

THE OTHER *LOVING*: UNCOVERING THE FEDERAL GOVERNMENT'S RACIAL REGULATION OF MARRIAGE

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This Article seeks to fill a gap in legal history. The traditional narrative of the history of the American racial regulation of marriage typically focuses on state laws as the only sources of marriage inequality. Overlooked in the narrative are the ways in which federal laws also restricted racially mixed marriages in the decades before 1967 (when the Supreme Court invalidated antimiscegenation laws in Loving v. Virginia). Specifically, during the American occupation of Japan after World War II, a combination of immigration, citizenship, and military laws and regulations led to restrictions on marriages along racial lines. These laws also converged to prevent married couples, many of whom were White American soldiers and local Japanese women, from living in the United States together. Accordingly, this Article claims that the confluence of immigration, citizenship, and military laws functioned as a collective counterpart to state antimiscegenation laws.

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By unearthing this neglected history, this Article seeks to deepen the conventional account of the public regulation of mixed marriages. As the Article reveals, racial barriers to marriage were far more pervasive than previously acknowledged. Contrary to the familiar chronicle, racial restrictions on marriage occurred through federal laws, were enforced by federal officials, took place beyond state borders, and effected distinct harms on interracial couples whose experiences have largely escaped legal and scholarly inquiry. Recovering this lost history thus provides a more complete story of antimiscegenation regulation. Moreover, it draws attention to the largely undertheorized role that immigration law played in preventing interracial marriages and provides insight into contemporary debates on federal involvement in marriage regulation.

“Except under very unusual circumstances, United States military personnel, and civilians employed by the War Department, will not be granted permission to marry nationals who are ineligible to citizenship in the United States.”

—U.S. Army, Circular No. 6¹

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¹ GENERAL HEADQUARTERS, FAR EAST COMMAND, U.S. ARMY, CIRCULAR NO. 6, Marriage of Military and War Department Civilian Personnel ¶ 2(c) (Jan. 14, 1947) [hereinafter CIRC. 6] (on file with the *New York University Law Review*).

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INTRODUCTION

On May 9, 1946, Helene Emilie Bouiss, a half-Japanese, half-German woman, and her husband, John Bouiss, a White American soldier, arrived in Seattle, Washington, aboard a military ship.² The two were newlyweds, married by the captain of the ship just days before landing in Seattle.³ Their decision to marry prior to coming to the United States was significant. This is because six months earlier, Congress had passed the War Brides Act of 1945 (War Brides Act),⁴ which conferred on persons who were serving or who had served in the U.S. military the right to sponsor the expedited admission of their spouses to the United States.⁵ Thus, Helene's marriage to John, an honorably discharged soldier, provided the basis for her entry into the country. Or so they thought.

Upon arriving in Seattle, Helene was refused admission into the country.⁶ Immigration officers cited a provision in the immigration law that excluded at the border those persons who were not eligible to become citizens under U.S. citizenship law.⁷ The citizenship law in effect in 1946 restricted the right to naturalize to certain racial groups: Whites, persons of African ancestry, and, beginning in 1943, Filipinos, Indians, and persons

² Virgil Smith, *Vet's Jap Bride Detained by U.S.*, SUNDAY OREGONIAN, July 7, 1946, at 1 (reporting the story of the Bouiss couple).

³ See Virgil Smith, *Detention Jolt to Jap Bride*, SUNDAY OREGONIAN, July 7, 1946, at 13 (describing the Bouiss marriage).

⁴ Pub. L. No. 79-271, 59 Stat. 659 (codified as amended in scattered sections of 8 U.S.C.) [hereinafter War Brides Act].

⁵ See *id.* § 1, 8 U.S.C. § 232 (2006) (qualifying noncitizen spouses and noncitizen minor children of U.S. citizen members of the armed forces for an expedited immigration admission process provided that they passed medical examinations and were not excludable on other grounds).

⁶ Smith, *supra* note 3, at 13 (reporting that Helene was the only passenger not allowed to land); *Portlander Seeks Release of Bride*, OR. J., July 6, 1946, at 1 [hereinafter *Portlander*].

⁷ See Smith, *supra* note 2, at 1 (explaining that immigration officers ruled Helene was not allowed to become an American citizen, and was thus inadmissible to the United States, because she was Japanese); see also Immigration Act of 1924, ch. 190, § 13(c), Pub. L. No. 68-139, 43 Stat. 153, 162 (providing that persons ineligible for citizenship are not admissible into the United States).

from the Western Hemisphere.⁸ Notably, Japanese, who were considered to be a distinct racial group and a national origin group,⁹ were precluded from naturalization and thus not admissible at the border.¹⁰

Helene was actually a Swedish citizen based on her prior marriage to a Swede who was working in Japan.¹¹ Yet, her Swedish nationality was irrelevant for immigration entry purposes. Border officials ruled that Helene was a person of “mixed racial blood” under immigration administrative regulations, who was ineligible for naturalization because

⁸ See *infra* Part II.A (explaining the history of racial eligibility for citizenship, including the exclusion of Japanese from the naturalization process).

⁹ See *infra* Part II.A (noting, for instance, that “Japanese” was considered a racial category in the 1920 U.S. Census, but “Japanese” also referred to a group of foreign nationals who were not eligible for citizenship). Moreover, as this Article discusses, significant anti-Japanese animus during the early and middle part of the 1900s reflected the dual construction of Japanese as both a racial identity and a national origin. See generally Keith Aoki, *No Right To Own?: The Early Twentieth-Century “Alien Land Laws” As a Prelude to Internment*, 40 B.C. L. REV. 37, 46–62 (1998) (discussing anti-Japanese sentiments in the early to middle part of the twentieth century that led to bills and laws designed to discriminate against both Japanese Americans and Japanese nationals). Such anti-Japanese animus was perhaps best exemplified by the issuance of Executive Order 9066 (E.O. 9066), which led Japanese Americans and Japanese nationals in the western states to be placed in internment camps. See GREG ROBINSON, BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS 108–24 (2003) (examining E.O. 9066). Regrettably, the Supreme Court upheld E.O. 9066. See *Korematsu v. United States*, 323 U.S. 214, 216–18 (1944) (holding that, in light of perceived threats of espionage and sabotage during the time period, exclusion from limited areas was not beyond the President’s power). On the state level, California and other western states passed laws that prohibited persons who were ineligible for citizenship from owning agricultural land. See *Rose Cuison Villazor, Rediscovering Oyama v. California: At the Intersection of Property, Race and Citizenship*, 87 WASH. U. L. REV. 979, 992 (2010) (examining ways in which states relied on citizenship law to prohibit Japanese nationals from owning land). In a series of cases decided within a week of each other in 1923, the Supreme Court upheld these alien land laws. See *Porterfield v. Webb*, 263 U.S. 225, 233 (1923) (upholding California’s alien land law); *Terrace v. Thompson*, 263 U.S. 197, 222–23 (1923) (affirming Washington’s alien land law); *Webb v. O’Brien*, 263 U.S. 313, 322, 324 (1923) (affirming California’s alien land law). As Keith Aoki argued, the alien land laws and E.O. 9066 were related, with the restrictions on land ownership against both Japanese Americans and Japanese nationals foreshadowing their internment decades later. See Aoki, *supra*, at 68 (“Alien Land Laws provided a bridge that sustained the virulent anti-Asian animus that linked the Chinese Exclusion Act of 1882 with the internment of Japanese-American citizens pursuant to Executive Order 9066.”). It was not until 1948 that the Supreme Court eventually invalidated California’s alien land law because of its discriminatory impact on U.S. citizens of Japanese descent. See *Oyama v. California*, 332 U.S. 633, 646–47 (1948).

¹⁰ See *infra* notes 197–213 and accompanying text (describing the citizenship law’s impact on interracial marriages where at least one spouse was of Asian ethnicity). Although Japanese noncitizens were ineligible to become naturalized U.S. citizens, Japanese people born in the United States acquired birthright citizenship. See *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898) (holding that any person born in the United States is a citizen of the United States). Ark was born in San Francisco, California, to parents of Chinese descent. He was refused entry into the United States by customs officials upon his return from a temporary trip to China on allegations that he was not a U.S. citizen. *Id.* at 649.

¹¹ See Smith, *supra* note 3, at 13 (explaining that Helene was previously married to a Swedish man).

she was racially half-Japanese.¹² Accordingly, Helene was deemed inadmissible to the United States despite her status as a war bride.¹³ John sought a judicial challenge to Helene's exclusion from the country to no avail.¹⁴ Although the district court agreed that Helene should have been admissible under the War Brides Act,¹⁵ the Ninth Circuit ultimately reversed and upheld Helene's removal in *Bonham v. Bouiss*.¹⁶ The case never reached the Supreme Court.

At first glance, *Bouiss* might appear to be a simple immigration case, representative of the period in history in which Congress barred Japanese, as well as most Asians, from immigrating to the United States.¹⁷ Yet this Article argues that *Bouiss* was not just a case about the exclusion of a noncitizen. Upon closer examination, *Bouiss* illuminates an underexplored part of our nation's antimiscegenation story. John, a White man, and Helene, a Japanese woman, were among the thousands of couples in Japan—many of whom were racially mixed—who faced legal barriers to getting married and to enjoying the privileges and benefits of marriage between 1942 and 1952.¹⁸ Notably, these binational, and in many instances, mixed-race couples experienced obstacles to marriage as a result of federal laws, regulations, and policies.

The traditional narrative of the public policing of marriage along racial lines has unfortunately elided this part of history.¹⁹ In particular, the

¹² See *Ex parte Bouiss*, 67 F. Supp. 65, 66 (W.D. Wash. 1946) (explaining that the federal government sought to exclude Helene as “a person of mixed racial bloods,” under 8 C.F.R. § 350.2); 8 C.F.R. § 350.2 (1943) (rescinded 1944) (explaining that to be eligible for naturalization, persons of “mixed races” had to be “preponderately [sic] of one or more of the eligible races”). Helene Bouiss had a German father and a Japanese mother. See *infra* note 91 and accompanying text (explaining Helene's background).

¹³ *Portlander*, *supra* note 6, at 1; Smith, *supra* note 3, at 13.

¹⁴ See *Bonham v. Bouiss*, 161 F.2d 678, 679 (9th Cir. 1947) (denying Helene a writ of habeas corpus).

¹⁵ See *Ex parte Bouiss*, 67 F. Supp. at 66–67 (reasoning that the War Brides Act's purpose of “keep[ing] intact all conjugal and family relationships and responsibilities of . . . service men” overrode a “generalized phrase” in the immigration law).

¹⁶ *Bouiss*, 161 F.2d at 679.

¹⁷ See generally MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004) (providing a historical discussion of immigration law's exclusion of different racial groups, including Asians, from the United States).

¹⁸ See *infra* Part I.B (situating John and Helene Bouiss's story within the larger context of immigration and antimiscegenation laws of the historical period).

¹⁹ Leti Volpp wrote almost ten years ago that there remains a dearth of legal scholarship on how antimiscegenation laws affected Asian Americans. Leti Volpp, *American Mestizo: Filipinos and Antimiscegenation Laws in California*, 33 U.C. DAVIS L. REV. 795, 797–98 (2000). Published legal scholarship in this area has increased only marginally. See PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 20, 78–93, 194–200, 235–40 (2009) (examining antimiscegenation laws that prohibited Whites from marrying Asian Americans); Hrishikesh Karthikeyan & Gabriel J. Chin, *Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian Americans*,

conventional story about the racial regulation of marriage identifies race-based barriers to getting married solely within the states.²⁰ State antimiscegenation laws, or laws that restricted individuals from marrying persons from another race,²¹ were the primary examples of these legal barriers. Perhaps no other case better illustrates the ways in which these state laws prevented interracial couples from getting married than *Loving v. Virginia*.²² In striking down Virginia's antimiscegenation law under federal equal protection and due process principles,²³ the Supreme Court underscored the historical role of states as perpetrators of marriage inequality.²⁴ Notably, the Court acknowledged in *Loving* that state antimiscegenation laws were enacted to promote White supremacy.²⁵ By ensuring that Whites did not marry non-Whites, Virginia's antimiscegenation law prevented the "corruption of [White] blood."²⁶ In so doing, marriage restrictions played a powerful role in creating a racial hierarchy in marriage formation. They not only determined who was

1910-1950, 9 ASIAN L.J. 1, 5 (2002) (exploring the relationship between antimiscegenation laws and Asian American communities); Deenesh Sohoni, *Unsuitable Suitors: Anti-Miscegenation Laws, Naturalization Laws, and the Construction of Asian Identities*, 41 LAW & SOC'Y REV. 587, 590 (2007) (examining state-level antimiscegenation laws' impact on the legal and political categorization of Asian ethnic groups).

²⁰ See *infra* Part I.A (discussing the common narrative of racial regulation of marriage in American history).

²¹ BLACK'S LAW DICTIONARY 1088 (9th ed. 2009) (defining "miscegenation" as "marriage between persons of different races"); PASCOE, *supra* note 19, at 1 (explaining that the term "miscegenation" refers to "interracial marriage" and was first coined in the 1860s).

²² 388 U.S. 1 (1967).

²³ See *id.* at 2 (holding that "restricting the freedom to marry solely because of racial classifications" violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment).

²⁴ See *id.* References to *Loving* in contemporary cases that challenge state bans against same-sex marriage further emphasize the trope of states as the only domain where couples who chose to go outside the normative bounds of marriage faced unlawful racial discrimination. See, e.g., Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 958 (N.D. Cal. 2010) (citing *Loving* as evidence that racial restrictions on an individual's choice of marriage partner were unconstitutional under the California Constitution of 1948); Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 392 (D. Mass. 2010) (citing *Loving* as the focal point in the decline of state miscegenation statutes); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 473 (Conn. 2008) ("[L]imiting marriage to opposite sex couples is not necessary to preserve the rights that those couples now enjoy. In this regard, removing the barrier to same sex marriage is no different than the action taken by the United States Supreme Court in *Loving v. Virginia* . . ."); Goodridge v. Dep't of Pub. Health, 798 N.E. 2d 941, 958 (Mass. 2003) (citing *Loving* for the proposition that "the right to marry means little if it does not include the right to marry the person of one's choice, subject to appropriate government restrictions in the interests of public health, safety, and welfare"); Dean v. District of Columbia, 653 A.2d 307, 332 (D.C. 1995) (citing *Loving* as precedent for due process in the marriage context).

²⁵ See *Loving*, 388 U.S. at 11 ("The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.").

²⁶ *Id.* at 6.

eligible for marriage, but they also stigmatized—and in some instances, criminalized—those couples who chose to violate the norms that protected racial purity.²⁷

Yet state laws and actors were not the only legal bulwarks that pursued racist goals by restricting individuals' right to marry their partners of choice. As *Bouiss* illuminates, in the decades before *Loving*, a different and overlooked type of racial regulation of marriage occurred. This racial regulation was unique because it functioned at the federal level, involved more than one set of laws, and did not explicitly prohibit interracial marriage. Specifically, this system of federal race-based marriage restrictions was comprised of immigration, citizenship, and military laws and regulations that collectively prevented citizens who were serving or who had served in the U.S. military from marrying “nationals who [were] ineligible to citizenship.”²⁸ Between 1943 and 1952, the terms “ineligible to citizenship” referred mainly to Japanese.²⁹ As previously noted, because Japanese individuals were precluded from naturalization, they were also racially inadmissible to the United States under immigration law.³⁰ Critically, both prohibitions against their naturalization and admission to the United States were grounded in immigration policies that were designed to promote a static majority-White country.³¹ Excluding Japanese from immigrating to the United States and from naturalizing was consistent with the anti-Japanese sentiment in America that animated the early-to-middle part of the 1900s.³² Consequently, the combination of these federal laws, regulations, and policies, with immigration law at the center, resulted in the denial of marriage applications filed by citizen soldiers because their Japanese fiancées were racially inadmissible.

The amalgamation of these laws also prevented those couples who were already married from living in the United States together.³³ These laws tended to be selectively enforced to prevent interracial marriages and they impacted primarily White men and Japanese women.³⁴ Accordingly,

²⁷ See PASCOE, *supra* note 19, at 2 (“[M]arriage has extraordinary power to naturalize some social relationships, and to stigmatize others as unnatural.”).

²⁸ See CIRC. 6, *supra* note 1, ¶ 2(c).

²⁹ See *infra* Part II (explaining the link between “ineligible to citizenship” and race).

³⁰ See *infra* notes 194–95 and accompanying text (explaining that, because of their race, Asian women could not gain citizenship through marriage from 1885 to 1922).

