutory criteria). The extent to which classifications based on alienage are subject to strict scrutiny is beyond the scope of this paper because one of the people in each of the relationships at issue is a U.S. citizen or legal permanent resident and they are probably covered by the Fifth Amendment. But see Tuan Anh Nguyen v. I.N.S., 553 U.S. 53 (2001) (upholding gender-based classification, in 8 U.S.C. § 1409(a), regarding children born out of wedlock); Fiallo v. Bell, 430 U.S. 787 (1977) (upholding exclusion of the relationship between an illegitimate child and the natural father from the INA’s statutory protections, before the statute was revised in 1986). Fiallo was legislatively overruled, and it is unclear how much of the reasoning on this point has been maintained. See Tuan Anh Nguyen, 553 U.S. at 72-73 (noting that “[i]n light of our holding that there is no equal protection violation, we need not . . . assess the implications of statements in our earlier cases regarding the wide deference afforded to Congress in the exercise of its immigration and naturalization power,” and citing Fiallo); see also Fiallo, 430 U.S. at 800 (1977) (Marshall, J., dissenting) (“I cannot agree that Congress has license to deny
The *Windsor* Court also pointed out that DOMA definition of marriage had a “far greater reach” than federal laws related to marital status that the Court had previously considered; the definition cut across many different areas of law, impacting many people in a variety of ways.\(^{64}\) However, the Nation’s immigration laws have a profound impact each year on the lives of millions of individuals, including hundreds of thousands of U.S. citizens. Also, regardless of the scope of the problem, the nature of the relationship at issue seems to be more important than the number of States that respect it or the number of people affected. In *Windsor*, the Court noted that only twelve States at the time of that decision had sought to protect same-sex marriages.\(^{65}\) So, even if only a handful of States recognize same-sex marriages, some common law marriages, unconsummated proxy marriages, or certain parent-child relationships, that recognition should still be respected by the Federal Government.

In conclusion, where a federal law “rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State,”\(^{66}\) courts should give substantial weight to legal relationships that are based on State laws. Under federalism principles as interpreted in *Windsor*, courts should give substantial weight to other authentic and valid family relationships based on State laws, even if the courts owe no deference to State law that conflicts with or creates an obstacle to federal law.

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\(^{64}\) *Windsor*, 133 S. Ct. at 2690.

\(^{65}\) See *id*.

\(^{66}\) *Id.* at 2692.
B. Substantive Due Process Principles

Following the Court’s reasoning in Windsor and other recent cases, immigration laws that infringe on a person’s right to pursue family or intimate relationships may now need to meet a higher bar than traditional rational basis scrutiny.

Several historical cases deal with parental rights and rights in other family and intimate relationships that are protected by the Due Process Clause. In Meyer v. Nebraska, for example, the Court held that the State exceeded its power in regulating the teaching of foreign languages before eighth grade. The Meyer Court concluded that a teacher’s right to teach and a parent’s right to engage a teacher were within the liberties covered by the Due Process Clause. The Court noted that the Due Process Clause’s right to liberty extends “[w]ithout doubt” beyond personal, physical liberty, to encompass the rights to “to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Similarly, in Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, the Court held that a State statute that compelled parents to send their children to public school “unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of children under their control.” The Court reasoned that a “child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” Under Meyer and Pierce, parents’ rights to care for their children and direct those children’s upbringing trumped

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67 262 U.S. 390 (1923).
68 Id. at 400-01 (contrasting Platonic and Spartan ideals of a homogenous population).
69 Id. at 399.
71 Id. at 535; see also Troxel v. Granville, 530 U.S. 57 (2000) (O'Connor, J.) (plurality opinion) (concluding that the right of parents to rear their children is fundamental).
the States’ interest in ensuring the presence of some characteristics among its citizenry.

Generally, the Court frowned on the States’ attempts to ensure a homogenous population.

