

COMMENT

PROTECTING THE IMMIGRANT FAMILY: THE MISGUIDED POLICIES, PRACTICES AND PROPOSED LEGISLATION REGARDING MARRIAGE LICENSE ISSUANCE

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“We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.”¹

I. INTRODUCTION

Heather Buck and Jose Guadalupe Arias-Maravilla fell in love in 2005. Heather is a citizen of the United States and resides in the town of West Hazelton in Luzerne County in the Commonwealth of Pennsylvania.² Jose is a citizen of Mexico and is currently a resident in West Hazleton, Pennsylvania.³ In October 2005, Heather and Jose moved into a home together in West Hazelton.⁴ In December 2006, Heather gave birth to their first son. The child lives with both parents in their West Hazelton home.⁵ In preparation for the birth of their child, Heather and Jose planned to marry before their son was born. Heather and Jose were forced to postpone their marriage, however, due to the premature birth of their son. Heather and Jose then made plans to be married shortly after their child was born.⁶

Before they were able to marry, however, Pennsylvania police put Jose in detention after his car broke down on the way to work.⁷ Jose was walking along the side of the road to call a tow truck when police stopped him and asked for identification.⁸ The police immediately interrogated Jose as to his legal presence in the United States.⁹ Jose refused to answer any questions on the grounds that local police were not authorized to enforce federal immigration laws. The police took him into custody and turned him over to immigration officials. Jose was never charged with a crime.

Jose then began the immigration removal process. After spending over a month in detention facilities, Jose appeared before a United States immigration judge. In immigration court, Jose conceded his illegal entrance to the United States and agreed to voluntarily return to Mexico.¹⁰ Jose agreed to post bond and was given sixty days to arrange his personal affairs in the United States.¹¹

1. Supreme Court Justice William O. Douglas, in the majority opinion of *Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535, 541 (1942).

2. Complaint at 2, *Buck v. Stankovic*, 485 F. Supp. 2d 576 (M.D.Pa. 2007) (No. 3:07-CV-0717).

3. *Id.*

4. *Id.* at 6.

5. Brief of Plaintiff at 1, *Buck*, 485 F. Supp. 2d 576 (No. 3:07-CV-0717).

6. *Id.*

7. *Id.* at 2.

8. Complaint, *supra* note 2, at 6–7.

9. *Id.* at 7.

10. *Id.* The federal Immigration and Nationality Act § 240B(a) allows the Department of Homeland Security to grant voluntary departure, including all extensions, only up to a total of 120 days to a person who voluntarily agrees to depart the U.S. at his own expense instead of being subject to immigration removal proceedings. 8 U.S.C. § 1229 (2006).

11. Complaint, *supra* note 2, at 7.

In the shadow of Jose's fast approaching departure from the United States, Heather and Jose scrambled to renew their marriage efforts. Heather and Jose went to the office of District Justice Joseph Zola in the Hazelton area to apply for a marriage license. Upon inquiring about the requirements for a marriage license, Justice Zola informed Heather and Jose that they needed birth certificates in English, photo identification, and Social Security numbers.¹² Heather and Jose explained that Jose did not have a Social Security number since he was a citizen of Mexico.¹³ Then, the licensing official questioned Jose on his legal presence in the United States. Jose explained his voluntary departure status, and the licensing official told them to come back with all of their papers.¹⁴ Jose and Heather returned to the licensing offices with all of their papers, including Jose's expired passport, but the licensing office denied their application for a marriage license. The licensing official explained they would not accept the application because there was no visa in Jose's passport.¹⁵ The officer refused to accept any other legal documentation.¹⁶ The licensing official produced a document that instructed licensing clerks to deny marriage licenses to "foreign nationals who were in the country illegally," even if they produced valid passports.¹⁷

Ultimately, Heather and Jose were denied their right to marriage, and thereby precluded from attaining the legal protections of marriage for themselves and their child. They were also denied the social, spiritual and psychological satisfaction of a lawful marriage. Unfortunately, stories of marriage denials such as Heather and Jose's have occurred at licensing centers across the United States, such as Orlando,¹⁸ Philadelphia,¹⁹ Mem-

12. *Id.* at 9.

13. Brief, *supra* note 5, at 3.

14. *Id.*

15. A visa mark stamped in a passport serves as the official endorsement that a passport has been examined and the immigrant is allowed to proceed through the border. A visa is generally required for admission of aliens into the United States. 8 U.S.C. § 1181 (1990); 8 U.S.C. § 1184 (2006).

16. Brief, *supra* note 5, at 4.

17. Complaint, *supra* note 2, at Exhibit B.

18. See Susan Clary, *Some Citizens Could Face Tighter Rules to Wed*, ORLANDO SENTINEL, Nov. 27, 2001, at D1 (Orange County Clerk of Courts Lydia Gardner tells press, "In view of 9-11, we have a new awareness that this country is easy to enter and it's easy to set up shop. We have a hole in this fence that needs to be mended.").

19. Thomas Ginsberg, *Marriage Office Gets Tough on Immigrants: A Phila. Official Says Scrutiny May Help Block Terrorists, Activists Question Expertise*, PHILADELPHIA INQUIRER, Mar. 30, 2002, at A01 (Due to security fears, the Philadelphia Marriage License Bureau checked immigration papers of people they believed undocumented and denied marriage licenses to those without proper legal documentation.).

phis,²⁰ Richmond,²¹ Kansas City,²² New Jersey²³ and Minneapolis.²⁴

This article is about the importance of promoting marriage of immigrant families in United States law. Particularly, this article is about promoting and protecting marriages through the policies in marriage license issuance. This article will show the following: (1) county licensing centers across the country are misconstruing state and federal statutes regarding marriage licenses for undocumented immigrants; and (2) recent proposed state legislation in Virginia, Tennessee and Connecticut denying marriage licenses to undocumented immigrants violates the Constitution's Due Process, Equal Protection and Supremacy clauses, and is therefore unconstitutional. In addition, this article has a threefold advocacy purpose: (1) to assist the heads of county licensing centers across the country in interpreting complicated state and federal laws; (2) to assist attorneys and judges in making constitutional and statutory-based arguments against any law or policy that denies marriage to immigrant families; and (3) to encourage clergy and lay members of the Catholic Church to advocate for the right to marriage for immigrants in their communities.

Section II of this article will discuss in policies and practice of marriage license issuance across the country. Section II will also discuss the Welfare Reform Act, which was the mistaken cause for many marriage li-

20. Rebekah Gleaves, *Long Road to the Altar: Immigrants in Memphis Must Bypass Laws to Get Married*, MEMPHIS FLYER, July 5, 2001, at 6

Edwin and Eber were high school sweethearts. They met while attending the same school here in Memphis and like countless couples before them, they dated all the way through school, fell in love, and planned to marry someday. Now, each is 20 years old, out of school, and living thousands of miles from his native country of Guatemala and hers of Mexico. They wanted to marry in the only city the both call home, the city where they met and where they plan to live out their lives. But in this forbidden love story, there are no Montagues and no Capulets. The only force stopping Edwin and Eber from being married in Memphis is the Shelby County requirement that each person has a Social Security number to get a marriage license.

Associated Press, *Red Tape Silences Wedding Bells for Many Immigrants: Documentation Requirements Vary Across State*, COMM. APPEAL (Memphis), June 6, 2006, at B9 (story detailing denials of marriage license to immigrants—even legal immigrants—unless they had a fiancé visa).

21. Michael Martz & Meredith Bonny, *Does Policy Make Law?: Court Clerk's Position Puts Henrico in Murky Immigration Debate*, RICH. TIMES DISPATCH, Jan. 22, 2005, at A1 (marriage license denied to United States citizen and West African immigrant who overstayed his visa).

22. Mary Sanchez, *Trip to DMV Frustrates Immigrant*, KAN. CITY STAR, Apr. 10, 2005, at B1.

23. Miguel Perez & Carolyn Salazar, *Social Security Number Not Always Enough; ID Requests for Cards Send Many Scrambling*, THE RECORD (Hackensack, N.J.), Sept. 17, 2006, at A01 (undocumented immigrants denied marriage license due to failure to provide Social Security number). Many other instances of denials of marriage licenses to undocumented immigrants are on file with the author.