³¹ See *infra* Parts II.A, II.B, and III.A (explaining that immigration and citizenship laws sought to promote White supremacy by explicitly excluding disfavored races).

³² See *infra* notes 218–20 and accompanying text (describing U.S. efforts to exclude Japanese and other Asian races).

³³ See *infra* Parts II.A, II.B, and III.A (detailing such laws).

³⁴ See *infra* Parts III and IV (explaining how the combination of federal and military laws and regulations disproportionately impacted couples comprised of a White male U.S. soldier and a Japanese woman).

this Article claims that the convergence of immigration and citizenship law with military regulations functioned as a federal counterpart to state antimiscegenation laws. These race-based restrictions on marriage to Japanese nationals were akin to state antimiscegenation laws because they similarly sought to protect and maintain White racial supremacy through marriage regulation. Additionally, these laws served a specific antimiscegenation purpose, as they were selectively enforced against, and disparately impacted, interracial couples.

In exploring the federal regulatory scheme that operated alongside state antimiscegenation laws, this Article has three aims. First, as a descriptive matter, it seeks to fill a gap in the historical understanding of public policing of interracial marriages. I reveal that, contrary to the familiar story, both general racial restrictions on marriage and antimiscegenation barriers occurred through federal laws, were enforced by federal officials, and took place beyond state borders. This network of federal laws and actors fundamentally shaped the lives of binational and interracial couples, especially White male soldiers and local Japanese women, whose experiences have been marginalized in the traditional discussions of race and civil rights (that generally operate within a Black-White paradigm).³⁵

Second, from a doctrinal perspective, I demonstrate the ways in which three separate types of federal laws—immigration, citizenship, and military—that are not conventionally viewed as “domestic relations” laws nevertheless functioned to limit the formation of marriages and families based on race. Such federal racial regulation of marriage arguably illustrates an example of “federal family law.”³⁶ To be sure, the notion of a “federal family law” is contested because it challenges the traditional

³⁵ For scholarship that critiques the examination of civil rights within a Black-White binary framework by contending that racial discourse in the United States, by focusing primarily on Black-White relations, has obscured the experiences of non-Black people of color, including Asian Americans, see ROBERT S. CHANG, *DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE* 11–26 (1997). For an argument that the Black-White paradigm of race relations has excluded the story of the Latino population from constitutional law scholarship, see generally Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CAL. L. REV. 1213 (1997).

³⁶ See Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 645 (2001) (listing and describing examples of federal statutory law that “create substantive federal family law policies”); Judith Resnik, “*Naturally*” *Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1698–1700 (1991) (describing how both the “equation of women with family” and the idea that family matters are not within federal jurisdiction led to the exclusion of both women and family law from federal courts). See generally Kristin A. Collins, *Federalism’s Fallacy: The Early Tradition of Federal Family Law and the Invention of States’ Rights*, 26 CARDOZO L. REV. 1761 (2005) (examining the historical and essentialist justifications of state sovereignty in domestic relations and particularly in the federal government’s authority over matters relating to family).

conception that states have exclusive control over domestic relations.³⁷ Yet, recognizing the ways in which the federal government participated in policing interracial marriages during the 1940s deepens law and society's broader and more general understanding of the public regulation of American families and the appropriate scope of federal intervention in family law. Indeed, the question of what role the federal government should have in the regulation of marriage is central in some of the contemporary marriage-equality cases today. Specifically, one issue that remains unsettled is whether the federal government unlawfully infringed on the traditional power of states over marriage relations when it enacted the Defense of Marriage Act (DOMA).³⁸ The current federal debates over who has authority to define marriage have obscured what this Article both descriptively and doctrinally uncovers. That is, that the federal government, prior to DOMA, passed laws and regulations that determined who may marry and the rights and privileges associated with marriage.

Third, I contend that this overlooked history underscores the need to pay greater attention to the attendant consequences of federal involvement in marriage through immigration law that continues to have contemporary relevance. Although recent legal scholarship has examined the ways in which immigration law has regulated marriage,³⁹ little exploration has been done on immigration law's more active policing of interracial relationships.⁴⁰ Additionally, few scholars have explored how the military

³⁷ See Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 872–73 (2004) [hereinafter Hasday, *Canon*] (“It is commonplace for courts and judges to assert that family law is, and always has been, entirely a matter of state government.”); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1298 (1998) [hereinafter Hasday, *Federalism*] (discussing courts’ typical judgment that family law belongs in the province of state and local governments).

³⁸ Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738c (2006)). See, e.g., *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234, 236 (D. Mass. 2010) (“DOMA violates the Tenth Amendment of the Constitution, by intruding on areas of exclusive state authority . . .”); Complaint at 2–3, *Pedersen v. Office of Pers. Mgmt.*, No. 310-CV-1750 (vlb) (D. Conn. Nov. 9, 2010) (contending that DOMA denies individuals in same-sex marriages benefits they should receive as spouses recognized by their state of residence).

³⁹ See Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 710–15 (2005) [hereinafter Abrams, *Polygamy*] (discussing immigration law’s regulation of marriage, specifically its impact on Chinese immigrants in the early twentieth century). See generally Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625 (2007) [hereinafter Abrams, *Regulation of Marriage*] (examining immigration law’s role in controlling marriage).

⁴⁰ Indeed, immigration law is generally viewed to be a body of law about the regulation of noncitizens’ entry to and exit from the United States and the terms upon which they may reside within this country. See *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948) (“The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization.”). Moreover, as Kerry Abrams has argued,

controlled marriage to promote racist immigration laws.⁴¹ The intersection of marriage and immigration law vis-à-vis military regulations led to broader and more troubling consequences for the rights and privileges of citizenship and marriage that remain present today.⁴² Understanding the military's power over marriage is particularly important given that a

immigration law is yet to be considered part of the canon of family law. See Abrams, *Regulation of Marriage*, *supra* note 39, at 1629 (“Despite its important role in regulating marriage, federal immigration law is not generally thought of as a form of family law.”).

It should be noted, however, that a few scholars have considered the effect of immigration law on interracial couples, and that this Article has benefitted significantly from their work. See, e.g., Jennifer M. Chacón, *Loving Across Borders: Immigration Law and the Limits of Loving*, 2007 WIS. L. REV. 345, 357 (“Federal immigration and nationality laws barred most nonwhites from entry, prevent[ing] certain nonwhite groups from attaining political membership even through marriage . . .”); Nancy K. Ota, *Flying Buttresses*, 49 DEPAUL L. REV. 693, 719–22 (2000) [hereinafter Ota, *Flying Buttresses*] (examining the military's regulation of marriage between soldiers and other foreign women); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 419–25 (2005) (exploring how nationality laws both denied citizenship to women married to American nationals and divested female U.S. citizens of citizenship if they married citizens of other countries).

⁴¹ Limited legal scholarship has been devoted to the intersection between military law, immigration law, and marriage. See Nancy K. Ota, *Private Matters: Family and Race and the Post-World-War-II Translation of “American,”* 46 INT’L REV. SOC. HIST. 209, 216–20 (2001) [hereinafter Ota, *Private Matters*] (focusing on the passage of private bills that enabled Japanese wives of U.S. citizens to enter, even when they had been deemed racially inadmissible); Ota, *Flying Buttresses*, *supra* note 40, at 719–22 (briefly discussing the role immigration law played in restricting interracial marriages). See generally Nancy K. Ota, *Loving Off-Base* (2001) (unpublished manuscript) (on file with the *New York University Law Review*) [hereinafter Ota, *Loving Off-Base*] (conducting a historical analysis of the military's regulation of marriage and intimacy). This Article builds on Ota's work and provides a more extensive examination of the interactions between citizenship, immigration, and military regulations that restricted interracial marriages and relationships. Beyond legal scholarship, there are helpful publications in the area of Japanese war brides. See MIKI WARD CRAWFORD ET AL., *JAPANESE WAR BRIDES IN AMERICA: AN ORAL HISTORY* xiii–xx (2010) (describing the conditions in Japan during and after World War II that led to marriages between U.S. servicemen and Japanese women and the difficulties in those women's immigration to the United States); see also Masako Nakamura, *Families Precede Nation and Race? Marriage, Migration, and Integration of Japanese War Brides After World War II* 1–22 (Aug. 2010) (unpublished Ph.D. dissertation, University of Minnesota) (on file with the *New York University Law Review*) (examining Japanese war brides and the War Brides Act and contending that the admission of Japanese war brides redefined the American family and conceptions of race and citizenship); cf. SUSAN ZEIGER, *ENTANGLING ALLIANCES: FOREIGN WAR BRIDES AND AMERICAN SOLDIERS IN THE TWENTIETH CENTURY* 72 (2010) (discussing the social, cultural, and political aspects of U.S. soldiers' relationships with foreign women during World War II); Phillip E. Wolgin & Irene Bloemraad, “*Our Gratitude to our Soldiers*”: *Military Spouses, Family Re-unification, and Postwar Immigration Reform*, 41 J. INTERDISC. HIST. 27, 28 (2010) (arguing that increased numbers of noncitizen military spouses after World War II were important in shifting immigration policies away from race and toward “family re-unification”).

⁴² See Julia Preston, *Immigration Status of a Soldier's Wife Leaves Family Afraid*, N.Y. TIMES, May 8, 2010, at A11 (explaining the story of a U.S. army soldier who fears his wife will be deported because of an immigration statute, “notorious among immigration lawyers, that makes it virtually impossible for her to become a legal resident without first leaving the United States and staying away for 10 years”).

significant portion of marriages between citizens and noncitizens has historically been composed of American soldiers and their spouses.⁴³ Moreover, the history that this Article uncovers parallels experiences of binational same-sex couples today, who, similar to binational American-Japanese couples of the 1940s, face being separated from each other because of DOMA and immigration law's non-recognition of their marital status.⁴⁴

The Article proceeds in six parts. To provide a framework for explaining and analyzing the interlocking federal laws—namely, immigration and citizenship laws, military regulations, and the War Brides Act—that prevented and discriminated against interracial marriages, Part I elaborates the story of John and Helene Bouiss. In so doing, this Part seeks to include within the broader antimiscegenation discourse the experiences of non-Black persons of color and their racially different, U.S.-citizen spouses.⁴⁵ Incorporating the experience of interracial, binational couples helps to complete and deepen the historical record of our racial past.

Next, Part II conducts a close examination of the varied laws and regulations—citizenship, immigration, and military—that led to restrictions on binational, interracial marriages. Part II acknowledges that these laws did not independently discriminate against interracial couples. Yet, as Part III argues, immigration law interacted with other laws and regulations to prohibit binational couples from getting married and enjoying the rights and benefits of marriage. The majority of these couples were White men and Japanese women, and the regulations were selectively enforced to prevent these marriages. The War Brides Act, in particular, illuminated

⁴³ THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, LEGAL ASSISTANCE FAMILY LAW GUIDE 1-4 (1998), available at <http://www.dtic.mil/dtic/tr/fulltext/u2/a346757.pdf> ("Soldiers tend to marry foreign nationals more than do civilians . . .").

⁴⁴ See Erica Pearson, *Deport Nightmare Splits Up Gay Pair*, N.Y. DAILY NEWS, Aug. 4, 2011, at 27 (reporting that a binational gay married couple is living apart as a result of the deportation of the noncitizen husband). *But see* Ari Burack, *Gay Couple's Deportation Case Dropped*, S.F. EXAMINER, Aug. 8, 2011, <http://www.sfexaminer.com/local/2011/08/gay-couple-s-deportation-case-dropped> (reporting that the federal government dropped a case that called for the removal of a married gay noncitizen from the United States). As these two cases indicate, there is lack of uniformity at the moment in the legal treatment of same-sex binational couples among immigration judges. See *infra* Part VI (discussing the similarities between past federal interracial marriage regulation and current restrictions against same-sex marriage and examining immigration law's exclusion of same-sex married couples from the benefits of family-based immigration law).

⁴⁵ Indeed, as other scholars have pointed out, relatively limited academic work has been devoted to the experience of interracial couples who fall outside of the Black-White paradigm. See generally Carla D. Pratt, *Loving Indian Style: Maintaining Racial Caste and Tribal Sovereignty Through Sexual Assimilation*, 2007 WIS. L. REV. 409 (considering the broader historical context surrounding *Loving* and state antimiscegenation laws as they relate to American Indians); Volpp, *supra* note 19 (considering the impact of California's antimiscegenation law on Filipino man-White woman couples).

precisely these race-based restrictions on marriages by failing to extend the privileges of the law to soldiers who married racially inadmissible women. Indeed, as Part III emphasizes, legislative history demonstrates that when Congress passed the War Brides Act, Congress recognized that Japanese nationals who were married to U.S. citizens would be denied entry to the United States.

Part IV returns to *Bouiss* and argues that this case presents a striking parallel to *Loving*. To be clear, as this Part explains, *Bouiss* did not lead to fundamental changes in the legal landscape of marriage in the same ways that *Loving* did. Yet *Bouiss* and the ensuing amendments to the War Brides Act marked a critical turning point in immigration law that not only lifted racial restrictions against Japanese women and Japanese people in general but also reflected federal recognition of interracial marriages.

Parts V and VI explain why closer scrutiny of this marginalized history is important. The history that this Article uncovers further challenges the position that states have had exclusive authority to regulate marriage. To the contrary, the federal government has concurrently participated in regulating marriage in ways that have been less explicit. Recognizing the federal government's involvement in marriage formation encourages us to focus less on an alleged historic absence of any federal regulation of marriage, and instead learn from the example of a previous federal restriction of marriage and examine what limits ought to be placed on the exercise of federal marriage regulation.

I

FEDERAL EXCLUSION OF RACIALLY INADMISSIBLE WIVES

Richard and Mildred Loving; Andrea Perez and Sylvester Davis; John and Helene Bouiss—all of these couples experienced obstacles in getting married and enjoying the privileges and benefits of marriage.⁴⁶ Yet the only

⁴⁶ Richard Loving, a White man, and Mildred Jeter, a part-Black, part-Indian woman, got married in 1958 in the District of Columbia, which allowed interracial marriages. They returned to their home state of Virginia and were subsequently prosecuted and convicted of violating the state's antimiscegenation law. See *Loving v. Virginia*, 388 U.S. 1, 4 (1967) (describing the couple's background). For a more in-depth discussion of *Loving*, its historical context, and its aftermath, see PETER WALLENSTEIN, *TELL THE COURT I LOVE MY WIFE* 215–29 (2002). Andrea Perez, a Mexican American who claimed that she was White, and Sylvester Davis, a Black man, were denied a marriage license because of California's ban on interracial marriages. See *Perez v. Lippold*, 198 P.2d 17, 18 (Cal. 1948) (explaining that a Los Angeles county clerk refused to issue a marriage license to Perez and Davis because they were an interracial couple). For scholarship on *Perez*—the first post-Reconstruction case to invalidate antimiscegenation laws—that explores *Perez*'s parallels to *Loving v. Virginia*, see R.A. Lenhardt, *Forgotten Lessons on Race, Law, and Marriage: The Story of Perez v. Sharp*, in *RACE LAW STORIES* 343 (Rachel F. Moran & Devon Wayne Carbado eds., 2008). Cf. R.A. Lenhardt, *Beyond Analogy: Perez v. Sharp, Antimiscegenation Law and the Fight for Same-Sex Marriage*, 96 CAL. L. REV. 839 (2008) [hereinafter Lenhardt, *Beyond Analogy*] (analyzing how *Perez* is being used in litigation today to

couples that Americans seem to know about are the canonical ones. Indeed, when scholars talk about antimiscegenation, we most likely think about the Lovings. Their exile from their home state of Virginia in order to avoid serving time in prison for violating the state's ban on interracial marriages⁴⁷ is indelibly etched in American legal scholars' racial consciousness.⁴⁸

By contrast, few know about John and Helene Bouiss's experience with interracial barriers to marriage. Obscured in the historical narrative of antimiscegenation laws, their case has become but a passing reference and a footnote in literature.⁴⁹ Yet the Bouisses' story tells an equally compelling account of a mixed-race couple who also faced racial discrimination because of their decision to marry. Moreover, their case helped lead to critical changes in immigration law, albeit temporary ones, that not only lifted race discrimination in immigration admissions but also validated interracial marriages. The Bouisses' experience, as well as those of other interracial, binational couples who encountered the same obstacles to marriage, sheds new light on the ways in which law sought to police racial lines through marriage restrictions. This Article takes the first step toward giving the Bouisses' story the attention it deserves by situating it within the broader narrative of antimiscegenation regulation.