More recent cases have focused on protecting privacy and autonomous decision making in choices about family composition and structure.\footnote{See, e.g., Skinner v. Oklahoma, ex rel. Williamson, 316 U.S. 535 (1942) (right to procreation). In particular, the Court has protected individuals’ access to contraception, see Carey v. Population Services Int’l, 431 U.S. 678 (1977) (striking down State’s law that prohibited sale of contraceptives to individuals under 16 years old); Eisenstadt v. Baird, 405 U.S. 438 (1972) (finding right to privacy belongs to individuals); Griswold v. Connecticut, 381 U.S. 479 (1965) (finding right to privacy for married couples in the Fourth, Fifth, and Sixth Amendments, and not resorting to substantive due process), and the right to an abortion in certain circumstances. See Roe v. Wade, 410 U.S. 113 (1973) (applying substantive due process); see also Stenberg v. Carhart, 530 U.S. 914 (2000); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992). See generally Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel). But see Washington v. Glucksberg, 521 U.S. 702 (1997) (holding that assisted suicide is not a deeply rooted, fundamental right); Cruzan v. Dir., Mo. Dep’t of Health, 497 U.S. 261 (1990) (as explained in Glucksburg, assuming but not holding that the Due Process Clause protects the right to refuse life-saving treatment); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (Stone, J.) (noting that courts should look with greater scrutiny at certain areas, including enumerated rights, minority rights, and the access to political processes).}

In *Moore v. City of East Cleveland, Ohio*, the Court held unconstitutional an ordinance that limited occupancy of housing units to members of a single family and defined “family” narrowly to include only a few categories of related individuals.\footnote{431 U.S. 494 (1977).} Justice Powell, writing for a plurality, said they could not avoid applying “the force and rationale” of *Meyer* and *Pierce* to the choice in family structure involved in *Moore*.\footnote{Id. at 501.}

The plurality concluded that the Constitution prevented the city from “standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns” just as the *Pierce* Court said the Constitution “excludes any general power of the State to standardize its children by forcing them [to attend public school].”\footnote{Id. at 506 (quoting *Pierce*, 268 U.S. at 535).}

Under the reasoning of these cases, immigration laws that require homogeneity or limit choices in family composition or structure may be subject to heightened scrutiny, or at least a hard look under rational basis scrutiny. Article I of the Constitution explicitly gives Congress the authority to make “uniform” rules at least in the sense of national regulations that cover
immigration in each State. However, the Court’s interpretation of the Fifth Amendment’s Due Process Clause means the Constitution does not give Congress the significantly broader authority to impose a homogenous structure on families that happen to include an alien or immigrant. Those policies deny individuals the right to family privacy and the right to important types of personal decision making.

However, Smith v. Organization of Foster Families for Equality and Reform (Smith v. OFFER), Lehr v. Robertson, and Michael H. v. Gerald D. show that not all family relationships are equally protected by the Due Process Clause. Except for marriage, family relationships that are primarily contractual as opposed to biological, and biological relationships that have not historically been judicially protected, are not entitled to the same level of protection as other family relationships.

The Smith v. OFFER Court considered whether foster parents had a constitutionally protected “liberty interest” in the integrity of their family unit. The Court distinguished biological families, which have origins “entirely apart from the power of the State,” from foster families, which the Court said are based on “state law and contractual arrangements.” The Court added that “the liberty interest in family privacy has as its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been

76 U.S. CONST. art. I, § 8, cl. 4.
77 See discussion supra note 63.
78 431 U.S. 816 (1977)
81 See also Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., concurring) (noting that parental rights under the Due Process Clause require more than biological connection); Quilloin v. Walcott, 434 U.S. 246 (1978) (upholding constitutionality of a State statute that allowed adoption of a child of a child born out of wedlock over objection of a biological father who never legitimated the child); Stanley v. Illinois, 405 U.S. 645 (1972) (holding that a statutory presumption that fathers of children born out of wedlock were unfit to have custody of those children violated the Due Process Clause by not giving the father to present evidence of fitness as a parent).
82 Smith, 431 U.S. at 842, 847. The Court distinguished marriage, which it called “[t]he basic foundation of the family in our society,” by noting that “its importance ha[d] been strongly emphasized in [prior] cases.” Id. at 843.
83 Id. at 845. The Court added that the emotional ties between a parent and foster child also “have their origins in an arrangement in which the State has been a partner from the outset.” Id.
understood in this Nation’s history and tradition.”\textsuperscript{84} However, the Court did not decide the issue. The Court assumed there was a liberty interest at stake, but New York and New York City’s procedures removal of foster children from foster homes were not constitutionally defective.\textsuperscript{85}