24. Michelle Lore, *Immigration Bar Upset with Hennepin County*, MINN. LAW., June 4, 2007, at A1 (Hennepin County licensing officials deny marriage license to a U.S. citizen and a legal immigrant due to immigrant's lack of SSN, despite the immigrant's valid K-1 visa status); see also, Emily Gurnon, *Couple Sues Over Marriage License Rule: County's Social Security Number Requirement Called Unconstitutional*, ST. PAUL PIONEER PRESS, June 7, 2007, at B1.

cense refusals. Sections III and IV will provide a constitutional analysis of laws that deny marriage to undocumented immigrants. Section V will provide a short summary of the Catholic Church's teaching on marriage, as well as a call to clergy and lay people to advocate the protection of the right to marriage.

II. DENIALS OF MARRIAGE LICENSES AND THE WELFARE REFORM ACT

The policies and practices of marriage license issuance vary across the country.²⁵ Each county has its own special procedures and applications for

25. For example, in Bronx County, New York, ID requirements include: a driver's license, non-driver's license ID card, learner's permit, active duty U.S. military identification card, passport, valid U.S. certificate of Naturalization, valid U.S. permanent residence card, birth certificate, census record, and baptismal record. NYC Marriage Bureau Online, <http://www.nycmarriagebureau.com/MarriageBureau/index.htm> (last visited Oct. 19, 2007). In Maricopa County, Arizona, nearly any ID document is allowed and proof of citizenship is not required. Clerk of the Superior Court of Maricopa County, <http://www.clerkofcourt.maricopa.gov/marlic.asp#application> (last visited Oct. 19, 2007). In Kern County, California, nearly any form of identification will work, including an applicant's ID from home country as long as it has a picture and birth date. Kern County Clerk, <http://www.co.kern.ca.us/ctyclerk/marriage/faq.asp#need> (last visited Oct. 19, 2007). Fresno County, California, requires the bride and groom each bring a valid driver's license or DMV issued identification card. If either party does not have such ID, they must provide a valid birth certificate and another acceptable form of identification, such as a school or employee ID. County of Fresno, <http://www.co.fresno.ca.us/2850/Post/MLCC112.pdf> (last visited Oct. 19, 2007). Palm Beach County, Florida, requires each party to provide a driver's license issued in the United States, a federal or state identification card, or a passport showing name and date of birth. Birth certificates or green cards are not acceptable. Clerk and Comptroller Palm Beach County, <http://www.mypalmbeachclerk.com/courtservices/circuitcivil/marriage.html> (last visited Oct. 19, 2007). Miami-Dade County, Florida, requires a driver's license, passport, military ID, alien registration card, state of Florida ID or any other legal form of identification. Their website generally states that no residence or citizenship-status requirement is enforced, all U.S. citizens and residents must provide their social security number, and non-U.S. residents may provide an alien registration card, driver's license, passport, or any other legal form of identification if they do not have a social security number. Miami Dade Marriage License Requirements, <http://cmaevents.com/Documents/Marriage%20License%20Requirements.pdf> (last visited Oct. 19, 2007). Los Angeles County, California, requires photo identification and verification of age but states that no residency or citizenship proof is required. L.A. County Online, Marriage Licenses & Ceremonies, <http://www.lavote.net/CLERK/Marriages.cfm> (last visited Oct. 19, 2007). Dallas County, Texas, requires the parties to provide a valid driver's license, U.S. passport, certified copy of a birth certificate (complete with raised seal and on blue certificate paper), or military identification. Dallas County Clerk, <http://www.dallascounty.org/department/countyclerk/marriage-license.html> (last visited Oct. 19, 2007) (the website provides no mention of residency or citizenship requirements). Fulton County, Georgia, requires a driver's license, passport or birth certificate and states that "[d]ocuments not in English must be accompanied by certified English translation." Fulton County Online, Marriage Licenses, http://ww2.co.fulton.ga.us/index.php?option=com_content&task=view&id=150&Itemid=140 (last visited Oct. 19, 2007). Cook County, Illinois, requires one of the following: state driver's license, state identification, U.S. passport, U.S. naturalization certificate, U.S. Armed Forces identification card, U.S. Selective Service card, or a U.S. immigration card (resident alien). If not one of these is provided, the applicant must provide two of the following: Social Security card, voter registration card, W-2 form, bank statement, utility bill, vehicle registration card, life insurance policy, checkbook or savings book, work ID card with photo, traffic ticket, school ID with photo, foreign passport or a Veteran's Association card. Cook County Clerk's Office, Applying for a Marriage License, http://www.cookctyclerk.com/sub/marriage_licenses.asp (last visited Oct. 19, 2007).

marriage licenses, and there are no uniform state or federal policies governing the practice. This section will discuss the confusion at licensing centers, and provide an explanation for the confusion by analyzing the Federal Welfare Reform Act.

A. *Differing Requirements for Marriage Licenses*

Licensing centers across the country employ different policies for issuance of marriage licenses.²⁶ While it is not normal practice for licensing centers to deny marriage licenses on account of failure to provide legal immigration status, several licensing centers across the country have denied marriage licenses on such grounds.²⁷ A case study best illustrates the marriage license issue. It also helps explain the confusion surrounding the practice of marriage license issuance. The following section details the marriage licensing procedures and requirements in Hennepin County, Minnesota.²⁸ The section also provides a statutory history and analysis in an attempt to explain Hennepin County's practice in light of the laws and policies governing marriage.

B. *Hennepin County: A Case Study*

Hennepin County, Minnesota provides a unique case study regarding the issuance of marriage licenses to immigrants. Hennepin County is home to over tens of thousands of immigrants from countries such as Somalia, Liberia, Laos, Mexico, and other Latin American countries.²⁹ Due to its high immigrant population, Hennepin County serves as an excellent example to illustrate the effects a heightened legal documentation requirement can have on immigrants and their families.

1. *Hennepin County Marriage License Requirements*

The Hennepin County Licensing Center has a uniform identification policy for service center transactions.³⁰ The uniform policy follows the pro-

26. *See id.*

27. Clary, *supra* note 18.

28. During the publication process of this issue of the *University of St. Thomas Law Journal*, a draft of this article was distributed to the Hennepin County Attorney's Office. In addition, several members of the local immigration bar were lobbying Hennepin County, to change their marriage license policies. At the time of publication Hennepin County officials were considering changes to their policies. Those potential changes had not occurred at the time of print.

29. METRO. COUNCIL, REGIONS MINORITY POPULATION IS GROWING DRAMATICALLY, <http://www.metrocouncil.org/Directions/development/dev2005/demographicsSept05.htm> (last visited Oct. 30, 2007); *See generally*, OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2005 YEARBOOK OF IMMIGRATION STATISTICS (2006). Immigrants are attracted to Minnesota because of its strong economy, active civic and cultural life, high quality of life, and educational opportunities.

30. Hennepin County, Marriage Licenses: Procedure/Required Documents, <http://www.co.hennepin.mn.us/portal/site/HCInternet/menuitem.3f94db53874f9b6f68ce1e10b1466498/?vgnext>

cedures for the State of Minnesota's Department of Public Safety requirement criteria for identification.³¹ Applicants are required to show one form of valid identification when applying for a marriage license.³² Hennepin County's licensing center website on marriage licenses states that acceptable documents for identification include "(1) Current driver's license ([Minnesota] or other state), (2) Clipped Minnesota license with yellow receipt, (3) *Current* Passport, (4) Current Minnesota ID card, (5) *Current* ID issued by INS, (6) Military ID, or (7) Naturalization papers with current photo."³³ In effect, Hennepin County's uniform policy denies undocumented immigrants and their families the right to marriage. Undocumented immigrants are usually not able to provide any of the required identification documents. For the past several years, Hennepin County immigration attorney advocates have circumvented this hurdle simply by sending clients to the nearby Ramsey County Licensing Center in St. Paul, Minnesota, where no heightened identification requirement exists.³⁴

Where does the authority for Hennepin County's heightened identification requirement for marriage licenses derive? Other than stating their decision to follow the Department of Public Safety requirements, Hennepin County provides few legal authorities for their practice. For a short period in the spring of 2005, Hennepin County's licensing center website stated that a judicial opinion had been issued by a Hennepin County judge authorizing the right to require such identification.³⁵ When asked for a copy of the judicial opinion, Hennepin County attorneys responded that no such opinion existed and that the website text was a mistake.³⁶

oid=2fcda44d3d9fc010VgnVCM1000000f094689RCRD&vgnnextfmt=default (last visited Nov. 19, 2007).