A. *The Conventional Narrative of Antimiscegenation History*

Understanding the history of regulation of interracial marriages enables us to situate the Bouisses' experience within the traditional narrative. As explained more fully below, that narrative generally begins with a discussion of state laws that formally proscribed Whites from marrying Blacks and other people of color prior to *Loving*⁵⁰ and focuses on

secure marriage rights for same-sex couples). John and Helene Bouiss were legally married but were denied the ability to enter the United States together. *See* *Bonham v. Bouiss*, 161 F.2d 678, 679 (9th Cir. 1947) (highlighting that Helene was deemed "not eligible to citizenship by reason of her Japanese blood").

⁴⁷ The Lovings were found guilty of violating Virginia's antimiscegenation law and sentenced to one year in prison. *Loving*, 388 U.S. at 4. The judge suspended their sentence for twenty-five years provided that they left the state. *Id.*

⁴⁸ As Ariela Dubler noted, the "standard historical account[] of the legal regulation of race, sexuality, and interracial intimacy" tends to focus on *Loving v. Virginia*. *See* Ariela R. Dubler, *From McLaughlin v. Florida to Lawrence v. Texas: Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165, 1167 (2006) (commenting that cases such as *McLaughlin v. Florida*, 379 U.S. 184 (1964), which also examined the public regulation of interracial sex and intimacy, have not attained the "iconic status" that *Loving* has).

⁴⁹ MARTHA GARDNER, *THE QUALITIES OF A CITIZEN: WOMEN, IMMIGRATION, AND CITIZENSHIP, 1870-1965*, at 227 & n.20, 228 & n.21 (2005) (mentioning the *Bouiss* case as an example of a war bride denied immigration to the United States on a racial basis); *see also* Nakamura, *supra* note 41, at 42-45 (summarizing the *Bouiss* case without discussing the critical changes that the Bouisses' experience contributed to immigration law).

⁵⁰ *See, e.g.*, NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 4 (2000) (invoking state antimiscegenation laws and *Loving* in a historical summary of civil rights

post-*Loving* impacts on interracial relationships.⁵¹ That the conversation would begin at the state level is unsurprising because marriage and family law normally fall within the domain of state regulatory powers.⁵² Indeed, the Supreme Court articulated this trope of state dominance in family law and marriage in two significant cases involving children and women.⁵³ In *United States v. Morrison*, the Supreme Court rejected the contention that Congress had power under the Commerce Clause to pass the civil-remedy provision of the Violence Against Women Act because it would intrude in an area that traditionally fell within the domain of state regulation.⁵⁴ Similarly, in *United States v. Lopez*, the Supreme Court, in invalidating the Gun-Free School Zones Act, noted that the Commerce Clause did not authorize the federal government to impose its authority in matters traditionally left for the states.⁵⁵

related to marriage).

⁵¹ Articles that center on *Loving* which have been presented at symposia held at various law schools centering on *Loving v. Virginia* have instantiated a deeper and fuller conversation about the regulation of interracial marriages. See, e.g., R.A. Lenhardt et al., *Introduction to Symposium, Forty Years of Loving: Confronting Issues of Race, Sexuality, and the Family in the Twenty-First Century*, 76 *FORDHAM L. REV.* 2669 (2008) (exploring contemporary implications of the *Loving* decision, in terms of impact on both marriage and race relations); Rachel F. Moran, *Loving and the Legacy of Unintended Consequences*, 2007 *WIS. L. REV.* 239, 255–61 (2007) (discussing the unintended consequences of *Loving* in an increasingly “multiracial” United States). See generally John DeWitt Gregory & Joanna L. Grossman, *The Legacy of Loving*, 51 *HOW. L.J.* 15 (2007) (considering, in a symposium entitled “Commemorating *Loving v. Virginia*,” *Loving*’s influence on a right to marry, constitutional limits on state regulation of family law, the constitutionality of race-based classifications, and *Loving*’s implication for interracial marriages). Several of these articles will be published in a forthcoming anthology on *Loving*. See *LOVING V. VIRGINIA IN A “POST-RACIAL” WORLD: RETHINKING RACE, SEX AND MARRIAGE* (Kevin Maillard & Rose Cuison Villazor eds.) (forthcoming 2012) [hereinafter *LOVING V. VIRGINIA IN A “POST-RACIAL” WORLD*].

⁵² Recent scholarship, however, has challenged the dominant view of marriage and other areas of family law as exclusively state domains. See Hasday, *Canon*, *supra* note 37, at 878–83 (arguing that certain federal statutory regimes and judicial decisions constitute family law); Hasday, *Federalism*, *supra* note 37, at 1298 (1998) (arguing that there is no compelling reason why family law should be governed by a local rather than a federal system). Indeed, “[t]he federal government has regulated family in a host of ways.” Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 *WASH. U. L.Q.* 611, 620–21 (2004) (noting, for example, that the federal government regulates family law through federal welfare, social security, and taxes, and stating that “there are well over a thousand [federal] benefits, rights, or privileges associated with marriage”).

⁵³ See *United States v. Morrison*, 529 U.S. 598, 613–16 (2000) (discussing the limits of congressional regulatory power over areas not closely related to interstate commerce, such as family law); *United States v. Lopez*, 514 U.S. 549, 564 (1995) (rejecting the argument that Congress may regulate any industry it finds even tangentially related to interstate commerce, because doing so would give Congress jurisdiction over family law).

⁵⁴ See *Morrison*, 529 U.S. at 613–16 (holding that gender-motivated crimes of violence are not “economic activity” as defined by Commerce Clause jurisprudence).

⁵⁵ See *Lopez*, 514 U.S. at 564 (reasoning that if Congress may regulate criminal law enforcement, an area historically left to states, then there is no logical limit on the federal government’s regulatory power).

In addition to examining states as domains of mixed-marriage regulation, discussions in legal scholarship concerning antimiscegenation laws typically analyze how these laws targeted Blacks in particular.⁵⁶ This focus is understandable given the history of slavery and overt racial discrimination against African Americans in the United States. Indeed, one of the country's first legal proscriptions against interracial marriage was passed in 1664, and it was concerned specifically with marriages between English women and Black slaves.⁵⁷ This statute not only prohibited marriages between a free White woman and a Black slave in the colony but also carried the additional punishment of enslaving the woman.⁵⁸

The traditional legal discourse on antimiscegenation history also centers on the various efforts to overturn these state laws.⁵⁹ Formal legal challenges to these laws date back to before the Civil War.⁶⁰ However, it

⁵⁶ See generally A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967 (1989) (examining the historical evolution of laws aimed at preserving racial purity and preventing interracial sex and marriage, with a focus on the implications of racial slavery); Reginald Oh, *Interracial Marriage in the Shadows of Jim Crow: Racial Segregation as a System of Racial and Gender Subordination*, 39 U.C. DAVIS L. REV. 1321, 1347–48 (2006) (commenting that racial segregation acted “as an antimiscegenation tool . . . regulat[ing] whites and blacks along gender lines”).

⁵⁷ An Act Concerning Negroes and Other Slaves, in 1 PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND 533 (William Hand Browne ed., 1883) [hereinafter An Act Concerning Negroes and Other Slaves] (prohibiting marriage between Black slaves and English women). Colonies that passed antimiscegenation laws after Maryland included Virginia (1691), Massachusetts (1705), North Carolina (1715), Louisiana (1724), Georgia (1725), and Pennsylvania (1726). PASCOE, *supra* note 19, at 20. Pascoe further notes:

[L]aws that prohibited the marriage of Blacks and Whites had spread to Kentucky (1792), Rhode Island (1798), the District of Columbia (1801), Indiana (1818), Maine (1821), Tennessee (1822), and Illinois (1829). . . . [T]he list [would later include] Florida (1832), Missouri (1835), Texas (1837), Arkansas (1838), Michigan (1838), and Iowa (1840). In 1852, Alabama passed a law against interracial marriage, and both Georgia and Utah passed laws prohibiting interracial sex. Before the Civil War broke out, laws against interracial marriage had spread to many midwestern states and territories as well, including California (1850), Kansas (1855), Nebraska (1855), Washington (1855), New Mexico (1857), and Ohio (1861).

Id. at 21.

⁵⁸ An Act Concerning Negroes and Other Slaves, *supra* note 57, at 534.

⁵⁹ See, e.g., PASCOE, *supra* note 19, at 96–108 (discussing legal challenges to antimiscegenation laws); Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s-1960s*, 70 CHI. KENT L. REV. 371, 373–420 (1994) (examining challenges to antimiscegenation laws in Alabama and Virginia). As R.A. Lenhardt explains, litigants deployed different legal strategies to challenge the validity of antimiscegenation laws. See Lenhardt, *Beyond Analogy*, *supra* note 46, at 843 n.21 (explaining that some litigants chose to disprove their status as members of a racial group that was prohibited from marrying Whites, while others elected to show that their particular racial or ethnic group was not among the group of persons barred from marrying Whites).

⁶⁰ See PASCOE, *supra* note 19, at 40–41 (noting that “cracks in the wall of antebellum laws against interracial marriage” first appeared in 1843).

was not until after the Reconstruction that challenges to these laws began to gather momentum.⁶¹ Even then, the gains in court were minimal. One case from the Alabama Supreme Court, *Burns v. State*,⁶² and two cases from the Texas Supreme Court, *Bonds v. Foster*⁶³ and *Honey v. Clark*,⁶⁴ were among the very few cases in the early 1870s that invalidated state antimiscegenation laws.⁶⁵ However, these cases did not have long-lasting effects. The Alabama court reversed *Burns* two years later,⁶⁶ and other decisions were similarly short-lived.⁶⁷

It was not until 1948 that a state supreme court once again overturned a state antimiscegenation law. Specifically, in *Perez v. Lippold*,⁶⁸ the California Supreme Court held that the state's restrictions against interracial marriages violated equal protection law and were void for vagueness.⁶⁹ Relying upon the then-developing strict scrutiny analysis⁷⁰ that has now become the traditional test applied in race discrimination claims,⁷¹ *Perez* examined and rejected the state's justifications for its antimiscegenation law. The court rebuffed the state's claim that the ban on interracial marriages was necessary to protect against Caucasian marriages to inferior Blacks,⁷² prevent racial tensions,⁷³ and avert detrimental effects

⁶¹ See *id.* at 40–45 (describing post-Reconstruction cases that challenged antimiscegenation laws).

⁶² 48 Ala. 195 (1872) (holding that statutes criminalizing performance of interracial marriage violate the Fourteenth Amendment).

⁶³ 36 Tex. 68, 69–70 (1872) (holding that after the adoption of the Fourteenth Amendment, interracial couples could prove putative marriage by the same standards as same-race couples).

⁶⁴ 37 Tex. 686, 687, 709 (1873) (finding that a White man and a Black woman who cohabitated from 1833 until the man died in 1862 were legally married, despite an antimiscegenation law being in force for much of that time).

⁶⁵ PASCOE, *supra* note 19, at 33–41.

⁶⁶ *Green v. State*, 58 Ala. 190, 192–93, 197 (1877).

⁶⁷ PASCOE, *supra* note 19, at 46 (“Reconstruction-era decisions upholding interracial marriages were first overruled and then abandoned.”).

⁶⁸ 198 P.2d 17 (Cal. 1948) (holding that the state's antimiscegenation law violated the United States Constitution).

⁶⁹ *Id.* at 21, 27.

⁷⁰ *Id.* at 19 (relying on *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943), for the proposition that discrimination based on race has often been deemed a denial of equal protection of the laws); see also Greg Robinson & Toni Robinson, *Korematsu and Beyond: Japanese Americans and the Origins of Strict Scrutiny*, 68 LAW & CONTEMP. PROBS. 29, 30 (2005) (stating that “the most decisive contribution of the Japanese Americans to the legal struggle for civil rights was in laying the foundation for the doctrine of strict scrutiny,” beginning with *Hirabayashi*).

⁷¹ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (“[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”).

⁷² *Perez*, 198 P.2d at 23–25 (noting that there is no scientific proof that Blacks are inferior to Whites).

⁷³ See *id.* at 25–26 (explaining that maintaining an antimiscegenation law would merely

on mixed-race children.⁷⁴ In so doing, *Perez* ushered in groundbreaking changes to California. Curiously, however, it failed to convince other state courts to similarly invalidate their own antimiscegenation laws.⁷⁵ Nevertheless, despite its failure to explicitly influence other state courts, *Perez* foreshadowed the broader invalidation of these laws that occurred in the following two decades.⁷⁶

In 1967, the Supreme Court struck down Virginia's proscriptions against interracial marriages in *Loving v. Virginia* on both equal protection and due process grounds.⁷⁷ Explaining that state racial classifications must be subject to the "most rigid scrutiny" and may only be upheld if necessary to achieve a "permissible state objective,"⁷⁸ the Court held that there was "no legitimate overriding purpose independent of invidious racial discrimination" that justified the racial classification.⁷⁹ The Court further found that Virginia's ban against interracial marriage to a White person demonstrated the state's intent to "maintain White supremacy."⁸⁰

Moreover, the Court noted that the right to marriage was one of the "basic civil rights of man."⁸¹ Although the Supreme Court recognized that the regulation of marriage fell within the state's police powers,⁸² it held that states could not exercise their regulatory authority over domestic relations in contravention of the Fourteenth Amendment.⁸³ The Court found that denying a person the right to marry based on a discriminatory racial classification violated a fundamental right without due process of law.⁸⁴ Thus, the antimiscegenation law could not stand.⁸⁵ By striking down Virginia's law, the Supreme Court's decision ultimately led to the

perpetuate racial tension).

⁷⁴ See *id.* at 26 (explaining that any stigma conferred on mixed-race children would be imposed by society's prejudices).

⁷⁵ See Lenhardt, *Beyond Analogy*, *supra* note 46, at 853–54 (noting that "*Perez* did not translate into change outside of that state," "few courts even cited it," and those courts that did cite to the case "did not do so approvingly" (citing *Naim v. Naim*, 87 S.E.2d 749, 753 (Va. 1955))).

⁷⁶ Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1155 (2009) (explaining that when *Perez* was decided, thirty states had antimiscegenation laws, but that when *Loving* was decided by the Supreme Court, there were only sixteen).

⁷⁷ 388 U.S. 1, 7–12 (1967) (describing equal protection analysis and conducting a due process analysis of the Virginia antimiscegenation statute).

⁷⁸ *Id.* at 11 (citing *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 12 (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

⁸² *Id.* at 7 (citing *Maynard v. Hill*, 125 U.S. 190, 211–12 (1888)) (identifying marriage as a social relation subject to the state's police power).

⁸³ *Id.*

⁸⁴ *Id.* at 12.

⁸⁵ *Id.*

invalidation of the remaining fifteen state antimiscegenation laws.⁸⁶

The traditional story of antimiscegenation laws centered on states as the exclusive domains of marriage inequality. *Perez* highlighted state officials as the antagonists who denied Andrea Perez and Sylvester Davis their right to get married and *Loving* involved state officials forcing Richard and Mildred Loving to leave their home state. In contrast, federal laws and officials appear to have been largely absent in this story. Indeed, whereas state laws were characterized as the perpetrators of marriage discrimination, the Constitution, and the Fourteenth Amendment in particular, played the part of the hero.

But there is still an untold story that implicates the federal government in the antimiscegenation enterprise. Using the experience of John and Helene Bouiss as an entry point,⁸⁷ this Article shows that the federal government, through military and immigration officials, directly participated in regulating and restricting interracial relationships. Such federal engagement in antimiscegenation policing underscores that race discrimination vis-à-vis marriage was far more extensive than previously acknowledged. Through an exploration of this marginalized history in our so-called “post-racial” world, this Article shows that we have overlooked the varied ways in which racism shaped the American family and private lives.

B. *The Story of John and Helene Bouiss*

In November 1945, two months after Japan had surrendered to the United States,⁸⁸ the United States took control over Japan,⁸⁹ deploying more than 500,000 military personnel.⁹⁰ That month, Helene Emilie Wilson and John Bouiss met in a Japanese hospital. Helene, born in Japan and raised by her German father and Japanese mother,⁹¹ was seeking medical treatment for an infection caused by malnutrition brought on during World War II.⁹²

⁸⁶ *Id.* at 6 n.5 (noting that sixteen states had antimiscegenation laws in 1967: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia).

⁸⁷ In the tradition of Critical Race Theory, I use stories to highlight the ways in which race and the law shaped the lived experiences of people of color. See Sheila R. Foster, *Foreword*, Symposium, *Critical Race Lawyering*, 73 *FORDHAM L. REV.* 2027, 2037–38 (2005) (discussing the importance of narrative in critical race legal scholarship).