The \textit{Lehr} Court clarified that even in cases of biological relationships (in that case, a putative father and his child), the “[t]he significance of the biological connection is that it offers the natural father an opportunity . . . to develop a relationship with his offspring.”\textsuperscript{86} In other words, a putative father must accept “some measure of responsibility” in order to enjoy not only “the blessings of the parent-child relationship” but also due process protections.\textsuperscript{87}

Similarly, in \textit{Michael H. v. Gerald D.}, Justice Scalia, writing for a plurality, upheld a State statute that presumed a woman’s husband to be the father of her child, where the child was actually born out of an affair.\textsuperscript{88} Justice Scalia found that the relationship between the petitioner and the child was not one that had “been treated as a protected family unit under the historic practices of our society” or that had been granted any other special protection.\textsuperscript{89} The plurality avoided deciding whether a child has a due process right “symmetrical with that of her parent, in maintaining her filial relationship” and rejected the child’s claimed right under the Equal Protection Clause to rebut the presumption of her legitimacy.\textsuperscript{90}

\textsuperscript{84} \textit{Id.} (citations and internal quotation marks omitted).
\textsuperscript{85} \textit{See id.} at 847.
\textsuperscript{86} \textit{Lehr}, 463 U.S. at 262 (emphasis added).
\textsuperscript{87} \textit{Id.}; see also \textit{Adoptive Couple v. Baby Girl}, 133 S. Ct. 2552, 2571-72 (2013) (Scalia, J., dissenting) (noting, in a discussion of parental rights, that “[i]t has been the constant practice of the common law to respect the entitlement of those who bring a child into the world to raise that child’’); \textit{id.} at 2572 (Sotomayor, J., dissenting) (taking note of the “principle, recognized in our cases, that the biological bond between parent and child is meaningful” and citing \textit{Lehr}, 463 U.S. at 262, for the proposition that “the Constitution does not compel the protection of a biological father’s parent-child relationship until he has taken steps to cultivate it . . . [but] offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring’’).
\textsuperscript{88} 491 U.S. 110, 132 (1989).
\textsuperscript{89} \textit{Id.} at 124.
\textsuperscript{90} \textit{Id.} at 130-31 (applying a rational basis test to California’s decision not to allow a child or the child’s guardian ad litem to bring a claim of illegitimacy while her parents could, and noting that “[i]llegitimacy is a legal construct, not a natural trait” and that under the upheld State statute the child was treated no differently than other legitimate children).
So, the Due Process Clause does not require courts to approach all burdens on family units with strict scrutiny. However, this does not grant the Federal Government or States a free pass in this area.

In *Lawrence* and *Windsor*, Justice Kennedy, writing for the Court, described in poetic detail the constitutional significance of intimate relationships and deep, enduring personal bonds. Specifically, he said that the Constitution protects at least some “moral and sexual choices.”