31. *Id.*

32. *Id.*

33. *Id.* (emphasis added). It is significant that Hennepin County requires a *current* Passport. A Passport with an expired visa is not considered current and would not be accepted. Also noteworthy, Hennepin County's website is far outdated in that it still refers to the federal government immigration agency as INS, its full title being Immigration and Nationalization Services, which no longer exists. Rather, beginning on March 1, 2003, nearly all immigration services were taken over by the newly formed United States Citizenship and Immigration Services.

34. Ramsey County, Marriage Licenses, http://www.co.ramsey.mn.us/ph/vr/marriage_licenses.htm (last visited Apr. 21, 2007). As compared to Hennepin County, Ramsey County does not require heightened forms of identification such as naturalization papers, passports, or other immigration documents. Ramsey only requires social security numbers if an applicant has one. Also, contrast Hennepin County's application practice with nearby Olmsted County, home of Rochester, Minnesota, which specifically states "[p]roof of U.S. Citizenship is not required. There are no special requirements for non-citizens. If you do not have a social security number, enter all zeros in the space provided for the social security number. Proof of Identity – Not required in Olmsted County." Olmsted County, Marriage Licenses: Instructions for Completing Marriage License Application, http://www.co.olmsted.mn.us/licenses/marriage_license.asp (last visited Apr. 21, 2007).

35. The actual website page is no longer in existence. However, a hard copy of the website is on file with the author.

36. Email from anonymous Hennepin County attorney to author (June 12) (on file at Minnesota Advocates for Human Rights, Minneapolis, MN).

On the application for the Hennepin County Marriage License application³⁷ and on the Hennepin County licensing center website,³⁸ the County provides citations to the following statutes: (1) 42 U.S.C. § 666(a)(13)(A); (2) Minnesota Statutes section 144.223; and (3) Minnesota Statutes section 517.08, subd. 1a(9). These statutes will provide an explanation for the Licensing Center's policies.

2. *Statutory Authority and Interpretation*

The following sections will provide the statutory interpretations, history, and intent of the above noted statutes. First, the article will address the Minnesota statutes. Second, the article will analyze and illustrate the significance of 42 U.S.C. § 666(a)(13)(A) of the Personal Responsibility and Welfare Reform Act (Welfare Reform Act). The following sections will demonstrate that Hennepin County officials misinterpreted a state statute that was derived and passed on account of mandates in the Federal Welfare Reform Act. This paper suggests that the following statutory interpretation illustration explains much of the confusion by licensing centers across the United States.

i. Minnesota Statutes sections 517.08 and 144.223 and the Minnesota State Requirement for Social Security Numbers for Marriage Licenses

Minnesota Statutes section 517.08 requires that marriage license applicants provide Social Security numbers (SSNs). The statute, which was amended in 1997 to comply with the Welfare Reform Act, follows the language of federal legislation by requiring collection of SSNs.³⁹ Specifically, Minnesota Statutes section 517.08 was amended in 1997 to comply with 42 U.S.C. § 666(a)(13)(A) of the Welfare Reform Act.⁴⁰ In following the lan-

37. HENNEPIN COUNTY DIR. OF LICENSING, STATE OF MINNESOTA MARRIAGE LICENSE APPLICATION, available at <http://wwwa.co.hennepin.mn.us/files/HCInternet/LCandR/Personal/Birth,%20Marriage,%20&%20Death/Marriage3.pdf> (last visited Oct. 30, 2007).

38. Hennepin County, Marriage License Application Form, <http://www.co.hennepin.mn.us/portal/site/HCInternet/menuitem.3f94db53874f9b6f68ce1e10b1466498/?vgnnextoid=0ac2185eda04d010VgnVCM1000000f094689RCRD> (last visited Nov. 19, 2007).

39. The language of the federal Welfare Reform Act required states to conform to the requirements of the statute. Specifically, 42 U.S.C. § 666(a) stated, "[I]n order to satisfy section 654(20)(A) of this title, each state must have in effect laws requiring the use of the following procedures, consistent with this section and with regulations of the Secretary, to increase the effectiveness of the program."

40. MINN. STAT. ANN. § 517.08 (West 1997); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105 (codified as amended in scattered sections of 8 U.S.C. and 42 U.S.C.); Failing to comply with the federal law would prevent states from receiving federal funds for child support. Paul K. Legler, *The Impact of Welfare Reform on the Child Support Enforcement System*, in CHILD SUPPORT: THE NEXT FRONTIER 46 (J. Thomas Oldham & Marygold S. Melli eds., 2000) (discussing welfare reform issues and goals); In fact, some states such as Michigan attempted to exempt themselves from the requirement of passing the federal law. See generally Tracey Lackman, *Welfare Reform Conflict: An Analysis of 42 U.S.C.A.*

guage of the Welfare Reform Act, section 517.08 requires marriage license applicants to provide the parties' SSNs and requires the collection of SSNs for the application, but prohibits them from appearing on the actual marriage license.⁴¹ Specifically, section 517.08 states,

Application for a marriage license shall be made upon a form provided for the purpose and shall contain the following information: (9) the full names the parties will have after marriage and the parties' Social Security Numbers. The Social Security numbers must be collected for the application but must not appear on the marriage license.⁴²

The statutory language of section 517.08 is quite clear in its requirement for SSNs.⁴³ While section 517.08 does require SSNs, it does not provide any language requiring proof of legal status.⁴⁴

A sister statute to section 517.08 is Minnesota Statutes section 144.223, which governs health-related issues in Minnesota.⁴⁵ Like section 517.08, section 144.223 was also amended in 1997 by the Minnesota Legislature to comply with the standards of the Welfare Reform Act.⁴⁶ Section 144.223 states that "[D]ata relating to certificates of marriage registered shall be reported to the state registrar by the local registrar or designee of the county board."⁴⁷ In addition, section 144.223 requires that the report shall state the applicant's SSN.⁴⁸ As with section 517.08, section 144.223 provides no prima facie legislative evidence that it was meant to restrict undocumented immigrants from a marriage license.

Further, nothing in the legislative history of section 517.08 and section 144.223 indicates that the requirement of SSNs on marriage license applications was meant to exclude undocumented immigrants from obtaining marriage licenses. A careful review of the reports and journals regarding the legislative history of section 517.08 and section 144.223 provides no information suggesting the statutes were meant to restrict undocumented immigrants from receiving marriage licenses. Rather, the requirement of SSNs in section 517.08 and section 144.223 was simply Minnesota's compliance with the federally mandated Welfare Reform Act, which was meant to strengthen the foundation of marriage and two-parent families.

§ 666(A)(13)(A) of the *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 19 T.M. COOLEY L. REV. 105 (2002); H.R. Rep. No. 104-651, at 1324 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2183.

41. Act of June 2, 1997, ch. 203, art. 6, § 34, 1997 Minn. Laws 1750, 1772.

42. MINN. STAT. ANN. § 517.08(9) (West 2007).

43. It is therefore no wonder that licensing center officials have become confused in attempting to apply law in regards to marriage licenses.