⁸⁸ *Japan Surrenders to Allies, Signs Rigid Terms on Warship; Truman Sets Today as V-J Day*, *N.Y. TIMES*, Sept. 2, 1945, at 1.

⁸⁹ See CRAWFORD ET AL., *supra* note 41, at xvi (explaining that the period of “Occupied Japan” officially lasted from 1945 to 1952).

⁹⁰ See *id.* at xvii. (discussing the U.S. occupation of Japan).

⁹¹ Bonnie Wiley, *Freed Jap War Bride Hopes To Settle Down in Portland*, *OREGONIAN*, July 31, 1946, at 9.

⁹² Smith, *supra* note 2, at 1.

John, an American, was serving the last six months of his four-year tour in the Army in a medical battalion in Osaka.⁹³

World War II wrought significant devastation on Japan. Conventional and atomic bombs caused thousands of deaths and decimated the country's major cities.⁹⁴ Nine million Japanese people became homeless, and many died from starvation and malnutrition.⁹⁵ The end of the war also ushered in fundamental changes to the lives of many Japanese women, as well as to Japanese society in general. As a result of the casualties of war, Japanese women greatly outnumbered Japanese men.⁹⁶ Moreover, women were placed in the position of having to support their families due to the number of male casualties.⁹⁷ Consequently, many entered the workforce.⁹⁸ This move constituted not only a shift away from the previously male-dominated society but also a type of liberation for many Japanese women.⁹⁹ With the economy of Japan devastated, the more desirable and higher paying jobs were on the U.S. military bases.¹⁰⁰ Accordingly, many women sought employment there and found work as interpreters, clerical employees, and housekeepers.¹⁰¹ Helene herself obtained a job working for the U.S. Army, first as an accountant and stenographer, and eventually, as an interpreter.¹⁰²

⁹³ See Smith, *supra* note 3, at 13 (reporting that John Bouiss had been serving in Japan when he and Helene met).

⁹⁴ See *id.* at xv–xvi (explaining that in addition to the atomic bomb destruction of Hiroshima and Nagasaki, conventional bombs caused “58 percent of Yokohama, 56 percent of Kobe, 40 percent of Tokyo, and 35 percent of Osaka [to be] destroyed”).

⁹⁵ See *id.* at xvi; Associated Press, *Starvation Deaths Rising Near Tokyo, Army Says*, N.Y. TIMES, June 3, 1946 (noting that Japanese police reported 1291 deaths attributed to malnutrition in the Tokyo area between November 1945 and June 1946).

⁹⁶ See CRAWFORD ET AL., *supra* note 41, at xvii (explaining that the 1947 Japanese national census reported that “the number of men between 20 and 29 years old was 5.77 million, while the number of women in the same age group was 6.78 million” (quoting KEIKO TAMURA, MICHIE’S MEMORIES: THE STORY OF A JAPANESE WAR BRIDE 95 n.8 (2001))).

⁹⁷ ELFRIEDA BERTHIAUME SHUKERT & BARBARA SMITH SCIBETTA, *WAR BRIDES OF WORLD WAR II* 187 (1988) (noting that Japanese women “became heads of households after their fathers and brothers were killed or disabled” after the war).

⁹⁸ See CRAWFORD ET AL., *supra* note 41, at xvi (highlighting women’s desire for employment and the number of jobs created by 500,000 American soldiers stationed in Japan).

⁹⁹ See SHUKERT & SCIBETTA, *supra* note 97, at 187 (“The breakup of the male-dominated social structure and the enfranchisement of Japanese women were major social changes in the postwar years.”).

¹⁰⁰ See CRAWFORD ET AL., *supra* note 41, at xvii (noting the difficulty of obtaining better pay elsewhere).

¹⁰¹ See *id.* (discussing the conditions that brought American GIs in contact with Japanese women). Many of those who were unable to find jobs turned to prostitution as a means of supporting their families. SHUKERT & SCIBETTA, *supra* note 97, at 190.

¹⁰² *Portlander*, *supra* note 6, at 1. I do not mean to gloss over important social, cultural, and economic factors that shaped the relationships between American military personnel and Japanese women. For a more in-depth feminist critical analysis of their interaction, including an explanation of the depiction of White American soldiers as “‘husbanding’ the Japanese woman’s

The presence of Japanese women on the military bases naturally facilitated interactions with Americans.¹⁰³ John and Helene were no exception.¹⁰⁴ Soon after they met, Helene and John began spending time together and eventually fell in love.¹⁰⁵ At the time, Helene was a divorced woman, previously having been married to a Swedish man; accordingly, although she lived in Japan, she had acquired his Swedish citizenship.¹⁰⁶ In April 1946, John received his discharge papers.¹⁰⁷ By then, the couple was engaged. John wanted to return to his home state of Washington, and the two set sail together on the U.S.S. Stetson Victory.¹⁰⁸ John and Helene originally intended to get married in the United States. Yet on May 9, 1946, while at sea, they suddenly changed their plans and asked to be married by the captain on the deck.¹⁰⁹ The captain agreed and “under a mellow moon,” married the two of them.¹¹⁰

John and Helene’s decision to get married was important for at least two reasons. First, the military had an official policy and had promulgated regulations that prohibited marriages between American military personnel and Japanese.¹¹¹ Additionally, immigration laws at the time prohibited persons who were not eligible to become citizens from entering the United States.¹¹² Ethnic Japanese individuals, whether citizens of Japan or another

emancipation from the formerly oppressive Japanese patriarchy,” see Caroline Chung Simpson, “*Out of an Obscure Place*”: Japanese War Brides and Cultural Pluralism in the 1950s, 10 J. FEM. CULT. STUD. 47, 52 (1998).

¹⁰³ Because many Japanese men died as a result of the war, Japanese women had little hope of marrying Japanese men. By contrast, there were thousands of American men of marriageable age who were deployed in Japan. See CRAWFORD ET AL., *supra* note 41, at xvii.

¹⁰⁴ See Smith, *supra* note 3, at 13 (describing John and Helene’s romance).

¹⁰⁵ Wiley, *supra* note 91, at 9.

¹⁰⁶ *Portlander*, *supra* note 6, at 1 (reporting that “the former Helene Emilie Wilson” had acquired Swedish citizenship through her former marriage to a Swedish man).

¹⁰⁷ Smith, *supra* note 3, at 13.

¹⁰⁸ See *id.* (reporting that the Bouiss couple was on board a military ship that was set to return to the United States). John Bouiss was returned home for discharge by the Army after completing his tour in Japan, and Helene’s friends obtained passage for her on the U.S.S. Stetson Victory, the same ship that was going to bring John back to the United States. See *id.* (reporting on the circumstances of the Bouiss couple’s trip to the United States). Armed with her Swedish passport, Helene had a ticket to go to Sweden “via the United States.” *Id.* She planned to go to Sweden to get money from her bank and then return to the United States. *Portlander*, *supra* note 6, at 1.

¹⁰⁹ Smith, *supra* note 3, at 13 (reporting that the Bouisses were married by the ship’s captain).

¹¹⁰ *Id.*; see also Brief for Appellant at 2, *Bonham v. Bouiss*, 161 F.2d 678 (9th Cir. 1947) (No. 11451) [hereinafter Appellant Brief] (stating that John and Helene Bouiss were married on May 9, 1946).

¹¹¹ See *infra* Part II.C (discussing the military regulations that prohibited military personnel from marrying Japanese citizens). The military also restricted civilians working for the Armed Forces from marrying Japanese citizens. See CIRC. 6, *supra* note 1, ¶ 2(c) (noting the marriage prohibition except “under very unusual circumstances”).

¹¹² See Immigration Act of 1924, ch. 190, § 13(c), 43 Stat. 153, 162 (Outlawing entry into the United States for aliens “ineligible to citizenship” unless such alien met one of two exceptions); *infra* Part III.C (discussing inadmissibility to the United States based on ineligibility to gain

country, were among the very few groups in 1945 who remained ineligible to become citizens and, thus, were deemed inadmissible.¹¹³ Accordingly, the Armed Forces sought to prohibit marriages between military personnel and persons who would be excluded at the border and whose exclusion could lead to divorce.¹¹⁴ The second justification was grounded in state law. Specifically, the military cited state antimiscegenation laws to discourage American soldiers from marrying Japanese women.¹¹⁵ Of course, federal officers were not under any obligation to enforce these state laws; nevertheless, some deployed them to prevent interracial marriages.¹¹⁶ Consequently, most American soldiers who sought to marry Japanese nationals had difficulty doing so and, indeed, John probably would have been unable to marry Helene while he was still enlisted in Japan.¹¹⁷ Thus, the fact that the captain of the ship decided to marry John and Helene¹¹⁸ meant that they were able to overcome a barrier that stymied thousands of American-Japanese couples.¹¹⁹

Second, as previously noted, less than six months prior to their

citizenship).

¹¹³ See *infra* Part II.A (explaining the use of race as a prerequisite for naturalization). Between 1882 and 1924, Congress passed laws that barred different Asian groups from becoming eligible for citizenship. Through congressional legislation passed in December 1943 and January 1946, Chinese, Filipinos, and Indians became eligible for citizenship and thus admissible to the United States. See Act of Jan. 14, 1946, ch. 534, Pub. L. No. 79-483, 60 Stat. 416 (allowing persons from the Philippines and India to become eligible for citizenship); Act of Dec. 17, 1943, ch. 344, Pub. L. No. 78-199, § 3, 57 Stat. 600, 601 (repealing Chinese Exclusion Acts and allowing Chinese people to become eligible for naturalization). However, all other Asians, including the Japanese, remained ineligible for citizenship and were thus barred from entering the United States.

¹¹⁴ See *infra* Part III.B (discussing military regulations that restricted marriage for persons ineligible for citizenship).

¹¹⁵ See *id.* (explaining military marriage regulations that noted state antimiscegenation laws); see also Ota, *Flying Buttresses*, *supra* note 40, at 720 (stating that the military forbade marriages between citizens and Japanese women because “couples could also encounter legal impediments to their marriages” as a result of antimiscegenation laws). The following states had laws that restricted marriages between Whites and Asians in 1946: Arizona, California, Georgia, Idaho, Mississippi, Missouri, Montana, Nebraska, Nevada, Oregon, South Dakota, Utah, Virginia, and Wyoming. See Note, *Constitutionality of Anti-miscegenation Statutes*, 58 YALE L.J. 472, 480–81 (1949) (listing and describing state antimiscegenation statutes). These laws used terms like “Mongolians,” “Malays,” and “Hindus,” meaning that many of these laws restricted marriage only for certain groups of Asians who were deemed to fall within the covered groups. See also Volpp, *supra* note 19, at 799 n.18 (noting that states made distinctions between different Asian ethnicities).

¹¹⁶ See *infra* Part III.B (discussing reliance on state antimiscegenation laws to deny requests by interracial couples to get married).

¹¹⁷ See *id.* (explaining the difficult process that Japanese-American couples faced when seeking approval to get married).

¹¹⁸ News articles about the case do not provide an explanation as to why the captain decided to marry the couple. On May 9, 1946, the date of their wedding, John was still a member of the Armed Forces. See Appellant Brief, *supra* note 110, at 9 (noting that John testified that he “expected to be discharged [from the armed forces] on May 17 or May 18, 1946”).

¹¹⁹ See *infra* Part II (discussing the legal obstacles to marriage faced by binational couples).

wedding, Congress enacted the law popularly known as the War Brides Act.¹²⁰ This law conferred to U.S. citizens, either serving in or honorably discharged from the military, the right to sponsor the expedited admission of their noncitizen spouses and children as nonquota immigrants to the United States.¹²¹ Thus, Helene's marriage to John, a U.S. citizen who was honorably discharged from the Army,¹²² provided the requisite legal basis for her entry to the United States.

Days after their wedding, the couple arrived in Seattle excited about their new life together in the United States.¹²³ Their honeymoon, however, ended at the border. Upon Helene's arrival in Seattle, immigration officials refused to allow her to enter the country.¹²⁴ Despite Helene's status as the spouse of an honorably discharged serviceman, immigration officials deemed her "inadmissible" because she was Japanese.¹²⁵ In particular, when immigration officers asked Helene, "Of what race are you?," she replied, "One-half German and one-half Japanese."¹²⁶ Under federal regulations concerning eligibility for naturalization at that time, "persons of mixed racial blood" were allowed to apply for citizenship "only if they were preponderantly of an eligible racial strain."¹²⁷ Based on her statement, immigration officers found Helene to be a person of "mixed blood, being of

¹²⁰ War Brides Act, ch. 591, Pub. L. No. 79-271, 59 Stat. 659 (1945). Although the law does not use the word "brides," courts and commentators referred to it as the "War Brides Act." For legal opinions that refer to it as the "War Brides Act," see, for example, *Lutwak v. United States*, 344 U.S. 604, 606 (1953) and *Knauff v. Shaughnessy*, 338 U.S. 537, 545–46 (1950). For legal commentary discussing the War Brides Act, see Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 475 (2009) and Liav Orgad, *Love and War: Family Migration in Time of National Emergency*, 23 GEO. IMMIGR. L.J. 85, 106 (2008).

¹²¹ War Brides Act § 232. The War Brides Act applied not only to wives but also husbands and children of U.S. citizen military personnel. See *Brownell v. We Shung*, 352 U.S. 180, 181 (1956) (examining the case of a male Chinese national who claimed admission to the United States as a beneficiary of the War Brides Act because he was the son of a U.S. citizen soldier). However, the majority of the beneficiaries of the Act were women. See *infra* notes 290–94 and accompanying text.

¹²² *Portlander*, *supra* note 6, at 1 (reporting that John Bouiss served for four years in a medical battalion).

¹²³ *Smith*, *supra* note 3, at 13 (stating that after getting married, the couple was "looking happily forward to being united at Seattle").

¹²⁴ See Appellant Brief, *supra* note 110, at 2–3 (explaining that immigration officials denied entry to Helene).

¹²⁵ See *id.* at 9–11 (citing "findings, conclusions and order of the Commissioner of Immigration and Naturalization" that Helene was "inadmissible to the United States in that she is an alien ineligible to citizenship and not entitled to enter the United States").

¹²⁶ *Id.* at 17.

¹²⁷ See 8 C.F.R. § 350.2 (1943) ("Persons of mixed races. A person of mixed race must be preponderately [sic] of one or more of the eligible races described in § 350.1, to be eligible to naturalization . . ."); Appellant Brief, *supra* note 110, at 16 (citing federal regulations regarding racial eligibility for naturalization); see also *id.* § 350.1 (describing racial eligibility to be generally restricted to "white persons, persons of African nativity or descent, and descendants of races indigenous to the Western hemisphere").

fifty percent of the white race and fifty percent of the Japanese race.”¹²⁸ Thus, because Helene was half Japanese, she was ineligible for naturalization and inadmissible to the United States.¹²⁹

Helene’s Swedish citizenship also did not help her gain entry. Under immigration laws in effect in 1946, citizens of Sweden had greater opportunities for immigrating to the United States than citizens of Japan.¹³⁰ Immigration officers recognized that Helene “was a native of Japan and a subject of Sweden”¹³¹ and that she “acquired Swedish nationality through marriage to a Swedish subject.”¹³² Despite her Swedish nationality, immigration officers denied Helene entry to the United States because she was racially Japanese. Accordingly, immigration officials brought her to the local detention center,¹³³ where she stayed for a couple of months while John tried to obtain her release from immigration officers.¹³⁴ As John reported it, the couple “got the impression from immigration authorities that everything would be worked out and [Helene] would be released.”¹³⁵ John was allowed to visit her once a week for “15-minute visit[s] with the matron sitting in.”¹³⁶ When the Board of Immigration Appeals affirmed the exclusion,¹³⁷ and John found out that immigration officers were going to deport Helene, he hired lawyers to help him get Helene released from detention.¹³⁸

C. Bonham v. Bouiss: *Between Wife and Country*

With his lawyers’ assistance, John filed a writ of habeas corpus on

¹²⁸ Appellant Brief, *supra* note 110, at 10 (quoting an administrative finding that these facts made Helene ineligible for naturalization and thus admission).

¹²⁹ *See id.* at 17.

¹³⁰ As explained in Part II.B, immigration law employed a national-origins-quota system that limited Japanese and other Asians’ immigration to the United States. *See* Immigration Act of 1924, ch. 190, Pub. L. No. 68-139, 43 Stat. 153. For example, in 1929, Japan was limited to a 100 person quota per year. Sweden, by contrast, was allotted 3314. NGAI, *supra* note 17, at 27–29 (citing Immigration Quotas Based on National Origin, Proclamation by the President of the United States (Mar. 22, 1929)).