Broader acknowledgment of a substantive due process right to define one’s own family and intimate relationships could have a dramatic impact on policies that limit recognition of the results of protected moral and sexual choices. In *Brown v. Buhman*, for example, the Utah District Court held that a State statute prohibiting what the court characterized as “religious cohabitation” was invalid based on either a strict scrutiny analysis under the Free Exercise Clause or, following *Lawrence*, a rational basis analysis under the Due Process Clause. The District Court described the right at stake as the same “consensual sexual privacy” considered in *Lawrence* and Tenth Circuit precedent. Since this right is not “fundamental,” the court applied the lowest standard, rational basis review. However, the court followed *Lawrence* by taking a hard look at the State’s justifications and rejected each of them. *Lawrence* and *Windsor*’s rationale even more clearly suggests that courts should take a hard look at federal policies that burden personal bonds which have already been given protection by the States. These burdens

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92 947 F. Supp. 2d 1170, 1190 (2013) (finding that the statutory provision prohibiting cohabitation was not generally applicable because of its targeted effect on religious cohabitation, and that there is a substantive due process right to intimate relations under *Lawrence*, and applying strict scrutiny to the “hybrid right” based on Washington v. Glucksberg, 521 U.S. 702 (1997) and Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990)).
93 Id. at 1223 (citing *Lawrence* and Seegmiller v. Laverkin Cty, 528 F.3d 762 (10th Cir. 2008)).
94 See id. at 1201 (noting that the Seegmiller court denied the plaintiff-police officer’s substantive due process claim because there is no fundamental right to sexual privacy and the defendant’s actions met the rational basis standard; the justifications involved regulating a police department, the police department’s reputation in the community, and the general task of keeping the peace).
95 See id. at 1223-24.
could not be more clear-cut in the immigration context: without federal recognition of a sufficient tie, families can be broken up and some members may be forced to leave the country.

In conclusion, courts must consider applying strict scrutiny or taking a hard look at federal and State policies that burden family and other close relationships by limiting individuals’ choices in family composition and structure. In the context of our immigration laws, this requires rethinking the scope of Congress’s authority to refuse to recognize certain authentic family and other relationships, especially where those relationships are enduring bonds and have been granted protection by the States.

C. Equal Protection Principles

In the immigration context, the INA grants federal recognition to certain marital and family relationships, but not others, for the nominal purpose of restricting immigration and naturalization. This Note concludes the fit is so poor, especially where the INA refuses to recognize a relationship that has been granted protection by a State, that the provisions cannot be considered sufficiently related to a legitimate public purpose.

In most cases, a court must ask whether a challenged distinction is rationally related to a legitimate public purpose. Since the New Deal, courts have accepted almost any rationale for economic regulations under the rational basis standard of review. However, when a policy distinguishes along certain lines (in particular, race or gender), courts require a more pressing purpose and a closer fit.

\[96 \text{Compare Minnesota v. Clover Leaf Creamery Co.}, 449 \text{U.S.} 456 (1981) \text{(finding that Minnesota’s stated environmental concerns were sufficient motivation, even though those claims were clearly empirically false);} \]
\[\text{Williamson v. Lee Optical of Okla., Inc.}, 348 \text{U.S.} 483 (1955); \text{Ry. Express Agency, Inc. v. New York}, 336 \text{U.S.} 106 (1949) \text{(upholding a New York regulation that prohibited advertising on special advertising trucks but allowed advertising on a company’s own truck), with Lochner v. New York}, 198 \text{U.S.} 45 (1905) \text{(striking down maximum-hour law as interfering with the right to determine the substance of a contract).}\]
The core equal protection cases involve racial classifications. In *Loving v. Virginia*, the Court concluded that the concept of equal protection forbids “arbitrary and invidious discrimination,” and held that racial classifications “must be shown to be necessary to the accomplishment of some permissible state objective.”97 The State had argued that the challenged law, which prohibited marriages between whites and non-whites, punished both parties to an interracial marriage regardless of race.98 In other words, the Court rejected the State’s claim that the law was not an inequitable classification. On the other hand, in *Korematsu v. United States*, the Court infamously upheld the Federal Government’s exclusion policy for people of Japanese descent on the West Coast.99 The *Korematsu* Court found that national security concerns justified the classification in question even though a “definite and close relationship” to a legitimate purpose was required and the policy was overinclusive (by covering far too many Japanese Americans), and underinclusive (for example, by not covering Americans of German or Italian decent).100 The Court formalized the modern “strict scrutiny” standard in the 1970s, after the racial desegregation cases following *Brown v. Board of Education of Topeka*101 and *Bolling v. Sharpe*.102 This standard asks (1) whether the challenged rule distinguishes people on certain grounds, such as race, national origin, religion, or alienage103; (2) whether the distinction serves a