44. MINN. STAT. ANN. § 517.08(9) (West 2007).

45. MINN. STAT. ANN. § 144.223 (West 2007).

46. Act of June 2, 1997, ch. 203, art. 6, § 4, 1997 Minn. Laws 1755.

47. MINN. STAT. ANN. § 144.223 (West 2007).

48. *Id.* at § 144.223(1)(vi).

ii. *The Welfare Reform Act and the Requirement of Social Security Numbers for Marriage License Applications*

There are a variety of federal policies that have come to include SSN requirements.⁴⁹ Though the number was initially intended only for the purpose of administering the social security program, the use of the SSN is now ubiquitous. The SSN is used by both government and nongovernmental entities for numerous purposes.⁵⁰ The original purpose of the SSN, however, was far less expansive. Created under the Federal Social Security Act, the SSN was originally designed to keep track of an individual's earnings and eligibility benefits.⁵¹

As stated above, in 1997, Minnesota Statutes sections 517.08 and 144.223 were amended to comply with the Welfare Reform Act.⁵² The stated purpose of the Welfare Reform Act was to "encourage the formation and maintenance of two-parent families."⁵³ Further, the Act intended to "prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals of preventing and reducing the incidence of these pregnancies."⁵⁴ Moreover, the act intended to "end the dependence of needy parents on government benefits by *promoting* marriage."⁵⁵ Clearly, the intent of that statute was to encourage the formation of families through marriage.

Congress enacted the statute with the above stated intent in response to finding that: (1) "Marriage is the foundation of a successful society";⁵⁶ (2) "Marriage is an essential institution of a successful society which promotes the interests of children";⁵⁷ (3) "The absence of a father in the life of a child has negative effect on school performance and peer adjustment";⁵⁸ (4) "Children of single-parent homes are 3 times more likely to fail and repeat a year in grade school than are children from intact 2-parent families";⁵⁹ (5)

49. See generally U.S. Social Security Administration, Social Security Online, <http://www.ssa.gov>.

50. *Id.*

51. See generally U.S. Social Security Administration, History, <http://www.ssa.gov/history/law.html> (last visited Oct. 3, 2007); see also Flavio L. Komuves, *We've Got Your Number: An Overview of Legislation and Decisions to Control the Use of Social Security Numbers as Personal Identifiers*, 16 J. MARSHALL J. COMPUTER & INFO. L. 529 (1998) (arguing for limited governmental use of the SSN as a personal identifier).

52. Act of June 2, 1997, ch. 203, 1997 Minn. Laws 1772.

53. Personal Responsibility and Work Opportunity Reconciliation Act [Welfare Reform Act] of 1996, Pub. L. No. 104-193, § 401(a)(4), 110 Stat. 2105, 2113 (codified as amended in scattered sections of 8 U.S.C. and 42 U.S.C.).

54. Welfare Reform Act § 401(a)(3).

55. Welfare Reform Act § 401(a)(2) (emphasis added).

56. Welfare Reform Act § 101(1).

57. Welfare Reform Act § 101(2).

58. Welfare Reform Act § 101(9)(H).

59. Welfare Reform Act § 101(9)(J). Note also that *Plyler v. Doe*, 457 U.S. 202, 216, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982) gave all children of undocumented immigrants the right to education. Therefore, by preventing these children's parents the opportunity to foster their rela-

“Children from single-parent homes are almost 4 times more likely to be expelled or suspended from school”;⁶⁰ (6) “Neighborhoods with larger percentages of youth aged 12 through 20 and areas with higher percentages of single-parent households have higher rates of violent crimes”;⁶¹ (7) “Of those youth held for criminal offenses within the State juvenile justice system, only 29.8 percent lived primarily in a home with both parents. In contrast to these incarcerated youth, 73.9 percent of the 62,800,000 children in the Nation’s resident population were living with both parents.”⁶² Congress therefore concluded that “in light of this demonstration of the crisis in our Nation, it is the sense of the Congress that prevention of the out-of-wedlock pregnancy and *reduction in out-of-wedlock birth are very important Government interests . . .*” that the Welfare Reform Act was meant to address.⁶³ Clearly, the statute was meant to promote the institution of marriage and to encourage its practice within the United States.

The Welfare Reform Act contains a special section requesting corresponding state agencies to require the SSNs of marriage license applicants.⁶⁴ Specifically, the statute requires the SSN of “any applicant for a professional license, commercial driver’s license, occupational license, or marriage license” for purposes of child support enforcement. The section of the statute regarding the SSN requirement caused much confusion for licensing departments across the country.⁶⁵ Staff members of these departments requested clarification from the United States Department of Health and Human Services (DHHS) because the statute dealt specifically with child support enforcement, and DHHS was the government agency overseeing child support programs.⁶⁶

In response to the confusion, Commissioner David Gray Ross of the Office of Child Support Enforcement (a subagency of DHHS), in an interpreting memo to “[D]irectors and Regional Program Managers” titled “Inclusion of Social Security Numbers on License Applications and Other Documents,” provided this important clarification:

We interpret . . . section 466(a)(13)(A) . . . to require that States have procedures which require an individual to furnish any social security number that he or she *may have*. [However], [s]ection

tionship by marrying, we are effectively, albeit indirectly, defeating the purpose of the Welfare Reform Act and attempting to increase our cost and workload on education by setting up children of undocumented immigrants for failure.

60. Welfare Reform Act § 101(9)(K).

61. Welfare Reform Act § 101(9)(L).

62. Welfare Reform Act § 101(9)(M).

63. Welfare Reform Act § 101(10) (emphasis added).

64. 42 U.S.C. § 666(a)(13)(A) (2007).

65. Memorandum from David Gray Ross, Commissioner, Office of Child Support Enforcement, to State IV-D Directors and Regional Program Managers (July 14, 1999), available at <http://www.acf.hhs.gov/programs/cse/pol/PIQ/1999/piq-9905.htm>.

66. *Id.*

466(a)(13)(A) . . . does not require that an individual have a social security number as a condition of receiving a [driver's] license.⁶⁷

Additionally, Commissioner Ross recommended that state licensing agencies require those applicants without a SSN to sign a sworn affidavit, under penalty of perjury, stating that they do not have a SSN and that they are not eligible for a SSN.⁶⁸ The language of the interpreting memo by the DHHS Office of Child Support Enforcement is quite clear: a SSN is only needed if one has a SSN. Further, this memo's interpretation is consistent with earlier policies of other federal agencies, such as the U.S. Department of Housing and Urban Development, requiring SSNs only from those who actually have them.⁶⁹

Regarding government agency interpretations of federally mandated statutes, the United States Supreme Court recognized in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.* that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations."⁷⁰ The "*Chevron* deference" therefore applies to the administrative interpretation provided by the DHHS memo. Since *Chevron* grants DHHS the interpretative authority and DHHS has said SSNs are not required of those who do not have them, it seems clear SSNs are not required of all.

With such a clear and concise statutory interpretation of section 466(a)(13)(A) provided by DHHS, and the Supreme Court's judicial backing of the agency interpretations, it is curious how the Hennepin County Licensing Center so misapplied the related statutes. One possible explanation is the fact that the DHHS memo was distributed to child support directors and not county licensing centers. It is therefore likely that many licensing centers, such as Hennepin County, were not and still are not aware of the DHHS memo and its clarifying interpretation of the Welfare Reform Act's language requiring a SSN for licenses.⁷¹ Whether licensing centers were aware of the interpretation or not, § 466(a)(13)(A) of the Welfare Reform Act has been wrongly construed and misapplied in Hennepin County.

67. *Id.* (emphasis added).

68. *Id.*

69. See HUD Circular No. H-90-60 (8/24/90), allowing individuals not having SSNs to execute the certifications to that effect.

70. 467 U.S. 837, 844 (1984).

71. The author of this article, during its publication, provided Hennepin County with a copy of Commissioner Ross's clarifying memorandum. Upon receiving a copy of the memorandum, Hennepin County subsequently changed the wording on their marriage license application to read "[f]ederal and state law require that an applicant's Social Security number, *if any*, must be provided on the marriage license application." (emphasis added). Hennepin County's marriage license application is available at <http://wwwa.co.hennepin.mn.us/files/HCInternet/LCandR/Personal/Birth,%20Marriage,%20&%20Death/Marriage3.pdf>. However, Hennepin County has not yet—at the time of this publication—changed their heightened identification requirement for marriage licenses.