¹³¹ Appellant Brief, *supra* note 110, at 10.

¹³² *Id.* at 1–2.

¹³³ Smith, *supra* note 3, at 13.

¹³⁴ Smith, *supra* note 2, at 1.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ After being initially denied entry at the border, Helene was brought before a Board of Special Inquiry, which held an exclusion hearing on May 13, 1946. *See* Appellant Brief, *supra* note 110, at 2. After the Board of Special Inquiry held Helene inadmissible, she appealed her exclusion to the Commissioner of Immigration and Naturalization, who affirmed the Board of Inquiry’s conclusion on June 10, 1946. *Id.* at 2–3. The Board of Immigration Appeals approved the Commissioner’s conclusion. *Id.* at 3, 9–12.

¹³⁸ *Portlander*, *supra* note 6, at 1.

Helene's behalf.¹³⁹ In his petition, John invoked Helene's marriage to him—a U.S. citizen—as the basis for her release from detention and admission to the United States.¹⁴⁰ Specifically, John contended that Helene's "exclusion order [and detention] . . . was unlawful, null and void, in that [she was] the lawful wife of a citizen of the United States," and that as such was "lawfully admissible" under the War Brides Act.¹⁴¹ John essentially argued that the immigration laws permitted his citizenship to "cover" her racial inadmissibility.¹⁴²

The couple succeeded in federal district court.¹⁴³ At the outset, the court did not challenge immigration authorities' classification of Helene as inadmissible because of her racial ineligibility to become a citizen. Citing immigration regulations, the court recognized that she was a person of "mixed racial bloods, being one-half White and one-half Japanese" and thus not eligible to naturalize.¹⁴⁴ Indeed, the court acknowledged that the Supreme Court opinion in *Chan v. Nagle* provided support for the government's conclusion that Helene was inadmissible.¹⁴⁵ In *Chan v. Nagle*, four Chinese women who had married Chinese Americans were excluded at the border.¹⁴⁶ Immigration officers deemed them inadmissible under the 1924 immigration law, which barred persons ineligible for citizenship from crossing the border.¹⁴⁷ Because the wives were "alien Chinese," they were "ineligible to citizenship" and were thus barred from entering the United States.¹⁴⁸ The Supreme Court upheld their exclusion,

¹³⁹ See Amended Petition for Writ of Habeas Corpus, *Ex parte Bouiss*, 67 F. Supp. 65 (W. D. Wash. 1946) (No. 1589) [hereinafter *Bouiss Writ of Habeas Corpus*].

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at V.

¹⁴² Coverture—the legal principle that a man's identity covered his wife's legal identity upon marriage—had long been abolished by 1946. See Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1654–57, 1709–10 (2003) (discussing the "gradual demise" of coverture with married women's property acts and earning statutes, though noting the continued impact of marital status on women's political and legal identities). Nonetheless, John Bouiss's citizenship argument may be viewed as a type of coverture claim, as John argued for a reading of the U.S. immigration laws that would allow Helene's identity as the wife of a U.S. citizen to take precedence over her racial inadmissibility. Such analogies to coverture in the immigration context were hardly novel. See Todd Stevens, *Tender Ties: Husbands' Rights and Racial Exclusion in Chinese Marriage Cases, 1882-1924*, 27 LAW & SOC. INQUIRY 271, 273–74 (2002) (discussing Chinese American husbands' claims that their own rights to coverture and family unity "trumped" the racial inadmissibility of their Chinese wives).

¹⁴³ See *Ex parte Bouiss*, 67 F. Supp. 65, 66 (W.D. Wash. 1946) (granting John Bouiss's writ of habeas corpus). Part IV conducts a fuller analysis of the district court and appellate court decisions in this case.

¹⁴⁴ *Id.* at 66.

¹⁴⁵ See *id.* (citing *Chan v. Nagle*, 268 U.S. 346 (1925)).

¹⁴⁶ *Chan*, 268 U.S. at 350.

¹⁴⁷ *Id.* at 351.

¹⁴⁸ *Id.* at 351, 353.

stating that “the words of the statute plainly exclude petitioners’ wives.”¹⁴⁹

Despite similarities in the grounds of exclusion of Helene and the plaintiffs in *Chan*, the *Bouiss* court chose not to apply *Chan*. Instead of focusing on Helene’s racial inadmissibility, the court instead emphasized Helene’s status as the lawful wife of an honorably discharged U.S. soldier.¹⁵⁰ Noting that the statute required that the marriage to a citizen had to have occurred prior to arriving in the United States when a visa would be issued,¹⁵¹ the court concluded that Helene and John legally complied with the statute.¹⁵² The court explained that the case should be examined with the purpose of the War Brides Act in mind.¹⁵³ Describing it as a remedial statute, the court underscored that the law was enacted during a “post-bellum environment, which found millions of the personnel of the armed forces of the Nation in distant and widely separated foreign areas around the globe.”¹⁵⁴ The court explained:

The intent to keep intact all conjugal and family relationships and responsibilities of honorably discharged service men of the Second World War is clearly expressed, and the obvious purpose to safeguard the social and domestic consequences of marriage of service men while absent from the United States must take precedence over a generalized phrase which if interpreted along purely racial lines would frustrate the plain purpose of the whole statute.¹⁵⁵

Thus, recognizing that Helene’s status as a citizen’s wife “cured” her racial inadmissibility,¹⁵⁶ the court released Helene from detention. After three months of being separated, the couple reunited.¹⁵⁷

The government, however, appealed the case to the Ninth Circuit¹⁵⁸ and prevailed against the Bouisses.¹⁵⁹ The Ninth Circuit acknowledged that Helene was John’s lawful wife.¹⁶⁰ Nevertheless, the court held that Helene

¹⁴⁹ *Id.* at 352.

¹⁵⁰ *Ex parte Bouiss*, 67 F. Supp. 65, 66 (W.D. Wash. 1946).

¹⁵¹ *Id.*

¹⁵² *See id.* (“Her marriage to the petitioner took place on the high seas en route to the United States and it occurred prior to the issuance of the visa.”).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 67.

¹⁵⁵ *Id.*

¹⁵⁶ *Cf.* Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 776–78 (2006) (discussing the “curative” powers of marriage in policing the line between illicit and licit sex and protecting couples’ legal rights, particularly as reinforced by immigration law).

¹⁵⁷ *German-Japanese Bride Rejoins Portland Husband*, OR. J., July 31, 1946, at 8.

¹⁵⁸ *See* Appellant Brief, *supra* note 110, at 1.

¹⁵⁹ *Bonham v. Bouiss*, 161 F.2d 678, 679–80 (9th Cir. 1947).

¹⁶⁰ *Id.* Curiously, the court noted that “although appellee’s moral character is not in issue[,] the record shows that in Japan she also openly engaged in immoral practices with various other men.” *Id.* at 678. According to the record cited by the government in its brief, Helene testified at her exclusion hearing that “[s]he cohabited with a former employer for about five years” and that she

was not eligible to citizenship by reason of her Japanese blood.¹⁶¹ In holding against Helene's admission, the court agreed that the War Brides Act was intended to "facilitate the admission of spouses and children acquired by members of our Armed Forces" who had been deployed overseas.¹⁶² Yet, the court emphasized that Congress did not expressly lift the excludability of persons ineligible for citizenship.¹⁶³ Thus, applying the "obvious and plain command of the statute," the court upheld Helene's exclusion¹⁶⁴ and allowed the continued exclusion of other Japanese war brides. *Bouiss*, which is the only reported case involving a racially inadmissible war bride after World War II,¹⁶⁵ ultimately did not reach the Supreme Court.¹⁶⁶

Helene's exclusion as a racially inadmissible war bride demonstrates that *Bouiss* was more than a case about the removal of a noncitizen from the country. Rather, *Bouiss* illuminates the ways in which immigration law's racial exclusion erected barriers to the ability of an interracial couple to live together in the United States. Moreover, a closer examination of the historical and legal factors that surrounded *Bouiss* reveals that immigration law went beyond preventing interracial married couples from living together in the United States. Instead, interrelated regulations and statutes helped to stop many interracial couples from getting married and forming families in the first instance. In brief, *Bouiss* was part of a larger,

had "intimate relations with soldiers." Appellant Brief, *supra* note 110, at 11. Notably, Helene denied that she "practi[ced] prostitution." *Id.* Had she been a prostitute, Helene would have been barred from entering the United States. See Act of Mar. 3, 1875 (Page Law), ch. 141, 18 Stat. 477 (prohibiting the immigration of prostitutes, contract laborers, and convicts from "China, Japan, or any Oriental country"); see also Abrams, *Polygamy*, *supra* note 39, at 692–95 (noting that the legislative history of the Page Act suggests a racialized intent and purpose of the law to exclude Chinese women). It is possible that Helene's sexual history may have played a factor in the immigration officers' decision to exclude her. See Appellant Brief, *supra* note 110, at 12 (quoting the administrative finding that "the record raises a doubt regarding whether appellant and her husband intend to live together in the United States and the reasons that prompted them to enter their marriage").

¹⁶¹ See *Bouiss*, 161 F.2d at 679 ("Since we conclude that appellee is not eligible to citizenship by reason of her Japanese blood, she is not admissible as a non-quota immigrant under the Immigration Act of 1924 . . .").

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 680.

¹⁶⁵ Prior to World War II, there were several cases that addressed the admissibility of Chinese women who were married to U.S.-born Chinese men between 1882 and 1924. See Stevens, *supra* note 142, at 273–75 (noting that some U.S.-born Chinese men did win the legal right to have their Chinese wives legally admitted to the United States, based on arguments establishing the husbands' rights to family unity, despite their wives' racial inadmissibility under the Chinese Exclusion Act).

¹⁶⁶ In contrast, one "war bride" case that reached the Supreme Court and has become well-known in immigration law is *Knauff v. Shaughnessy*, 338 U.S. 537 (1950). *Knauff* upheld the exclusion of the wife of a U.S. citizen for security reasons. *Id.* at 547.

overlooked story about our nation's antimiscegenation history.

II

DISENTANGLING THE FEDERAL ANTIMISCEGENATION REGULATORY SCHEME

The foregoing discussion of *Bouiss* sought to expand the historical terrain of the public regulation of interracial marriages. As this Part contends, this new account of our racial past demonstrates that restrictions on interracial marriages were imposed not only by states, but also by the federal government. Notably, they occurred not only within our borders but extraterritorially as well. How, precisely, did the federal government regulate certain interracial marriages? And why has such federal policing escaped public consciousness?

The federal framework for regulation of interracial marriage differed remarkably from its state counterparts. State antimiscegenation laws expressly barred mixed marriages and thus explicitly signaled the types of marriages and relationships that were forbidden. The Virginia statute that the Supreme Court invalidated in *Loving v. Virginia*, for example, provided that “[i]t shall . . . be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian.”¹⁶⁷ Additionally, a number of state antimiscegenation laws criminally punished persons who chose to violate the laws. Virginia’s law, for instance, made it a felony to violate the antimiscegenation law, punishable by serving one to five years in jail.¹⁶⁸ Moreover, Virginia’s antimiscegenation law declared all marriages between white persons and colored persons “absolutely void.”¹⁶⁹

By contrast, the federal marriage racial regulatory scheme was composed of not one law that explicitly barred interracial marriages, but rather a confluence of laws and administrative regulations that produced the same results. That is, the convergence of these laws prevented interracial couples from getting married and enjoying the rights, benefits, and privileges of marriage.¹⁷⁰ Undergirding these laws was immigration law’s project of promoting and reifying a White nation, in part through the exclusion of Asians from the United States.¹⁷¹

¹⁶⁷ 388 U.S. 1, 5 n.4 (quoting VA. CODE ANN. § 20-54 (Supp. 1960)).

¹⁶⁸ VA. CODE ANN. § 20-59 (Supp. 1960).

¹⁶⁹ *Id.* § 20-57.

¹⁷⁰ See *infra* Part III (arguing that immigration, citizenship, and military laws and regulations formed a convoluted framework that functioned like a federal antimiscegenation regulatory scheme).

¹⁷¹ See NGAI, *supra* note 17, at 3 (explaining that during the period between the official beginning of the national origins quota in 1924 and the end of the quota in 1965, immigration restrictions “remapped the nation,” in part by emphasizing racial and ethnic “categories and hierarchies of difference”); Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination*

To understand the web of federal laws, regulations, and policies that regulated interracial marriages abroad, Parts II and III unravel three different areas of law that comprised the federal antimiscegenation framework. Part II examines the three zones of law—citizenship, immigration, and military—apart from each other and considers their distinct goals and purposes. It highlights that these laws independently were not intended to restrict mixed marriages. Yet, as Part III argues, they nevertheless operated in practice as a federal restriction of interracial marriages. Such an extensive analysis of the doctrinal operation of these laws is necessary to emphasize the complex ways in which racism manifested itself through marriage restrictions.

A. *Citizenship Law and Race*

The first area of law that played a critical part in the federal policing of interracial marriages was citizenship law—specifically, a provision of the law that enabled legal immigrant residents to naturalize. As explained in the ensuing Section, citizenship law was not explicitly concerned with regulating marriage.¹⁷² Instead, citizenship laws focused primarily on determining who could become an American citizen.

Although the Fourteenth Amendment conferred birthright citizenship to any person born within the United States,¹⁷³ the Constitution vested Congress with the authority to pass laws regarding a person's eligibility for naturalization.¹⁷⁴ And from the early years of the nation's founding until 1952,¹⁷⁵ race was central in the consideration of acquiring citizenship, with

and the Constitutional Law of Immigration, 46 UCLA L. REV. 1, 37–38 (1998) (examining the role of federal immigration law in race-based discrimination, and observing that “the Asian Exclusion Laws bear the same indicia of belief in racial hierarchy that other forms of discrimination did [and that t]hey were motivated by the idea that the United States was particularly reserved for white people”); James F. Hollifield et al., *Immigrants, Markets, and Rights: The United States as an Emerging Migration State*, 27 WASH. U. J.L. & POL'Y 7, 21 (2008) (stating that immigration law's national origins quota system that was enacted during the 1920s “was deeply informed by a new scientific theory—eugenics—that reinvigorated old distinctions between desirable and unworthy immigrants on the basis of race, ethnicity and religion,” and noting that the “new quota system was explicitly planned to favor northern and western European immigrants, and to exclude Asians, Africans, as well as southern and eastern Europeans”).

¹⁷² This is not to say that citizenship law did not affect marriage and the rights of marriage. See generally Volpp, *supra* note 40 (discussing the neglected history of the ways in which women lost formal citizenship and other rights based on marriage to noncitizens).

¹⁷³ U.S. CONST. amend. XIV, § 1; *United States v. Wong Kim Ark*, 169 U.S. 649, 705 (1898) (“[A] child born in the United States . . . becomes at the time of his birth a citizen of the United States.”).

¹⁷⁴ U.S. CONST. art. I, § 8.

¹⁷⁵ See Immigration and Nationality Act, ch. 477, § 311, Pub. L. No. 82-414, 66 Stat. 163, 239 (1952) (“The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race . . .”).

“Whiteness” as the essential requisite for naturalization.¹⁷⁶ In 1790, Congress passed the nation’s first naturalization statute, which limited the right to naturalize to White people.¹⁷⁷ The Supreme Court later constitutionalized the equation of Whiteness to citizenship in *Dred Scott v. Sandford*, when it refused to recognize African Americans as citizens, thereby depriving Blacks of both birthright citizenship as well as the right of naturalization.¹⁷⁸ Although the Fourteenth Amendment, ratified in 1868, recognized the citizenship of all persons born in the United States,¹⁷⁹ and thus reversed *Dred Scott*, it was not until 1870 that Blacks became eligible for naturalization. In particular, Congress opened up citizenship to persons of “African descent” in 1870.¹⁸⁰ Thus, after 1870, in order to become a naturalized American, one had to be either White or Black.

It took another seventy years before Congress opened the right to naturalize to other racial groups. In 1940, Congress allowed persons from the “Western Hemisphere” to naturalize.¹⁸¹ In 1943, it extended the right to naturalize to Chinese persons.¹⁸² And in 1946, Filipinos and Indians became eligible for naturalization.¹⁸³ Congress ultimately lifted all racial requirements for citizenship in 1952.¹⁸⁴

Congress’s imposition of racial requirements for citizenship played a significant role in the construction of racial identities, racial hierarchies, and racial subordination in the United States. As a formal matter, naturalization laws’ race requirements posed critical barriers to those who fell outside of the Black-White binary, preventing them from becoming citizens and full members of the nation. Accordingly, plaintiffs brought cases seeking to prove their eligibility, and they did so by contending that they were White.¹⁸⁵ These noncitizens included Takao Ozawa, a Japanese man,¹⁸⁶ and Bhagat Singh Thind, a Punjabi man.¹⁸⁷ In 1922, the Supreme

¹⁷⁶ See IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 37–109 (1996) (discussing the history of racial prerequisites for naturalization).