97 388 U.S. 1, 10-11 (1967); see also Strauder v. West Virginia, 100 U.S. 303 (1880).
98 See *Loving*, 388 U.S. at 1.
100 *Id.* at 218.
compelling public purpose; and (3) whether the distinction is necessary or narrowly tailored to pursue that compelling public purpose.\textsuperscript{104}

The Court has also interpreted the Equal Protection Clause to require “intermediate” scrutiny for gender-based classifications. This standard of review requires that the distinction be substantially related to an important public purpose.\textsuperscript{105}

Finally, the Court has taken a hard look at policies that are based on animus, even if it has not applied strict or heightened scrutiny in those cases. In \textit{U.S. Department of Agriculture v. Moreno}, the Court held that “a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”\textsuperscript{106} The \textit{Moreno} Court found that a rule denying food stamp eligibility to unrelated people sharing a household (targeting “‘hippies’ and ‘hippie communes’”) was insufficiently related to the stated statutory policies of improving nutrition among low-income households and strengthening the agricultural economy.\textsuperscript{107} The Court rejected the Government’s arguments that the policy promoted families and that there needed to be some eligibility rule to avoid encouraging people to form a household just to get benefits.\textsuperscript{108} In \textit{City of Cleburne, Texas v. Cleburne Living Center}, a city denied permits for a

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\item \textsuperscript{104} \textit{See}, e.g., \textit{Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1}, 551 U.S. 701, 720-22 (2007) (reiterating that compelling interests for racial classifications include remedying the effects of past intentional discrimination and achieving diversity in higher education).
\item \textsuperscript{105} \textit{See} \textit{United States v. Virginia}, 518 U.S. 515 (1996) (requiring an “exceedingly persuasive justification” for gender-based classifications, and striking down the Virginia Military Institute’s exclusionary policy toward women and rejecting the adequacy of the State’s proposed remedy); \textit{Craig v. Boren}, 429 U.S. 190 (1976) (striking down a State’s law that disadvantaged young men who wanted to purchase low-alcohol beer); \textit{Frontiero v. Richardson}, 411 U.S. 677 (1973) (Brennan, J.) (plurality opinion) (striking down a military spousal benefits policy that distinguished surviving spouses by sex); \textit{Reed v. Reed}, 404 U.S. 71 (1971) (striking down a State’s law that prioritized men over women for positions as an administrator of an estate as “the very kind of arbitrary legislative choice forbidden by the equal protection clause”).
\item \textsuperscript{106} \textit{U.S. Dep’t of Agric. v. Moreno}, 413 U.S. 528, 534 (1973) (emphasis in original).
\item \textsuperscript{107} \textit{Id.} (noting that there was limited legislative history available to determine the purpose of the statute).
\item \textsuperscript{108} \textit{See also} \textit{New York City Transit Authority v. Beazer}, 440 U.S. 568 (1979) (upholding a New York City Transit Authority policy that disadvantaged certain drug users, based on a traditional rational basis review, and explaining that the ban was a public safety policy choice based on the need to hire a reliable workforce.) While the City could have been less overinclusive and underinclusive, it needed to draw the line somewhere in the context of broader policy considerations. Justice White, dissenting, focused on the poor, minority population that was disadvantaged and noted that the rule might have been motivated by animus.
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group home for individuals with disabilities while allowing an old-age home in the same place, effectively distinguishing individuals with disabilities from other individuals.\textsuperscript{109} The city argued that it needed to draw the line somewhere for zoning purposes. In contrast to some other socioeconomic policies,\textsuperscript{110} the city’s plan in \textit{Cleburne} was not allowed.\textsuperscript{111} The Court concluded that the city’s actions were based on “irrational prejudice” against the individuals with disabilities who would live in the facility “under the closely supervised and highly regulated conditions expressly provided for by state and federal law.”\textsuperscript{112}