3. *Statutory Construction of Minnesota Statutes*

As demonstrated by the above discussion, Minnesota statutes 517.08 and 144.223 do not require SSNs as a condition for a marriage license and the Hennepin County Licensing Center is incorrectly interpreting the statute. Minnesota statutes 517.08 and 144.223 do not set forth the requirement for eligibility for marriage but rather establish the procedure for obtaining a marriage license. Because Minnesota statutes shall be construed in line with Congress's intent, sections 517.08 and 144.223 are only meant to require SSNs from those individuals who have a SSN.

It is true that the state and federal statutes specifically require a SSN for a marriage license. It therefore seems logical for the Hennepin County Licensing Center to follow the plain language of the statute and to require all applicants to provide a SSN. Indeed, the Minnesota courts have stated that the rules of statutory construction require that a statute's words and phrases are to be given their plain and ordinary meaning.⁷²

The courts, however, have also said that the object of the court in construing statutes is to ascertain and give effect to the intent of the legislature.⁷³ The discussion *supra* illustrates the clear intent of the Welfare Reform Act: to promote two-parent families by promoting marriage.⁷⁴ Many of the legislators who created the Welfare Reform Act would be abhorred by the knowledge that it is effectively being used to prevent marriages, as in Hennepin County.

Furthermore, as stated above, the DHHS issued a clarifying memo on the statute resolving any confusion as to whether a SSN requirement existed for non-SSN possessors. Minnesota courts, in particular, have stated that "an agency interpretation of the statutes it administers is entitled to deference and should be upheld, absent a finding that it is in conflict with the express purpose of the [a]ct and the intention of the legislature."⁷⁵ The DHHS memo clearly states that a SSN is only required if an applicant has one.⁷⁶ Rather, the Office of Child Support advises states to require persons without SSNs to submit sworn affidavits that they do not have such numbers. The DHHS's interpretation is not outside the scope of the Welfare Reform Act considering the statute was intended to support the formation of two-parent families. Since the DHHS interpretation does not conflict with

72. *Hince v. O'Keefe*, 632 N.W.2d 577, 582 (Minn. 2001).

73. *See Arlandson v. Humphrey*, 27 N.W.2d 819 (Minn. 1947); *Tuma v. Comm'r of Econ. Sec.*, 386 N.W.2d 702 (Minn. 1986) (objective when construing a statute is to ascertain and effectuate the legislature's intent); *Colonial Ins. Co. of Cal. v. Minn. Assigned Risk Plan*, 457 N.W.2d 209 (Minn. Ct. App. 1990) ("Our objective when construing a statute is to ascertain and effectuate the legislature's intent."); *see also* MINN. STAT. ANN. § 645.16 (West 2007).

74. *See supra* discussion on the Welfare Reform Act.

75. *Geo. A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn. 1988).

76. Memorandum from David Gray Ross, *supra* note 65.

the statute, it should be upheld and Hennepin County's practice should be corrected to comply with the agency interpretation.

The preceding sections illustrate at least one explanation for the confusion among licensing centers: misunderstanding of statutory interpretation and improper distribution of the DHHS interpreting memo. The Hennepin County case study serves a representative example of similar problems that have arisen across the nation. The laws on marriage and immigration are indeed complex. The complexity is intensified by the fact that marriage and family law is governed by the states while immigration law is exclusively controlled by the federal government. The statutory interpretation analysis can become confusing and misleading without an in-depth explanation. It is no wonder so many county licensing clerks—untrained in law—had difficulty and confusion in applying the standards. Indeed, in other states such as North Carolina, Tennessee and Florida, the issue was only resolved after an intervening decision was issued by the Attorney General's office.⁷⁷ The confusion over marriage licenses has great potential for litigation. The following section will discuss the legality of licensing centers that, despite knowledge of the statutory intent and construction of the marriage license laws, continue to deny marriage licenses to undocumented immigrant families.

III. CONSTITUTIONAL LEGALITY OF MARRIAGE LICENSE DENIALS

As mentioned above, state marriage license requirements differ across the country because states have the primary power to regulate family and marriage. The states' power to regulate family and marriage law derives from the state police power, as family law is an area outside of Congress's enumerated powers. For much of United States history, states have held the power of deciding what counts as marriage and who is allowed to marry.⁷⁸

The legality of misapplied statutes by licensing clerks is one issue. More interesting, however, is the constitutional legality of actual state legislation requiring legal documentation of immigrants for a marriage license. Several times in recent years, states have attempted to pass legislation to

77. Letter from Andrew J. Vanore, Jr., General Counsel, Office of the Att'y Gen., State of N. C., to Katherine Lee Payne, Guilford County Registrar of Deeds (Aug. 14, 1998), available at <http://www.ncdoj.com/DocumentStreamerClient?directory=AGOpinions&file=378.pdf>. (North Carolina law complied with 42 U.S.C. § 666(a)(13)(A), which requires a SSN for the purpose of implementing stricter and more efficient means of enforcement of child support laws); Legality of Marriage Without Tennessee License, Op. Att'y Gen., State of Tenn. 06-110 (2006), available at <http://www.attorneygeneral.state.tn.us/op/2006/OP/OP110.pdf>; Processing Aliens' Professional License Applications, Op. Att'y Gen., State of Fl. AGO 99-71 (1999), available at <http://my.floridalegal.com/ago.nsf/Opinions/FB945308BD503DD485256827004BD90E> (laws construed to carry out legislative intent which was to enforce child support payments and not to prevent aliens from marriage).

78. See generally Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625 (2007).

require all immigrants to provide documentation of legal status in the United States before issuing a marriage license. States such as Connecticut,⁷⁹ Florida,⁸⁰ Virginia,⁸¹ Alabama⁸² and Texas⁸³ have all drafted legislative bills which require heightened procedural standards for immigrant families applying for a marriage license. These proposed bills would require an applicant to provide proof of legal status upon applying for a license application. This section of the paper will discuss the constitutional legality of any official state law or policy prohibiting immigrant families the right to marry. Particularly, the following sections will analyze the constitutional legality of these proposed bills under the Due Process, Equal Protection and Supremacy clauses.

IV. CONSTITUTIONALITY OF PROPOSED LEGISLATION REQUIRING LEGAL DOCUMENTATION

As mentioned, Connecticut, Virginia and Alabama (collectively, “the states”) all have proposed legislation that would require documentation of legal status prior to issuance of a marriage license. These statutes would likely fail Constitutional Due Process and Equal Protection analyses because they violate the constitutionally-protected fundamental right of marriage. The following will provide those analyses each in turn.

A. *Substantive Due Process*

Assuming such bills pass their respective legislatures, they would likely be challenged in court under a Constitutional Due Process analysis. In a Substantive Due Process analysis, the court must determine whether the particular government regulation affects a fundamental right. If the regulation affects a fundamental right it is then subject to strict scrutiny.⁸⁴ Where a law or regulation affects a fundamental right, it will be reviewed under the strict scrutiny standard and will be upheld only if it is necessary to achieve a compelling governmental purpose.⁸⁵

79. H.B. 5401, Jan. Session (Conn. 2007) (requiring persons applying for a marriage license to provide the Registrar of Vital Statistics with proof of their United States citizenship or legal resident alien status at time of their application).

80. Lesley Clark, *Proposal Targets Noncitizens' Marriages*, MIAMI HERALD, Jan. 10, 2002, at 1B (requiring noncitizens seeking a marriage license to present any form of identification; the bill would require a valid and unexpired passport or visa).

81. Dahleen Glanton, *Illegal Immigrants Brace for State Laws, Legislatures Push Own Measures as Congress Struggles to Reach Consensus*, CHI. TRIBUNE, Apr. 10, 2006, at 1 (proposing a bill to block illegal immigrants from getting marriage licenses).