¹⁷⁷ See Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, 103 (“[A]ny alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen.”).

¹⁷⁸ 60 U.S. 393, 404–27, 454 (1856), *superseded by constitutional amendment*, U.S. CONST., amend. XIV.

¹⁷⁹ U.S. CONST., amend. XIV.

¹⁸⁰ Naturalization Act of 1870, ch. 254, 16 Stat. 254, 256.

¹⁸¹ Nationality Act of 1940, ch. 876, § 303, Pub. L. No. 76-853, 54 Stat. 1137, 1140.

¹⁸² Act of Dec. 17, 1943, ch. 344, § 3, Pub. L. No. 78-199, 57 Stat. 600, 601.

¹⁸³ Act of July 2, 1946, ch. 534, Pub. L. No. 79-483, 60 Stat. 416.

¹⁸⁴ Immigration and Nationality Act, ch. 477, § 311, Pub. L. No. 82-414, 66 Stat. 163, 239 (1952).

¹⁸⁵ See LOPEZ, *supra* note 176, at 49–153 (1996) (examining cases involving plaintiffs who claimed that they were White for purposes of naturalizing).

¹⁸⁶ *Ozawa v. United States*, 260 U.S. 178 (1922).

¹⁸⁷ *United States v. Thind*, 261 U.S. 204 (1923).

Court rejected both citizenship arguments and held that Japanese and South Asian Indians were not White, and thus were ineligible for naturalization.¹⁸⁸ The opinions in *Ozawa* and *Thind* had far-reaching effects because the Court “completed the legal construction of ‘Asiatic’ as a racial category” and applied the “rule of ineligibility to Koreans, Thai, Vietnamese, Indonesians,” and other discrete ethnic groups.¹⁸⁹ In contrast, immediately before *Ozawa* and *Thind*, the federal government did not appear to recognize “Asian” as a distinct racial category. For example, the 1920 census contained the following racial categories: “white,” “black,” “mulatto,” “Indian,” “Chinese,” “Japanese,” and “Hindu.”¹⁹⁰ *Ozawa* and *Thind* were thus instrumental in the eventual collapsing of Japanese, Indians, Chinese, and Hindus under the “Asian” category.

These cases did more than define who was Asian (rather than White) and thus ineligible for naturalization, however. They also reflected citizenship law’s power to construct and reify White domination and supremacy. Arguably, it would have been equally difficult for a Chinese to seek naturalization by claiming that he was White or Black; yet, the asserted racial bases for naturalization in the previous cases was membership in the White race, illuminating the individuals’ rejection of the other available racial category—a person who was of “African descent.”¹⁹¹ By claiming that they were White, the plaintiffs both indicated and reinforced society’s equation of Whiteness with privileges of citizenship.¹⁹² Being White meant the ability not only to become a formal citizen of the United States but also, substantively, to be a “first-class” citizen as well.

Citizenship law’s racial discrimination was compounded by a parallel gender discrimination, which posed unique obstacles for noncitizen Asian women and for U.S.-citizen women married to noncitizen Asian men.¹⁹³

¹⁸⁸ *Ozawa*, 260 U.S. at 190–99; *Thind*, 261 U.S. at 206–15. For a more in-depth examination of *Ozawa*, see Devon W. Carbado, *Yellow by Law*, 97 CAL. L. REV. 633 (2009).

¹⁸⁹ NGAI, *supra* note 17, at 46 (discussing the *Thind* majority’s reliance on the inadmissibility of “all natives of Asia within designated limits of latitude and longitude, including the whole of India,” in concluding that the same category of people could not be considered White for purposes of naturalizing (quoting *Thind*, 221 U.S. at 204)).

¹⁹⁰ *Id.* at 26.

¹⁹¹ See LOPEZ, *supra* note 176, at 51–52 (explaining that, among other things, the geographical designation of Africa in the naturalization eligibility provision, coupled with the stigma of Black status, may help to explain why Asians chose not to pursue naturalization based on assertions that they were of African descent).

¹⁹² See Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1310–11 (2002) (explaining that Latinos and Asians have argued that they were White instead of Black to avoid discrimination). Claiming Whiteness reflects the high historical and contemporary value assigned to Whites. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1762 (1993) (“Although the substance of race definitions has changed, what persists is the expectation of white-controlled institutions in the continued right to determine meaning—the reified privilege of power—that reconstitutes the property interest in whiteness in contemporary form.”).

¹⁹³ See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and*

From 1855 to 1922, many foreign women automatically derived U.S. citizenship upon marriage to a U.S.-citizen man, thereby gaining legal entry into the United States.¹⁹⁴ Asian women, however, generally failed to acquire their husbands' citizenship because of their own racial ineligibility for naturalization.¹⁹⁵ The same principles of derivative citizenship also served automatically to divest American women of their citizenship upon marrying noncitizen husbands.¹⁹⁶

As Leti Volpp has argued, although the 1922 Cable Act has often been heralded in legal scholarship as a complete eradication of such marital expatriation, in reality, the Act "only ended the expatriation of white or black women married to white or black men."¹⁹⁷ The Act explicitly mandated that women who married men who were ineligible for citizenship (mainly Asian men) would lose their citizenship for the duration of their marriage.¹⁹⁸ Additionally, the Act specified that women who were themselves racially ineligible to naturalize did not derive any right to citizenship through marriage to a U.S. citizen.¹⁹⁹ These respective bars to citizenship were only addressed in piecemeal legislation during the decades

Violence Against Women of Color, 43 STAN. L. REV. 1241, 1265 (1991) (explaining that intersectional analysis along racial and gender axes reveals unique harms faced by women of color); see also Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex*, 1989 U. CHI. LEGAL F. 139, 139–40 (explaining that Black women are marginalized in "feminist and antiracist politics" because the intersectionality of their experience is ignored); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585–93 (1990) (critiquing "gender essentialism" and other abstract intellectual frameworks that exclude traditionally marginalized experiences, especially those of Black women).

¹⁹⁴ Act of Feb. 10, 1855, ch. 71, 10 Stat. 604 ("[A]ny woman who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen."); see also CANDACE LEWIS BREDBENNER, *A NATIONALITY OF HER OWN* 7 (1988) (identifying the Cable Act of 1922 as the beginning of the "laborious retreat from derivative citizenship"). See generally LEWIS, *supra*, at 7 (providing a historical discussion of derivative citizenship based on marriage).

¹⁹⁵ See BREDBENNER, *supra* note 194, at 29 (discussing Chinese women's racial bar from naturalization); see also Stevens, *supra* note 142, at 273–75 (discussing Chinese wives' racial inadmissibility, as well as cases in which U.S.-citizen husbands successfully argued that their rights to family "covered" their Chinese wives' racial exclusion).

¹⁹⁶ Act of Mar. 2, 1907, ch. 2534, §§ 3–4, Pub. L. No. 59-193, 34 Stat. 1228, 1228–29 (causing many women to lose their citizenship upon marriage to a noncitizen); *Mackenzie v. Hare*, 239 U.S. 299 (1915) (upholding the validity of a statute which revoked the citizenship of the petitioner, an American-born woman who married a noncitizen, and denying the petitioner the right to register to vote); see also BREDBENNER, *supra* note 194, at 1–43 (providing a historical discussion of derivative citizenship based on marriage).

¹⁹⁷ Volpp, *supra* note 40, at 432 (discussing the Married Women's Independent Nationality Act (Cable Act), ch. 411, § 3, Pub. L. No. 346, 42 Stat. 1021, 1022 (1922)).

¹⁹⁸ *Id.* at 408.

¹⁹⁹ Thus, in the 1925 case of *Chan v. Nagle* (cited in *Bouiss*), the Supreme Court upheld the exclusion of four Chinese women who were married to Chinese Americans, based in part on an interpretation of the Cable Act as precluding any argument that the women had assumed their husbands' citizenship. 268 U.S. 346 (1925); see also Volpp, *supra* note 40, at 439–40.

following the Page Act.²⁰⁰

In sum, particularly as refracted through the lens of gender, the role that citizenship laws played in constructing racial meanings and reifying racial hierarchies provides historical context for the ways in which those same laws operated to promote White supremacy through the restriction of interracial marriage.

B. Immigration Law, Racial Inadmissibility, and Construction of a White Nation

While naturalization law shaped racial and gender hierarchies within the United States by restricting non-Whites' access to political membership, immigration law produced racial effects by excluding certain racial groups at the border. By barring certain racial groups, Congress sought to create and reify a White nation through immigration law. Indeed, this was the purpose of the Page Act, the nation's "first federal restrictive immigration statute."²⁰¹ The statute barred contract workers and prostitutes from entering the United States, thus implicitly targeting Chinese immigrants and, in particular, Chinese women.²⁰² The Page Act foreshadowed the broader exclusion of Chinese immigrants from the United States, which Congress explicitly achieved in 1882 when it passed the Chinese Exclusion Act and subsequent amendments that strengthened the racial inadmissibility of Chinese.²⁰³ Congress later extended the ban against Chinese to most Asians when it established the "barred Asiatic Zone" in 1917.²⁰⁴ This zone "encompassed the entire area from Afghanistan to the Pacific, save for Japan."²⁰⁵ Japanese immigrants were spared from the ban against Asian immigration as a result of a "Gentlemen's Agreement" between the United States and Japan, wherein the United States agreed not to exclude Japanese and Japan agreed to prevent Japanese from leaving Japan.²⁰⁶

²⁰⁰ See Volpp, *supra* note 40, at 443–47 (chronicling the gradual lifting of restrictions on bars to citizenship).

²⁰¹ Abrams, *Polygamy*, *supra* note 39, at 643 (discussing the Act of Mar. 3, 1875 (Page Law), ch. 141, 18 Stat. 477, which prohibited the immigration of prostitutes, contract laborers, and convicts from "China, Japan, or any Oriental country").

²⁰² See *id.* at 692–702 (contending that the Page Act was enacted to prohibit Chinese women from entering the United States); Volpp, *supra* note 40, at 432–42 (same).

²⁰³ Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (barring Chinese laborers from entering the United States); see also *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889) (upholding the 1889 Amendment to the Chinese Exclusion Act of 1882 that revoked the ability of Chinese nationals who had previously resided in the United States to return to the country, even though they had previously received permission from the federal government to come back).

²⁰⁴ NGAL, *supra* note 17, at 37 (discussing the Immigration Act of 1917).

²⁰⁵ *Id.*

²⁰⁶ The Japanese government negotiated with the United States under the "Gentlemen's

In 1924, Congress enacted the Johnson-Reed Act, which further exemplified its goal of promoting a White America through immigration law.²⁰⁷ In particular, in at least three ways, the Johnson-Reed Act aimed to create a White, Anglo-Saxon nation by “produc[ing] new categories of racial difference.”²⁰⁸ The racial hierarchies that this law facilitated directly affected the ability of mixed-race couples located overseas to get married and enjoy the rights attendant to marriage. First, the 1924 Act expressly barred immigrants who were ineligible for citizenship from entering the United States.²⁰⁹ This provision of the law was specifically designed to exclude Japanese,²¹⁰ whom, as explained above, the Supreme Court declared nonwhite in *Ozawa* and thus ineligible for citizenship.²¹¹ By prohibiting persons who were ineligible for citizenship from entering the United States, Congress ensured that the Japanese—the only Asian group still statutorily able to immigrate—would also find the borders foreclosed to them beginning in 1924.²¹² As historian Ngai argued, it “completed Asiatic exclusion, thereby constituting ‘Asian’ as a peculiarly American racial category.”²¹³

Second, the 1924 Johnson-Reed Act created a national origin quota system designed to limit severely the population of immigrants in the United States.²¹⁴ Considered to be the country’s “first *comprehensive*

Agreement” to avoid an express prohibition against the entry of Japanese to the United States by agreeing to restrict the outward migration of Japanese from their country. See Bill Ong Hing, *Institutional Racism, ICE Raids and Immigration Reform*, 44 U.S.F. L. REV. 307, 335–36 (2009) (explaining the informal agreement between Japan and the United States). Congress superseded the Gentlemen’s Agreement in 1924. See Immigration Act of 1924 (The Johnson-Reed Act), ch. 190, 43 Stat. 153 (nullifying the 1907 commitment by setting quotas on Japanese immigration).

²⁰⁷ Margot K. Mendelson, *Constructing America: Mythmaking in U.S. Immigration Courts*, 119 YALE L.J. 1012, 1020–21 (2010) (contending that the Johnson-Reed Act sought to maintain a majority White nation).

²⁰⁸ NGAI, *supra* note 17, at 7.

²⁰⁹ See Immigration Act of 1924, ch. 190, 43 Stat. 153, 163 (making it “unlawful for any person . . . to bring to the United States . . . (1) any immigrant who does not have an unexpired immigration visa, or (2) any quota immigrant having an immigration visa the visa in which specifies him as a non-quota immigrant”).

²¹⁰ See Aoki, *supra* note 9, at 38–39 (“‘[A]liens ineligible to citizenship’ was a disingenuous euphemism designed to disguise the fact that the targets of such laws were first-generation Japanese immigrants”); see also Villazor, *supra* note 9, at 992 (“Since Japanese were not able to naturalize under the law, the phrase ‘aliens ineligible to citizenship’ thus constituted a euphemism employed to cover up the law’s underlying discriminatory intent.”).

²¹¹ See *Ozawa v. United States*, 260 U.S. 178, 195–99 (1922) (“The appellant, in the case now under consideration, however, is clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side.”).

²¹² At least one court held that the Japanese exclusion only applied to immigrants and not to Japanese non-immigrant visa holders. See, e.g., *In re Katsujiro Akiyama*, 58 F.2d 363 (S.D. Cal. 1932) (holding that a Japanese national who held a trade visa pursuant to an existing treaty was exempted from the Japanese exclusionary rule).

²¹³ NGAI, *supra* note 17, at 37.

²¹⁴ See *id.* at 3, 21–22 (examining the Johnson-Reed Act’s purpose of restricting immigration

restriction law,²¹⁵ the Act imposed numerical restrictions on immigrants along a racial and national hierarchy. Quotas were assigned to each country, calculated based on the number of that country's nationals living in the United States as a percentage of the total foreign nationals in the country in 1890.²¹⁶ The "admitted purpose" of relying on the 1890 census was to limit immigration from southeastern Europe, as 1890 had marked the beginning of major influxes of Southern and Eastern European immigrants.²¹⁷ As a formal matter, some Asian countries were allocated quotas; for example, in 1929, China, Japan, and India each received a quota of one hundred.²¹⁸ However, these quota admissions were only available to citizens of these countries who were not racially Chinese, Japanese, or Indian.²¹⁹ Overall, the national origins quota evidenced the federal government's "conviction that the American nation was, and should remain, a white nation descended from Europe."²²⁰

Third, the 1924 Johnson-Reed Act provided citizens the ability to petition for spouses and other family members to immigrate to the United States, outside of the quota system.²²¹ Designed to promote family unification, this law illustrated one of the benefits of being married to a U.S. citizen.²²² Congress exempted wives and unmarried children from the quotas to further promote family unity.²²³ It gave preference to spouses, unmarried children under twenty-one years old, and parents of U.S. citizens

to the United States based on country of origin).

²¹⁵ *Id.* at 3.

²¹⁶ *Id.*; see NGAI, *supra* note 17, at 21–23 (commenting on the restrictive nature of the 1924 national origins quota system, and underscoring that the total number of immigrants allowed to enter would be based on the number of each country's nationals who were residing in the United States in 1890).

²¹⁷ Note, *Developments in the Law—Immigration and Nationality*, 66 HARV. L. REV. 643, 648 n.28 (1953) (citing H.R. REP. NO. 68-176, pt. 2, at 3 (1924)). In 1929 the United States began to calculate the quotas based on the racial composition of the entire country, rather than merely the foreign-born population, thus giving further advantages to Western European immigrants. *Id.* at 648–49; see also NGAI, *supra* note 17, at 21–22.

²¹⁸ See NGAI, *supra* note 17, at 27–29 (citing Immigration Quotas Based on National Origin, Proclamation by the President of the United States (Mar. 22, 1929)).