In \textit{Romer v. Evans}, the Court took a hard look at, under rational basis scrutiny, a Colorado constitutional amendment that prohibited the State and local governments from including gays and lesbians in housing antidiscrimination rules.\textsuperscript{113} Justice Kennedy, writing for the Court, found that the only possible purpose of the amendment was animus and the State policy therefore violated the Equal Protection Clause.\textsuperscript{114} Specifically, the Colorado amendment was so much broader than its announced purposes required that it was clearly an effort to make gays and lesbians unequal.\textsuperscript{115} So, while States are not required to establish statutory protections in the first place (such as by including gays and lesbians in housing antidiscrimination rules), they may be prohibited from taking away rights that have been granted, particularly in cases involving newly protected groups. Justice Scalia, dissenting, complained that the Court was

\textsuperscript{109} 473 U.S. 432 (1985).
\textsuperscript{111} \textit{City of Cleburne}, 473 U.S. at 449-50. The city asserted that the location was in a 500-year flood plain and could be dangerous, and students from a local school might harass the residents. These arguments didn’t pass muster in the Supreme Court, which found that the distinction was underinclusive on the flood plain argument (because elderly residents would presumably be just as endangered in the case of a flood) and that the nearby school already served students with disabilities alongside other students. \textit{Id.}
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} 517 U.S. 620 (1996); cf. \textit{Lawrence v. Texas}, 539 U.S. 581, 579 (O’Connor, J., concurring) (concluding that the Court should have upheld but distinguished \textit{Bowers} by deciding the case on equal protection grounds that “moral disapproval is [not] a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy”).
\textsuperscript{114} See \textit{id.} at 632.
\textsuperscript{115} See \textit{id.} at 630-36.
taking a side in an ongoing cultural and political dispute that was resolved the other way by a majority of Colorado voters. 116 He would have applied a more traditional, lenient rational basis review because the Constitution doesn’t directly address this issue and the Court’s Equal Protection Clause doctrine didn’t say that elevated scrutiny applies to legislative distinctions involving gays and lesbians. 117 Several State courts followed the Supreme Court’s lead, 118 although some others have applied more traditional rational basis scrutiny in these cases. 119

In contrast, the U.S. Supreme Court has applied traditional rational basis scrutiny to laws that do not distinguish protected classes and are not based on animus. For example, the respondent’s challenge in Astrue v. Capato was based on the equal protection component of the Fifth Amendment’s Due Process Clause. 120 She argued that the statute at issue treated posthumously conceived children as inferior to natural children by denying them government benefits “simply because of their date of birth and method of conception.” 121 The Court upheld the Government’s reading of the statute based on the application of a rational basis standard, noting that “[n]o showing ha[d] been made that posthumously conceived children share the characteristics that prompted our skepticism of classifications disadvantaging children of unwed parents.” 122

In Windsor, the Court struck down section 3 of DOMA because the statute’s distinction between same-sex and opposite-sex couples served only “to disparage and to injure” the

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116 See id. at 636 (Scalia, J., dissenting).
117 See id.
118 See, e.g., Goodridge v. Department of Public Health, 440 Mass. 309, 798 N.E.2d 941 (2003) (relying on the Supreme Court’s reasoning in Lawrence, Loving, and Romer in holding that the Massachusetts constitution required the Commonwealth to recognize same-sex marriage).
119 See Hernandez v. Robles, 7 N.Y.3d 338, 855 N.E.2d 1 (2006) (finding the State’s rationale for restrictions on same-sex marriages were sufficient to survive rational basis review); see also Anderson v. King County, 158 Wis. 2d 1, 138 P.3d 963 (2006) (applying rational basis scrutiny).
120 132 S. Ct. 2021 (2012) (upholding the Social Security Administration’s interpretation of a statutory definition of “child” that pointed to State law, which excluded posthumously conceived children).
121 Id. at 2033 (quoting Brief for Respondent 42-43).
122 Id. at 2033; see also Mathews v. Lucas, 427 U.S. 495, 514 (1976) (discussing classifications that disadvantage illegitimate children).
personhood and dignity of same-sex couples. Lower federal courts are already beginning to apply the equal protection reasoning from Windsor, as the dissents predicted, to strike down State laws restricting personal relationships. Other laws limiting the rights of same-sex couples (married or not) have lately faced similar receptions in the courts.