82. S.B. 58, Regular Session (Ala. 2007) (requiring additional identification, including legal status documentation, before issuing marriage licenses).

83. Aman Batheja, *Two Local Legislators, Two Bills, One Goal*, FORT-WORTH STAR-TELEGRAM, Dec. 11, 2006, at B1 (legislation requiring Texas couples seeking a marriage license to swear in writing that they are not getting married to circumvent immigration laws).

84. *Zablocki v. Redhail*, 434 U.S. 374, 381 (1978).

85. *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995).

The first question, therefore, is whether marriage is a fundamental right. In *Zablocki v. Redhail*, the United States Supreme Court recognized that marriage is a fundamental right which no statute could prevent.⁸⁶ In *Zablocki*, the Supreme Court struck down a Wisconsin statute that prohibited a noncustodial parent who owed a support obligation to a minor child from legally marrying unless he or she submitted proof of compliance with support obligations and demonstrated that the child was not and was not likely to become a ward of the state.⁸⁷ The Wisconsin statutory requirement directly and substantially interfered with the right to marry. In addition, *Loving v. Virginia* also demonstrates the Supreme Court holding that marriage is a fundamental right, and any government regulations that unreasonably impede marriage absent a compelling state interest will not survive Due Process analysis.⁸⁸ By prohibiting undocumented immigrants from obtaining a marriage license, the proposed legislation clearly affects one's fundamental right to marriage. Because marriage is a fundamental right, it is subject to a strict scrutiny analysis under the Due Process Clause of the Constitution.⁸⁹ In applying the strict scrutiny test, there is a strong presumption that the regulation fails that scrutiny and is invalid.⁹⁰

After deciding to apply strict scrutiny, it must be asked whether the state objective is compelling. Indeed, the states may have a compelling interest in promoting not only marriage but also responsible parenting, which may include the payment of child support, prevention of marriage fraud or the enforcement of immigration laws. The means chosen by the states in proposing restrictive marriage license procedures, however, are not necessary to meet these compelling objectives. The states may have an interest in collecting SSNs to enhance child support enforcement because it will make tracking child support obligors possible. The denial of marriage licenses to those without such numbers, however, will not similarly enhance child support enforcement.

Regarding marriage fraud, the states could argue the proposed legislation serves the state interest of preventing marriage fraud as defined by 8 U.S.C. § 1325(c). However, it is not for the county licensing clerks or the state to enforce federal immigration laws. Therefore, it cannot be a sufficiently important state interest. Further, the states' interest and legality in

86. 434 U.S. at 388.

87. *Id.* at 376.

88. 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *see also* *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) ("Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society'"); *Turner v. Safley*, 482 U.S. 78, 95 (1987) ("[T]he decision to marry is a fundamental right").

89. *Zablocki*, 434 U.S. at 381.

90. *Id.* at 382.

enforcing federal immigration law is a separate Supremacy Clause question of law all in itself and is discussed in a separate section below.

Further, because marriage is a fundamental right, the states' bills must be narrowly tailored to pursue the statutory ends.⁹¹ The states' proposed legislation is not narrowly tailored to pursue their ends, however. As the Supreme Court stated in *Zablocki*, "[W]ith respect to individuals who are unable to meet the statutory requirements, the statute merely prevents the applicant from getting married, without delivering any money at all into the hands of the applicant's . . . children."⁹² Similarly, the states' proposed bills make children illegitimate and prevent families from properly forming. In this way, the states' proposed bills work against the purpose of the Welfare Reform Act and other statutes that work to promote marriage and the formation of two-parent families. No statute that is self-defeating can be considered narrowly tailored to achieve a compelling interest.

There are less restrictive means that can be used to enforce immigration laws, prevent marriage fraud, and to enforce child support, assuming that is what the states are attempting to achieve in their bills. In fact, states' interests in creating effective child support systems and strong families are actually damaged or thwarted by the proposed legislation. Rather, the states should use the less restrictive means as offered by the DHHS memo, which suggests SSNs are only required on marriage license applications for those with such numbers.⁹³ In lieu of SSNs, the states may require affidavits stating that the applicant does not have an SSN. Such means are much less restrictive and are more narrowly tailored to achieve the purpose of the Welfare Reform Act. Therefore, because the strict scrutiny test applies a strong presumption against validity and because the means chosen are neither necessary nor narrowly tailored to promote responsible parenting, the bills as proposed by the states violate Substantive Due Process and are therefore unconstitutional.

B. Equal Protection Analysis of the Restrictions

As the proposed state statutes would fail under a Substantive Due Process analysis, so too would the statutes fail under an Equal Protection analysis. The Equal Protection Clause applies only when the government makes a classification, that is, a legislative distinction that treats two similarly situated groups differently.⁹⁴ If a state's unequal treatment of classes of persons infringes on a fundamental right, it becomes a subject of strict judicial scrutiny and will be upheld only upon a showing that it is justified by a compelling state interest; that is, once the existence of a fundamental right or a

91. While the statutory ends vary slightly among the states, the ends are, in essence, the same: to enforce immigration laws by preventing undocumented immigrants from marriage.

92. 434 U.S. at 389.

93. Letter from David Gray Ross, *supra* note 65.

94. *Zablocki*, 434 U.S. at 383.

suspect class is shown to be involved, the state must assume the heavy burden of proving the legislation is constitutional.

1. The States' Proposed Bills are Unconstitutional as Applied Under the Equal Protection Clause of the U.S. Constitution

The Constitution requires all people be provided equal protection under the laws of the state.⁹⁵ The first step in applying the Equal Protection analysis to an alleged equal protection violation is to determine whether a governmental classification has been made. The proposed legislation that requires all who apply for a marriage license to provide documentation of legal status requires a heightened standard for marriage against undocumented immigrants. As the Supreme Court emphasized in *Zadvydas v. Davis*, “[T]he Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”⁹⁶ This classification violates undocumented immigrants’ rights guaranteed by the Equal Protection Clause of the Constitution. By denying marriage because of lack of legal status, the states (like Hennepin County) are effectively intending to classify individuals based on their alienage, which the Supreme Court has directly prohibited.⁹⁷ Thus, because there has been a statutory classification based on national origin, the strict scrutiny test will be applied.

As mentioned above, the Supreme Court has held that marriage is a fundamental right. The standard for determining whether a statutory classification involving a fundamental right violates the Equal Protection Clause of the Constitution is the strict scrutiny test. Thus, because the strict scrutiny test is applied, the statutory classification of the states’ proposed bills requiring applicants for marriage licenses to document their legal status is unconstitutional unless it can be shown that it is necessary to promote a compelling governmental interest.

The Supreme Court in *Zablocki* analyzed the constitutionality of a Wisconsin requirement that applicants prove they are current in any pending child support order to be eligible for a marriage license. To evaluate the statute in terms of the Equal Protection Clause, the court first had to determine the nature of the classification and the interests affected.⁹⁸ The appellee in *Zablocki* was indigent and unable to pay a pending child support order. Therefore, the requirement that he be current in his child support obligations effectively denied him his fundamental right to marry. The Su-

95. U.S. CONST. amend. XIV, § 1.

96. 533 U.S. 678, 693 (2001) (citing cases).

97. *Application of Griffiths*, 413 U.S. 717, 721 (1973) (prohibition against legal permanent residents becoming lawyers held unconstitutional).