²¹⁹ *Id.*

²²⁰ *Id.* (analyzing further examples of the quota system's role in preserving the historical racial composition of the U.S. population).

²²¹ Immigration Act of 1924, ch. 190, § 9, 43 Stat. 153, 157–58 (describing the petition process for the issuance of immigration visas to relatives).

²²² See Abrams, *Regulation of Marriage*, *supra* note 39, at 1634–35 (discussing the benefits and privileges of marriage to a U.S. citizen for purposes of immigration law).

²²³ Immigration Act of 1924 § 4(a) (defining "nonquota immigrant" to include the wife and unmarried minor children of a U.S. citizen residing within the United States); see also HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST HISTORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 126 (2006) (stating that "it would be a mistake to think that the quota set an absolute cap on immigration" since wives and children were exempted from quotas).

who otherwise would be subject to a quota.²²⁴ However, Congress's desire to unite families was racially circumscribed. The 1924 Act did not have a significant effect on the migration of Asian family members, as Congress maintained the exclusion of persons from the Asiatic Barred Zone and those ineligible for citizenship.²²⁵ Thus, while Congress promoted family unification of American citizens and their European family members, it hindered the family unification of American citizens and their Asian family members.²²⁶

In brief, like the restrictive naturalization laws, the quota system functioned as another congressional tool to engineer the racial identity of the United States.

C. *Military Marriage Regulations*

The third area of law that set the stage for the regulation of interracial marriages was military regulation. Unlike persons residing within the United States, who had to comply with state marriage laws and procedures, Americans who were serving in the military abroad had to follow federal rules that determined their rights to marry. In the 1940s, military regulations required military service personnel to first obtain permission from their supervisors prior to getting married.²²⁷ Compliance with these regulations was part of the overall body of military laws designed to maintain morale and order within the military community.²²⁸ The Supreme Court "has long recognized that the military is, by necessity, a specialized society separate from civilian society"²²⁹ grounded on discipline and

²²⁴ Immigration Act of 1924 § 6(a)(1).

²²⁵ Immigration Act of 1924 § 13(c) (excluding aliens that are ineligible for citizenship, with certain specified exceptions).

²²⁶ It should be noted, however, that despite immigration law's exclusion of Chinese at the border, an exception was made for Chinese wives of U.S. citizens, and 767 Chinese wives entered the country between 1930 and 1942. S. REP. NO. 79-1927, at 2 (1946); *see also supra* note 142 and accompanying text (discussing American husbands' claims that their Chinese wives should be admitted to the United States based on the husbands' citizenship).

²²⁷ *See* Capt. Ross W. Branstetter, *Military Constraints upon Marriages of Service Members Overseas, or, if the Army Had Wanted You To Have a Wife . . .*, 102 MIL. L. REV. 5, 6–8 (1983) (discussing the history of the military's regulation of soldiers' ability to marry). Today, military regulations continue to impose limitations on a soldier's ability to get married. *See* Capt. Dana Michael Hollywood, *An End to "Till DEROs Do Us Part,"* 200 MIL. L. REV. 154, 182–93 (2009) (analyzing current military regulations on marriage, promulgated by U.S. Forces in Korea, which require U.S. citizen soldiers to undergo various military, religious, and legal counseling prior to filing an application to marry a noncitizen).

²²⁸ Although Congress has plenary power over military discipline, U.S. CONST. art. I, § 8, cl. 14, it has delegated its authority over the military to the President, as Commander-in-Chief. *See* *Loving v. United States*, 517 U.S. 748, 767–68 (1996) (explaining the congressional delegation of military powers to the President). The President, in turn, has delegated the authority to military officials to issue regulations regarding personnel. *See id.*

²²⁹ *Parker v. Levy*, 417 U.S. 738, 743 (1974).

obedience.²³⁰ In the 1940s, military law and discipline were based on the Articles of War.²³¹ The Articles, as well as other military orders and regulations, restricted the public and private conduct and behavior of military personnel.²³² As Nancy Ota explained, the Articles and regulations reflected the military's need to maintain morale, obedience, and discipline.²³³ To reinforce the Articles, and other orders and regulations promulgated under them, the military operated a court-martial system that facilitated the process for adjudicating and punishing soldiers.²³⁴

The military considered the regulation of private and intimate lives part of its project of disciplining soldiers and protecting their morale.²³⁵ Accordingly, the Articles imposed various restrictions on soldiers' sexual relations throughout World War I and World War II, including prohibitions on sodomy and rape.²³⁶ Direct restrictions on a soldier's right to marry, however, were not initially among them.²³⁷ Indeed, military leaders opined as early as the mid-1870s that they did not have authority to prevent soldiers from getting married.²³⁸

At the onset of World War II, with the deployment of service

²³⁰ See *id.* at 744 (describing the discipline, obedience, and duty that are specific to the military context and separate from civilian society).

²³¹ In 1806, Congress enacted the Articles of War, which constituted military law. See Ota, *Flying Buttresses*, *supra* note 40, at 698 n.15 (explaining that until 1950, the Army functioned under the Army Articles of War, and the Navy and Marines operated under the Navy Articles of War). In 1950, Congress passed the Uniform Code of Military Justice, which currently operates as the law in the military. See Act of May 5, 1950, ch. 169, 64 Stat. 107 (codified as amended at 10 U.S.C. §§ 801–946 (2006)).

²³² See Ota, *Flying Buttresses*, *supra* note 40, at 699–702 (summarizing the regulation of military personnel's conduct directly related to military service, such as desertion and disobeying orders, as well as military regulation of intimate relationships).

²³³ *Id.* at 699–700.

²³⁴ *Id.*

²³⁵ See *id.* at 700–19 (describing the armed forces' regulation of the intimate relationships of military personnel).

²³⁶ See *id.* at 701 (describing such regulations). A prominent modern example of such restrictions on the private lives of military personnel is the recently repealed "Don't Ask, Don't Tell" policy. Pub. L. No. 103-160 § 571, 107 Stat. 1670, *repealed by* Don't Ask, Don't Tell Repeal Act, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

²³⁷ *United States v. Reese*, 22 C.M.R. 612, 614 (1956) ("Prior to World War II, it was held that the Army had no legal authority for prohibiting soldiers to marry, though it could refuse to re-enlist those who married without the permission of the regimental commander.").

²³⁸ See BVT. COLONEL W. WINTHROP, A DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, WITH NOTES 315 (1876), *available at* <http://www.archive.org/stream/digestofopinions00wintrich#page/315.pdf> ("[U]nder existing law, a military commander could have no authority to prohibit soldiers, while under his command, from marrying; and . . . the contracting marriage by a soldier . . . could not properly be held to constitute military offence."); Richard B. Johns, *The Right To Marry: Infringement by the Armed Forces*, 10 FAM. L.Q. 357, 359–60 (1977) (discussing the opinions of the Judge Advocate General of the Army, issued in 1876 and 1877, which determined that the armed forces did not have the authority to restrict soldiers from marriage).

personnel in foreign countries, many of which had populations of color,²³⁹ the War Department²⁴⁰ “issued directives requiring prior permission for soldiers to marry foreign nationals.”²⁴¹ Specifically, in 1939, it issued Army Regulation 600-750, which authorized the Army to discharge without delay and refuse to reenlist certain categories of soldiers who married without permission.²⁴²

By 1942, sixteen million U.S. soldiers had been deployed in various parts of the world, creating opportunities for international and interracial relationships—and ultimately, marriages—to form.²⁴³ Eventually, the War Department wanted to expand its marriage restrictions to other military personnel and sought an opinion from the Judge Advocate General of the U.S. Army regarding its ability to issue broader restrictions.²⁴⁴ In a written opinion, the Judge Advocate General reversed prior military opinions and explained, in deferential tones, that if the Secretary of War determined that “military efficiency of foreign commands requires the prohibition of marriages by members of those commands except with official permission,” such regulation would evoke “no legal objection.”²⁴⁵ Although the opinion did not offer any specific rationale for its position, inherent in the decision was a recognition of the plenary authority that military officials have in creating rules and policies designed to discipline soldiers.

Accordingly, on June 8, 1942, the War Department issued Circular

²³⁹ Ota, *Flying Buttresses*, *supra* note 40, at 702.

²⁴⁰ Between 1789 and 1947, the U.S. Department of War (War Department) oversaw the Army, Navy, and Air Force. In 1947, Congress passed a law that combined all three services under what is now known as the Department of Defense. *See* National Security Act of 1947, ch. 337, 61 Stat. 495, 500 (reorganizing military leadership and establishing a Secretary of Defense who reported to the President); Ota, *Flying Buttresses*, *supra* note 40, at 698 n.15 (noting Congress’s consolidation of the service branches under the Department of Defense).

²⁴¹ *Reese*, 122 C.M.R. at 614 (noting that these directives were intended to respond to the phenomenon of servicemen marrying “young women of markedly different national and racial backgrounds,” who could be ineligible for admission, or with whom they could not live in servicemen’s home states because of antimiscegenation laws).

²⁴² *See* U.S. WAR DEP’T, COMPILATION OF WAR DEPARTMENT GENERAL ORDERS, BULLETINS, AND CIRCULARS 112 (1940) (noting that Circular 65 rescinded paragraph 14 of AR 600-750 and provided that only those enlisted men in “grades 1, 2, [and] 3” would be exempt from the military’s restrictions on getting married without first obtaining written approval of the corps area commander), available at <http://rosecv.pbworks.com/w/file/fetch/26955161/war%20dept%20gen%20orders%201940.pdf>; Hollywood, *supra* note 227, at 164–71 (examining the history of military directions that limited service personnel’s right to marry).

²⁴³ XIAOJIAN ZHAO, REMAKING CHINESE AMERICA, IMMIGRATION, FAMILY, AND COMMUNITY, 1940-1965, at 83 (2002) (discussing the deployment of soldiers in various parts of the world and their opportunities to form relationships with foreigners).

²⁴⁴ Hollywood, *supra* note 227, at 165.

²⁴⁵ *United States v. Jordan*, 30 C.M.R. 424, 427–28 (1960) (quoting Opinion from Major General Myron C. Cramer, Judge Advocate General, U.S. Army (June 1, 1942)) (discussing the permissibility of Army regulations regarding restrictions on the marriage of military personnel).

No. 179, providing that “[n]o military personnel on duty in any foreign country or possession may marry without the approval of the commanding officer of the United States Armed Forces stationed in such foreign country or possession.”²⁴⁶ Failure to comply with this directive subjected military personnel to a court-martial.²⁴⁷

The War Department subsequently promulgated Special Regulation 600-240-5, “Personnel: Marriage in Oversea Commands,” which established the policy and procedures for obtaining approval for marriage between a U.S.-citizen military service personnel and a noncitizen.²⁴⁸ As Special Regulation 600-240-5 made evident, none of the expressed reasons for the implementation of restrictions on marriage had to do with prohibiting marriages based on race generally or interracial marriages specifically. Indeed, Special Regulation 600-240-5 emphasized that the regulations were not intended to proscribe marriage in the first instance. Rather, it explained that the policy and regulations were adopted “to protect the individual from the possible disastrous effects of an impetuous marriage entered into without a full appreciation of its implications and obligations.”²⁴⁹ Additionally, it noted that the regulations helped achieve the military’s obligation to the parents of young soldiers to “duplicate the wholesome influences of the home, family, and community.”²⁵⁰ Thus, the regulations furthered the military’s desire to protect its personnel and maintain discipline and morale in the service.²⁵¹

To implement the foregoing policies and regulations, the military imposed substantial requirements for the submission of requests to marry.²⁵² Applicants needed to take marriage counseling classes and

²⁴⁶ U.S. WAR DEP’T, CIRCULAR NO. 179, § 1 (June 8, 1942) [hereinafter CIRC. 179].

²⁴⁷ See *United States v. Radloff*, 2 B.R. (ETO 567) 143 (1943) (describing an instance in which an enlisted officer’s violation of CIRC. 179 resulted in a court-martial).

²⁴⁸ DEP’T ARMY AND AIR FORCE, SPECIAL REGULATION NO. 600-240-5 (Feb. 11, 1949) [hereinafter SPECIAL REGULATION].

²⁴⁹ *Id.* ¶ 5.

²⁵⁰ *Id.*

²⁵¹ See Ota, *Flying Buttresses*, *supra* note 40, at 719 (discussing the denial of permission for younger officers to marry, attributed to the fear that financial obligations associated with providing for a family could distract and devalue the officer).

²⁵² Obtaining permission to marry from a commanding officer constituted the first of many barriers to marrying Japanese. There were also stringent requirements for registering one’s marriage in Japan that were necessary before getting married. See AG 291.1, Memorandum for Japanese Government from General Headquarters, Supreme Commander for the Allied Powers (May 23, 1946) (mandating that the Japanese government require binational couples who intend to marry to complete a registration form (“Marriage Data”), produce two witnesses (one of whom had to be a U.S. citizen), demonstrate evidence of the service member’s U.S. citizenship and the Japanese person’s foreign nationality, establish the capacity to marry, complete a “Declaration Concerning Marriage to Aliens of Japanese Race,” and provide a copy of written permission from a commanding officer).

interview with a chaplain.²⁵³ They also could be required to submit several documents, including an affidavit of intent to marry, copies of financial statements, written consent of parents (where appropriate), and character references.²⁵⁴ A commanding officer was required to examine all the documents submitted in support of the application for marriage and was expected to approve such application unless it was evident that the noncitizen fiancée would be unable to enter the United States under immigration law.²⁵⁵ The regulations conferred on commanding officers the authority to reject marriage approvals but did not provide soldiers with any mechanism to appeal such rejections.²⁵⁶

Service personnel's failure to comply with these marriage regulations subjected them to a court-martial and punishment that included demotion, hard labor, and deduction of pay.²⁵⁷ *United States v. Radloff*, one of the earlier cases that challenged Circ. 179, exemplified the harsh consequences of disobeying military marriage regulations.²⁵⁸ Horace Radloff, an Army soldier deployed in Iceland, was charged with marrying his wife without the permission of his commanding officer.²⁵⁹ At trial, the evidence showed that Radloff knew about Circ. 179 and thus requested permission from his superior officer to marry his then-fiancée.²⁶⁰ Radloff submitted a written request to marry, which superior officers rejected.²⁶¹ Radloff, however, decided to marry his fiancée anyway.²⁶² The trial judge advocate found Radloff guilty of intentionally violating Circ. 179 and sentenced him to a lower rank, hard labor, and deduction of \$35 from his monthly pay.²⁶³

Radloff appealed, arguing, among other contentions, that Circ. 179 unconstitutionally violated his right to marry.²⁶⁴ However, the Board of

²⁵³ SPECIAL REGULATION, *supra* note 248, at app. I ¶ 2 (1949).

²⁵⁴ *See id.* at app. I ¶ 4 (listing the optional documentation requirements for marriage applications).

²⁵⁵ *Id.* ¶ 4 (stating that all marriages that comply with regulations should be approved unless the fiancée would “certainly or probably be barred from entry to the United States”).

²⁵⁶ *Id.*; *see Ota, Flying Buttresses*, *supra* note 40, at 722 (asserting that commanders “could deny permission [to marry] with impunity”); *cf. Hollywood*, *supra* note 227, at 184–89 (describing the regulation’s procedural requirements for military personnel to receive approval to marry in Korea, and noting the lack of an appeal process in regulations).

²⁵⁷ *See Johns*, *supra* note 238, at 385 n.95 (citing cases involving soldiers who were punished in various ways because they married without obtaining permission from their commanding officers).

²⁵⁸ *United States v. Radloff*, 2 B.R. (ETO 567) 143 (1943).

²⁵⁹ *Id.* at 143.

²⁶⁰ *Id.* at 145.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* at 144.

²⁶⁴ *Id.* at 147; *see also id.* at 160 (Riter, Judge Advocate, concurring) (addressing the defendant’s arguments regarding constitutionality).

Review for the European Theater affirmed the trial judge's ruling.²⁶⁵ The Board emphasized that although the Fourteenth Amendment protected the rights to "life and liberty with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety,"²⁶⁶ those rights were subject to "such restraints as the Government may . . . prescribe for the . . . good of the whole."²⁶⁷ The Board explained that persons who choose to become soldiers in the U.S. Army also choose to surrender some of their rights and privileges as citizens and must abide by the rules of the military.²⁶⁸

Overall, the military's imposition of rigorous requirements on a service member's request to get married functioned as part of the military's means of instilling control and discipline in its military personnel.²⁶⁹ Neither Circ. 179 nor the regulations implementing it explicitly sought to proscribe interracial marriages specifically or discriminate based on race generally.