The reasoning from these decisions is applicable beyond the same-sex marriage context. The INA classifies certain marital, parent-child, and other close relationships differently from similar relationships. Certain young people with ties to U.S. citizens or legal permanent residents may be included in the definition of “child” while others are excluded. To take an easy example, some people united by proxy marriage are included in the definition of “spouse” if the marriage has been consummated but excluded if the marriage has not been consummated. These classifications are probably not subject to strict scrutiny, as applied in cases that distinguish people by race, or even “intermediate” scrutiny, as applied in cases involving gender classifications. However, three decades of Supreme Court cases—stretching from Moreno to Cleburne to Romer to Windsor—show that courts must take a hard look at laws that classify people based on differences in choices of family composition and structure and other close relationships. These individuals also have a constitutionally protected interest in their moral and sexual choices. For the reasons explained in Windsor, the rationale from those cases is even

stronger where the Federal Government seeks to demean or delegitimize a genuine relationship that States have recognized and granted protection.

The Court’s approach in Romer and Windsor to the constitutional guarantee of equal protection also shows that distinctions in family composition and structure and close relationships are rarely going to be rationally related to a legitimate public purpose. In the immigration context, where Congress has a strong justification based on its enumerated power under Article I, these provisions serve the nominal purpose of marginally restricting immigration and naturalization. However, the exclusions appear either overinclusive by covering some aliens who are related to or in a genuine relationship with U.S. citizens or legal permanent residents, or underinclusive by failing to exclude some categories of relationships that pose the same level of risk of fraud. As in Romer and Windsor, the only remaining explanation for the distinctions in these cases is animus, especially where the statute excludes authentic relationships that have been recognized and granted protection by a State.

In conclusion, courts should take a hard look at classifications based on differences in choices of family composition and structure and other relationships, especially where States have recognized a relationship. In the immigration context, the INA’s definitional provisions for terms like “spouse” and “child” are so overinclusive or underinclusive that the only explanation for the law is animus towards certain family choices.

V. CONCLUSION

The INA’s definitional provisions unconstitutionally burden choices in family composition and structure. These provisions must be revised by Congress or revisited by the courts.
Congress could amend the INA’s anti-fraud provisions to more straightforwardly address concerns about individuals creating fraudulent family relationships. Congress could also provide more resources for this purpose. In addition, DHS could focus its regulatory and enforcement efforts on ferreting out false claims.

Absent congressional or executive action though, courts following Windsor should apply heightened scrutiny to remaining federal definitions of family relationships, or at least take a hard look at those policies under rational basis scrutiny, especially when a federal definition excludes an authentic relationship recognized by a State. The federalism, substantive due process, and equal protection principles raised in Windsor are applicable beyond the same-sex context from that case.

Under federalism principles, States are the primary regulators of domestic relations and have a more direct interest than the Federal Government in the marital and family status of persons within their borders. Courts should give substantial deference to State laws that recognize and grant protection to genuine, legal family relationships, within constitutional limits.

In addition, parental rights and rights in other family and intimate relationships are protected by the Due Process Clause under the substantive due process doctrine. Courts must consider applying elevated scrutiny or taking a hard look at federal and State policies that burden family relationships and some non-family intimate relationships.

Finally, equal protection principles direct courts to take a hard look at classifications based on differences in choices of family composition and structure and other close relationships, especially where States have recognized and granted protections to a relationship. In the immigration context, the INA’s definitional provisions do not appear to be sufficiently related to a legitimate public purpose.