98. *Zablocki*, 434 U.S. at 383 (citing *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 253 (1974)).

preme Court found that “[T]he right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that ‘critical examination’ of the state interests advanced in support of the classification is required.”⁹⁹

The fundamental character of the right to marry does not mean every state regulation that relates in any way to requirements for marriage must be subject to critical examination. The Supreme Court clarified that “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.”¹⁰⁰ As proposed, however, the states’ bills completely deny undocumented immigrants and their United States citizen fiancées the fundamental right to marry by requiring documentation of legal status and cannot be considered reasonable regulations. As in the introductory illustration of this article, Jose did not have legal documentation, and he was not currently eligible to obtain any. The states’ proposed legislation requires that all parties to a marriage apply for a marriage license. The inability to provide documentation of legal status or some other form of legal documentation results in the rejection of an undocumented immigrant’s application for a marriage license. The proposed bills “significantly interfere” with undocumented immigrants’ and their fiancées’ fundamental rights to marry and therefore must undergo “critical examination” to determine their constitutionality. The required “critical examination” entails a determination that the statutory classification is supported by a “sufficiently important state interest(s) and is closely tailored to effectuate only those interests.”¹⁰¹

The Supreme Court acknowledged in *Zablocki* that encouraging compliance with child support obligations is a “legitimate and substantial (state) interest.”¹⁰² Because the means selected to achieve those interests “unnecessarily impinge on the right to marry,” however, the statute could not be sustained.¹⁰³ The court analyzed the relationship between the requirement and its intent.¹⁰⁴ The court recognized that if the intent was to facilitate collection of child support, it was not likely to accomplish that goal.¹⁰⁵

99. *Id.* at 383.

100. *Id.* at 386; see also *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976).

101. *Zablocki*, 434 U.S. at 388.

102. *Id.* at 388.

103. *Id.*

104. *Id.*

105. *Id.* The restriction on the right to marry would keep a party who had child support arrears from marrying, but would not ensure their payment of any arrears. Indeed, as was the case in *Zablocki*, when the party in arrears was indigent, their indigence was found to be the reason for their arrears and would also prevent them from becoming current with their obligation. Preventing the requested marriage would not ensure any additional money would be paid to support the children, but it certainly would prevent the parties from exercising their fundamental rights to marry. In addition, forbidding the desired marriage would not safeguard against the child support debtor from having any more children; it merely would ensure that any children conceived during this new partnership would be born outside of marriage. Either way, the children would be in need

Ultimately, while the Substantive Due Process and Equal Protection clauses of the Constitution serve as independent bases for determining a law's constitutionality, the analysis is essentially the same: "state limitations on a fundamental right such as the right of privacy are permissible only if they survive strict constitutional scrutiny."¹⁰⁶ Therefore, as under the Due Process analysis, an Equal Protection analysis would apply the strict scrutiny standard to test the proposed law. As discussed above, the laws would fail the strict scrutiny standard because they are not closely enough tailored to effectuate a sufficiently important state interest.

Further, as discussed *infra*, the state is not in charge of enforcing immigration, and there are many ways more narrowly tailored to accomplish the state's intent—if the intent may also include protecting spouses in receiving child support—including wage withholding, criminal penalties, civil proceedings including civil contempt, interstate collection methods, and methods of attaching other assets of the obligor. Ultimately, the statutory classification created by the states' proposed bills, requiring applicants for marriage licenses to document legal status, cannot be constitutionally justified because they interfere with an undocumented immigrant's fundamental right to marry in violation of the Constitution.

C. Federal Regulation of Immigration and the Supremacy Clause

The federal government has actively and nearly exclusively regulated immigration for more than a century. Through the "plenary power doctrine," Congress has enjoyed an unusual amount of authority and power to oversee extensive aspects of immigration regulation.¹⁰⁷ Their power to regulate immigration comes from the United States Constitution Article I, Section 8, Clause 3, which states that Congress may "regulate commerce with foreign nations."

The Supreme Court has many times throughout history reaffirmed the plenary power of Congress over immigration matters. In *DeCanas v. Bica*, the Court wrote, "Power to regulate immigration is unquestionably exclusively a federal power."¹⁰⁸ Much has been written on Congress's complete authority to regulate immigration,¹⁰⁹ but for the present purposes of this

of parental support. Given the precarious nature of the relationship between the unmarried parents, the birth of children out of wedlock makes the likelihood that the indigent parent would comply with his/her obligation of support for any such children all the more uncertain.

106. *Alexander v. Whitman*, 114 F.3d 1392, 1403 (3d Cir. 1997).

107. *Abrams*, *supra* note 78, at 1641.

108. 424 U.S. 351, 354 (1976).

109. Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (1984); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1995); Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens' Rights*, 41 VILL. L. REV. 725 (1996).

article it is only necessary to note that the Supreme Court has many times struck down state laws that preempt Congress's authority in immigration.¹¹⁰

The states' proposed laws, in this instance also, are invalid under the Supremacy Clause of the Constitution. The states' proposed legislation interferes with the immigration policy and laws of the federal government, which has the sole authority to regulate immigration laws.¹¹¹ Because the states' proposed bills conflict with comprehensive federal immigration law on marriage,¹¹² it is precluded by federal law and its enactment is unconstitutional. The Supreme Court, on numerous occasions, has struck down state laws relating to noncitizens on preemption grounds.¹¹³

The states' proposed laws conflict directly with Congress's federal immigration regulation and framework. The federal government's immigration framework clearly contemplates marriage by foreign nationals regardless of immigration status. Regarding immigration, "where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation . . . states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations."¹¹⁴ Here, Congress has already legislated a wholly comprehensive act intended to prevent sham marriages.

The consequences of a noncitizen's marriage are the subject of a comprehensive scheme of federal statutory regulation, which considers marriage by undocumented immigrants. The title of this congressional act is the Immigration Marriage Fraud Amendments Act of 1986 (IMFA).¹¹⁵ The Act's purpose was for Congress to inhabit the field of law governing immigration and marriage fraud. Specifically, the Act established conditional resident status based on a marriage to a U.S. citizen or legal permanent resident, prevented alien adjustment for two years where an alien marries during a deportation or exclusion proceeding (which Jose attempted), established a five-year bar to petition for a new spouse where the individual's residency was obtained through a previous marriage unless the petitioner could first

110. See, e.g., *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (denying states' rights in student financial aid); *Graham v. Richardson*, 403 U.S. 365, 377–80 (1971) (denying state welfare restriction under Equal Protection Clause); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 418–20 (1948) (denying state right to issue commercial fishing license).

111. *DeCanas*, 424 U.S. at 354.

112. See Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended at 8 U.S.C. §§ 1154, 1184, 1186a (1994)). IMFA is a federal statute specifically passed to provide comprehensive legislation on preventing marriage fraud in regards to immigration.

113. See *Toll*, 458 U.S. at 10; *Graham*, 403 U.S. at 377–80; *Takahashi*, 334 U.S. at 418–20.

114. *Hines v. Davidowitz*, 312 U.S. 52, 66–67 (1941).

115. Immigration Marriage Fraud Amendments Act of 1986, Pub. L. No. 99-639, 100 Stat. 3537, 3543 (Nov. 10, 1986), Legislative History at H.R. Rep. No. 906, 99th Cong. 2d Sess. (on H.R. 3737), reprinted in part 1986 U.S.C.C.A.N. 5978–86; Sen. Rep. No. 99-491 (Sept. 26, 1986).

prove that the first marriage was *bona fide*,¹¹⁶ and created greater restrictions on U.S. entry for persons charged with material misrepresentation on visa applications.¹¹⁷ It is admirable the states would want to help ensure immigration policy and prevention of marriage fraud. However, as demonstrated by IMFA, Congress has already deeply contemplated and addressed the problems of marriage fraud and immigration. Likewise, Congress has already addressed the very issue the states' proposed legislation contemplates. Therefore, because Congress has already directly legislated in an area over which it has plenary power, any state law in conflict with IMFA would be considered unconstitutional under the Supremacy Clause.

In addition, Title I, section 1255(a) of the U.S. immigration code allows the adjustment of the status of a noncitizen, including one unlawfully in the country, who becomes eligible for a visa by, *inter alia*, marrying a United States citizen.¹¹⁸ Section 1255(a) applies to people who were inspected upon initial entry into the country, and were admitted or paroled, and to people who have been abused by their spouses. Section 1255(i) allows adjustment for those aliens who entered without inspection on the basis of, among other things, marriage to a United States citizen. The states' proposed legislation does not recognize or take into account these distinctions. As a result, the legislation prevents all undocumented people from marrying. The policy therefore interferes with Congress's regulatory framework on immigration and marriage.

In addition, the states' proposed legislation intrudes upon the federal government's exclusive power to regulate immigration by requiring state and local county licensing workers to interpret federal immigration law. These workers lack the authority, teaching, understanding and training on immigration laws to effectively enforce such laws. Such inappropriate attempts to interpret and enforce complex immigration laws is troubling because the untrained and unauthorized determinations made by county clerks threaten the fundamental rights to marriage of both undocumented immigrants and United States citizens, and also violates public policies created to promote marriage and the promotion of two-parent families. In sum, federal immigration law has long been the plenary power of Congress. States have few rights in issuing legislation in the area, and have no rights in issuing legislation in areas already directly governed by Congress. The proposed legislation therefore is unconstitutional under the Supremacy Clause.

V. THE ROLE OF THE CATHOLIC CHURCH

When denials of marriage licenses to immigrants have occurred, the leaders of the Catholic Church have often been the first to respond and

116. INA § 204(a)(2), 8 U.S.C. § 1154(a)(2).

117. See generally Pub. L. No. 99-639, 100 Stat. 3537 (Nov. 10, 1986).

118. See 8 U.S.C. §§ 1151, 1153, 1255 (2006); 8 U.S.C. §§ 1201, 1202 (2004).

advocate. Leaders of the Catholic Church were the first on the scene in Tennessee,¹¹⁹ Memphis,¹²⁰ Richmond,¹²¹ Miami,¹²² St. Louis¹²³ and Phoenix.¹²⁴ Catholic priests and leaders should continue these efforts by taking an active role in protests and legislative lobbying. Indeed, the Church teachings on marriage and the family are deep and robust. The following section will discuss the Church's teachings on the family, and provide clergy and lay people a statutory model for legal reform.

The great significance of the family regarding the person and society is made very clear in the Bible.¹²⁵ The Church has taught that it is in the place of the family where one learns the love and faithfulness of the Lord, and the need to respond to these.¹²⁶ Further, the Church teaches that marriage is the foundation of the family. The Church also teaches that "[n]o power can abolish the natural right to marriage or modify its traits and purpose."¹²⁷ Indeed, Pope John Paul II stated in "Charter of the Rights of the Family":

Every man and every woman, having reached marriageable age and having the necessary capacity, has the right to marry and establish a family without any discrimination whatsoever; legal re-

119. Associated Press, *supra* note 20, at B9.

Rev. Joseph Breen of St. Edward Catholic Church said he plans to perform a group marriage ceremony for congregants who have been unable to marry. The church may also charter a bus to Kentucky to allow couples to get legal marriage licenses. 'This is supposed to be a Christian nation and pro-family,' he said. 'People should be really upset.'

120. Gleaves, *supra* note 20, at 6 (Father Joseph Tagg leads local Catholic Church in helping immigrants obtain marriage licenses from other jurisdictions).

121. Martz & Bonny, *supra* note 21, at A1.

'It's really regrettable, but it's very foreseeable,' said Michael Stone, director of the Office of Justice and Peace at the Catholic Diocese of Richmond, which acts as an advocate for the rights of refugees and immigrants. He said the rights of immigrants, legal or not, have been sharply reduced since the terrorist attacks.

122. Clark, *supra* note 78, at D2.

The Florida Catholic Conference also criticized the bill, calling it 'very anti-marriage and very anti-family.' 'This bill makes it so specific, it would deny many couples the right to marry,' said Catholic conference lobbyist Pat Chivers, telling lawmakers she was speaking 'on behalf of all priests these couples come to.'

123. Stephen Deere, *Religious Group Wants Law on Immigrants' Side*, ST. LOUIS POST-DISPATCH, Oct. 30, 2006, at B1 ("'We believe that this whole thing involves human rights,' said Edgar Ramirez, pastoral associate at St. Cecilia Catholic Church in south St. Louis. 'Immigrants, like all other people, possess human dignity that should be protected. We believe that from the Christian perspective that strangers should be welcome.'").

124. NFPC: This Week, Priest in the News, http://nfpc.org/THIS_WEEK/week_146/priests.html (last visited November 20, 2007) (On undocumented immigrants being denied marriage licenses, Holy Cross Father Chuck Witzchorik, associate pastor of St. John Vianney parish in Goodyear, Arizona, states, "Often times what that means is that they live together but don't get married. That means they can't participate fully in the life of the church.").

125. "It is not good that the man should be alone." Genesis 2:18; A couple constitutes "the first form of communion between persons." SECOND VATICAN ECUMENICAL COUNCIL, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD: GAUDIUM ET SPES, 12: AAS 58 (1966); *see also* Genesis 2:18, 24; Mathew 19:5-6.

126. Exodus 12:25-27, 13:8, 14-15; Deuteronomy 6:20-25, 13:7-11; Samuel 3:13.

127. PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH 216 (USCCB) (2004).

strictions to the exercise of this right, whether they be of a permanent or temporary nature, can be introduced only when they are required by grave and objective demands of the institution of marriage itself and its social and public significance; they must respect in all cases the dignity and the fundamental rights of the person.¹²⁸

The Church takes a clear standing on the rights of marriage to all people regardless of their geographic location. Catholic lay and clergy have a duty to protect the institution of marriage in all levels of society. One avenue of advocacy would include lobbying their legislators.

In taking part in legislative lobbying, Church leaders and lay people should model their efforts on those performed by Church leaders, lay people and marriage advocates in Florida. Florida marriage advocates were able to pass model legislation which completely corrected the immigrant marriage license problem. The Florida statute should be viewed as a model for all states because it clearly defines the purpose behind the requirement of SSNs, as well as clarifies for the licensing centers that undocumented immigrants are able to receive marriage licenses and that nothing in the statute should be construed to require otherwise. The Florida legislature re-wrote their marriage license statutes to read:

Pursuant to the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996, each party is required to provide his or her social security number in accordance with this section. The state has a compelling interest in promoting not only marriage but also responsible parenting, which may include the payment of child support. Any person who has been issued a social security number shall provide that number. Disclosure of social security numbers or other identification numbers obtained through this requirement shall be limited to the purpose of administration of the Title IV-D program for child support enforcement. Any person who is not a citizen of the United States may provide either a social security number or an alien registration number if one has been issued by the United States Bureau of Citizenship and Immigration Services. Any person who is not a citizen of the United States and who has not been issued a social security number or an alien registration number is encouraged to provide another form of identification. Nothing in this subsection shall be construed to mean that a county court judge or clerk of the circuit court in this state shall not issue a marriage license to individuals who are not citizens of the United States if one or both of the

128. Pope John Paul II, Charter of the Rights of the Family (Oct. 22, 1983), available at http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_19831022_family-rights_en.html.

parties are unable to provide a social security number, alien registration number, or other identification number.¹²⁹

The Florida statute speaks for itself. Florida serves as the national leader in clarifying the requirements for marriage license applications for their licensing centers. Other states should follow their lead.

VI. CONCLUSION

County licensing centers across the country are wrongly denying immigrants—and their families—the fundamental right to marriage by requiring special documentation for marriage license applications. First, they are misconstruing the state and federal statutes regarding marriage licenses and the special documentation needed for their distribution. Second, the practice is unconstitutional because it deprives undocumented immigrants of their fundamental right to marriage. The Supreme Court has held that undocumented immigrants are protected by the Equal Protection Clause and therefore should not be denied their fundamental rights. Last, recent legislation blatantly conflicts with comprehensive federal law, violates the Supremacy Clause, and is therefore unconstitutional. Advocates of marriage and families should recognize the need to protect the right to marry and become involved at all levels in protecting the sacred institution. As Supreme Court Justice Stephen Johnson Field once wrote:

[Marriage] is something more than a mere contract It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.¹³⁰

129. FLA. STAT. ANN. § 741.04(1) (West 2004).

130. *Maynard v. Hill*, 125 U.S. 190, 210–11 (1888).