Military, naturalization, and immigration laws each had their own independent purposes and goals that were not designed to proscribe interracial marriages. However, as Part III establishes, they intersected to comprise a federal regulatory scheme that acted as a federal counterpart to state antimiscegenation laws.

III

THE CONVERGENCE OF FEDERAL LAWS FACILITATED BARRIERS TO INTERRACIAL MARRIAGES ABROAD

To comprehend the federal government's regulation of interracial marriage outside of U.S. borders, particularly in Japan,²⁷⁰ it is necessary to

²⁶⁵ *Id.* at 147.

²⁶⁶ *Id.* (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823)) (internal quotation marks omitted).

²⁶⁷ *Id.* at 147 (quoting *Corfield*, 6 F. Cas. at 552).

²⁶⁸ *Id.* at 147.

²⁶⁹ Cf. Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. (forthcoming 2011) (on file with the *New York University Law Review*) (exploring the role of state-regulated marriage as a means of disciplining sexuality).

²⁷⁰ This Article focuses primarily on federal race-based marriage regulation in Japan. In a parallel context, the military also restricted interracial marriages between Black male soldiers stationed in Europe and White European women. For example, in a letter written to the Secretary of the Navy, James Forrestal, Mr. Walter White, Secretary of the National Association for the Advancement of Colored People, wrote, "This Association has recently received several communications from American Negro servicemen . . . in France, Italy, England and other places reporting that American Army officers have refused permission to these individuals to marry." Letter from Walter White, Sec'y of the NAACP, to James Forrestal, Sec'y of the Navy (Dec. 20, 1945) (on file with the *New York University Law Review*). There have been only a handful of notations of this part of the antimiscegenation story in legal scholarship. See, e.g., Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Rights*, 83 MICH. L. REV. 1, 29 (1984) (noting that black servicemen who had married White European women had to

look at the cumulative impact of three distinct areas of law, which individually had little to do with restricting mixed marriage. When these laws are viewed from the perspective of the lived experience of interracial binational couples in Japan, rather than as independent regulatory codes, it becomes clear that the three sets of laws and regulations converged in ways that restricted interracial couples from enjoying the rights, benefits, and privileges of marriage.²⁷¹

A closer look at the War Brides Act of 1945²⁷² illuminates this point. First, immigration law's bars to admissibility worked in conjunction with military regulations that mandated the rejection of marriage applications of American military personnel seeking to marry inadmissible noncitizens. Second, immigration law categorized Asian spouses, primarily Japanese wives, as inadmissible because they were ineligible for citizenship on the basis of race.

A. *The War Brides Act*

Limited exploration has been devoted to the War Brides Act in legal scholarship.²⁷³ This is surprising given its role in facilitating the immigration of a vast number of women during the 1940s and 1950s. American involvement in World War II led to the deployment of 16 million military personnel to various parts of the world.²⁷⁴ Many military servicemen entered into relationships with noncitizen women overseas whom they wanted to marry and bring back to the United States at the conclusion of the war, but the couples faced a complex bureaucratic process that was ill-equipped to process the flood of applications.

Eventually, legislation was introduced that sought to accelerate the

be transferred when their divisions were stationed in jurisdictions with antimiscegenation laws); Moran, *supra* note 51, at 250–52 (describing the racial hierarchy and discrimination targeted against Black officers and their interracial relationships with foreign women).

²⁷¹ As Melissa Murray has argued in analyzing the relationship between criminal law and family law, examining the ways in which distinct doctrinal systems operate in tandem offers a more complete understanding of law's impact on our lives. See Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253 (2009) (discussing the often-overlooked cooperative relationship between criminal law and family law, especially as regulators of intimate life).

²⁷² War Brides Act, ch. 591, Pub. L. No. 79-271, 59 Stat. 659 (1945).

²⁷³ A search on Westlaw using the terms "War Brides Act" in the law journal database (JLR) revealed approximately 100 documents. Yet none of the journal articles examined the history or purpose of the Act, its impact on the immigration of noncitizens to the United States, or its effect on Japanese women. See, e.g., Abrams, *Regulation of Marriage*, *supra* note 39 (comparing immigration law's regulation of marriage with that of traditional family law); Hollywood, *supra* note 227 (describing the military regulations regarding U.S. forces in Korea and the marriage of noncitizens); Liav Orgad, *Love and War: Family Migration in Time of National Emergency*, 23 GEO. IMMIGRATION L.J. 85 (2008) (arguing that the admission of family members in times of war and national emergency should be regulated by a presumption of dangerousness).

²⁷⁴ SHUKERT & SCIBETTA, *supra* note 97, at 1.

immigration of the large number of “war brides” (and, to a lesser extent, grooms). In particular, on January 4, 1945, Congressman Samuel Dickstein introduced H.R. 714, which was intended to “facilitate the admission to the United States” of the “husbands, wives, and children” of U.S. citizens who have “served honorably in the armed forces.”²⁷⁵ Testimony during hearings on the bills emphasized the need to speed up the entry of thousands of spouses of U.S. military personnel to the United States. For instance, Edward J. Shaughnessy, Special Assistant to the Commissioner of Immigration and Naturalization, explained the daunting process that an American soldier and his or her spouse had to go through to file the spouse’s immigration papers.²⁷⁶ The bill, according to Mr. Shaughnessy, would “eliminate the necessity of filing these petitions” because it would allow the soldier to take the spouse “right to the American consul” who could then grant a visa after interviewing the couple.²⁷⁷ Moreover, to further expedite the admission of foreign spouses, the bill aimed to waive some of the categorical bars to admissibility.²⁷⁸ Finally, Congress estimated that there were “75,000 to 100,000 spouses of American service people throughout the world.”²⁷⁹ Without the passage of the bill, Mr. Shaughnessy testified that, “it will be utterly impossible for the State Department and our Public Health Service working abroad to attempt to process that number.”²⁸⁰

On December 28, 1945, Congress passed the War Brides Act,²⁸¹ which allowed U.S. citizens serving in or honorably discharged from the military to sponsor their spouses to immigrate to the United States in an expedited

²⁷⁵ H.R. 714, 79th Cong. (1945) (enacted). In addition to this bill, Congress also considered two similar bills, H.R. 2650 and H.R. 2299, at the same time. *See Hearing on H.R. 714, 2299, and 2650 Before the H. Comm. on Immigration and Naturalization*, 79th Cong. 8 (1945) (noting that the bills would be considered together). H.R. 2650 and H.R. 2299 were designed to speed the entry of spouses and children of U.S.-citizen military personnel by conferring citizenship on them. H.R. 2650, 79th Cong. (1945); H.R. 2299, 79th Cong. (1945).

²⁷⁶ *Hearing on H.R. 714, 2299, and 2650 Before the H. Comm. on Immigration and Naturalization*, 79th Cong. 11–12 (1945) (statement of Edward J. Shaughnessy, Special Assistant to the Comm’r, Immigration and Naturalization Serv., Dep’t of Justice) (explaining that a U.S.-citizen military personnel needed to fill out a petition, obtain two citizens to vouch for him, and execute the petition in front of a commanding officer before the petition would be submitted “across the ocean” to immigration authorities, who, upon approving the petition, would notify the State Department, which would then inform the U.S. consul to interview the noncitizen spouse before the visa could be approved).

²⁷⁷ *Id.* at 12.

²⁷⁸ *Hearing on H.R. 4857 Before the H. Comm. on Immigration and Naturalization*, 79th Cong. 23 (1945) (statement of Edward J. Shaughnessy, Special Assistant to the Comm’r, Immigration and Naturalization Serv., Dep’t of Justice).

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 2.

²⁸¹ *See supra* notes 4–5 and accompanying text (discussing the passage of the War Brides Act).

manner.²⁸² In the report accompanying the bill, Rep. Mason expressed that one of the reasons for the Act was to protect the right of “service men and women “ to have “their families with them.”²⁸³ The Act streamlined the admission process by guaranteeing entry to the United States for spouses of American soldiers who were not otherwise excludable and deeming such spouses to be nonquota immigrants.²⁸⁴ Moreover, the War Brides Act waived provisions of the immigration law that excluded “physically and mentally defective aliens.”²⁸⁵ Upon arriving in the United States, the noncitizen spouse would be subject to a medical examination.²⁸⁶ If the noncitizen was found to have a disability that, if not for the law, would have rendered him or her inadmissible, immigration officers were to inform the relevant “public medical officer of the local community to which the alien is destined.”²⁸⁷ Congress additionally waived some documentary requirements to address concerns about processing delays raised during the hearings.²⁸⁸ Finally, the War Brides Act provided that the “application for admission [had to be] made within three years of the effective date of th[e] Act,” December 28, 1945.²⁸⁹ Overall, the War Brides Act assured most military service personnel’s spouses that their immigration applications would be processed and approved at a faster rate.

As expected, the War Brides Act facilitated an unprecedented entry of immigrant women to the United States. Between 1830 and 1914, the “sex ratio of immigrants . . . was 177 males for every 100 females.”²⁹⁰ The ratio dropped to “121.8 males for every 100 females” between 1915 and 1945.²⁹¹ Between 1931 and 1940, the number of women immigrating to the United States began to increase and slowly outnumbered men. Statistics demonstrated, for example, that during the period from 1931 to 1940, there was a “total of 229,150 (43.4 percent) males and 299,283 (56.6 percent) females.”²⁹² The passage of the War Brides Act eventually led to even more significant increases in the immigration of women. In 1946, 1947, and 1948, “the percentage of female immigrants rose to 74.9, 63.5 and 60.5,

²⁸² War Brides Act, ch. 591, Pub. L. No. 79-271, 59 Stat. 659, 659 (1945) (establishing the provisions that allow spouses and children of military persons to enter the United States).

²⁸³ H.R. REP. NO. 79-1320, at 2 (1945).

²⁸⁴ War Brides Act. The nonquota status was particularly important for spouses and children coming from countries with limited quotas.

²⁸⁵ *Id.* § 1.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ S. REP. NO. 81-1515, at 160 (1950).

²⁹¹ *Id.*

²⁹² *Id.*

respectively.²⁹³ War brides comprised 33% of the female immigrant population.²⁹⁴

However, closer examination of the application of the War Brides Act reveals its racialized and gendered limitations, particularly for Japanese women who were married to U.S.-citizen soldiers. At the outset, the text of the War Brides Act only waived the exclusionary bars related to physical and mental disabilities.²⁹⁵ It did not remove any other inadmissibility grounds, such as being excludable based on ineligibility for citizenship. Indeed, the law explicitly stated that the noncitizen had to be “otherwise admissible under the immigration laws.”²⁹⁶ In other words, the text of the statute suggests that Congress intended to maintain racial bars to admission to the United States.

Indeed, the 1945 legislative hearings concerning earlier incarnations of the War Brides Act indicate that Congress understood that there would be a discriminatory effect on spouses who were not eligible for citizenship and were married to American soldiers. During a hearing on H.R. 714 held on May 16, 1945, the following exchange occurred:

Rep. Farrington: I would like to ask the witness . . . [i]f an American soldier should marry . . . a Filipino girl who is ineligible to naturalization[sic] . . . under this bill he could not bring his wife into the country?

Rep. Sadowski: That is correct.

. . . .

Chairman: Do you think the soldiers are marrying those races?

Rep. Farrington: Yes; I know they have married them.

Chairman: White Americans?

Rep. Farrington: White Americans.²⁹⁷

At that same hearing, Mr. Robert C. Alexander stated, “[T]here are some very pathetic cases where the soldier has married a woman who is not eligible for citizenship, although they look white from photographs, and we certainly do not blame the boys for being attracted by them, and it is unfortunate that they are not eligible.”²⁹⁸ At a later hearing, Mr. Alexander explained that “the alien who was ineligible to citizenship and who would be excluded under existing law would get no privileges in this bill.”²⁹⁹

²⁹³ *Id.*

²⁹⁴ *Id.* at 161.

²⁹⁵ War Brides Act § 1.

²⁹⁶ *Id.*

²⁹⁷ *Hearing on H.R. 714, 2299, and 2650 Before the H. Comm. on Immigration and Naturalization, 79th Cong. 35-a (1945)* (statement of Rep. George Sadowski).

²⁹⁸ *Id.* (statement of Robert C. Alexander, Assistant Chief, Visa Div., State Dep’t).

²⁹⁹ *Hearing on H.R. 714 Before the H. Comm. on Immigration and Naturalization, 79th Cong.*

The language and the legislative history of the War Brides Act illuminate the convergence of immigration, military, and marriage laws that continued to restrict members of the Armed Forces from marrying Japanese spouses, even as Congress facilitated the immigration of military family members of other races. As discussed next, the military established a policy and practice of imposing race-based barriers to marriage by rejecting soldiers' marriage applications when their chosen partners were ineligible for citizenship. Moreover, even American-Japanese couples who were able to marry faced the additional obstacle of immigration law's exclusionary bars.

B. Immigration Inadmissibility as a Basis for Denying Marriages to Japanese Spouses

In effect, through military regulation and immigration law prohibitions on entry for those ineligible for citizenship, the federal government restricted marriage, particularly for biracial couples. As discussed above, regulations required official approval for any marriages between U.S.-citizen military personnel and noncitizens.³⁰⁰ On September 15, 1945, the Supreme Commander of the Allied Forces, General Douglas MacArthur, issued Circular Number 70 (Circ. 70), which applied to all military personnel stationed outside the United States.³⁰¹ Circ. 70 provided that “[n]o military personnel may marry in any area outside the United States (which means . . . in any foreign country or territory thereof) without the approval of the commander of the United States.”³⁰² The circular, however, explained that the authority to approve marriage applications may be delegated to lower ranking officers.³⁰³

To underscore certain laws that affect marriage applications, section 3 of Circ. 70 explicitly highlighted both immigration inadmissibility provisions and state antimiscegenation laws.³⁰⁴ First, it explained that “immigration laws of the United States provide generally for exclusion of aliens ineligible for citizenship.”³⁰⁵ Using identical language to that of

18 (1945) (statement of Robert C. Alexander, Assistant Chief, Visa Div., State Dep't and Edward J. Shaughnessy, Special Assistant to the Comm'r, Immigration and Naturalization Serv., Dep't of Justice). Mr. Alexander was introduced at the hearing as having “really [done] the drafting job.” *Id.* at 1.

³⁰⁰ See *supra* Part II.C (outlining military restrictions on marriage).

³⁰¹ GENERAL HEADQUARTERS, PACIFIC, U.S. ARMY, CIRCULAR NO. 70, Marriage of Military Personnel (Sept. 15, 1945) [hereinafter CIRC. 70]; see also YUKIKO KOSHIRO, TRANS-PACIFIC RACISMS AND THE U.S. OCCUPATION OF JAPAN 156–58 (1999) (discussing CIRC. 70).

³⁰² CIRC. 70, *supra* note 301, ¶ 1.

³⁰³ *Id.* ¶ 2(b).

³⁰⁴ See *id.* ¶ 3 (entitled “General Rules, Immigration Laws and Regulations Applicable to Marriage of Military Personnel”).

³⁰⁵ *Id.*

immigration laws, Circ. 70 explained that existing naturalization laws extended the ability to apply for citizenship only to “white persons, persons of African nativity or descent, descendants of race indigenous to the Western Hemisphere and Chinese persons or persons of Chinese descent.”³⁰⁶ Circ. 70 further instructed that to be eligible for citizenship, a noncitizen “must have a preponderance of white, African or Chinese blood” and that a noncitizen who had “as much as one-half of other than white, African or Chinese blood” is not eligible for citizenship.³⁰⁷ Thus, Circ. 70 made it evident that immigration law’s exclusionary provision against persons who were ineligible for citizenship was a relevant factor in the approval or rejection of marriage requests.

Second, in summarizing the laws and regulations applicable to marriage applications of military personnel, Circ. 70 mentioned “laws of a number of states that do not recognize as valid any marriage contracted between persons of certain different races.”³⁰⁸ Although this did not directly prohibit interracial marriages, the inclusion of this section in Circ. 70 signaled the relevance of state antimiscegenation laws in the military marriage application process. This provision paralleled policies adopted in the European Theater that led to rejections of applications filed by African-American soldiers to marry their white European girlfriends.³⁰⁹

On January 15, 1947, almost one and a half years after publishing Circ. 70, the Armed Forces rescinded it and issued Circular 6 (Circ. 6).³¹⁰ Circ. 6 offered further guidance on restrictions on marriages of military personnel and civilians employed by the military.³¹¹ Most notably, Circ. 6 explicitly articulated that military policy generally proscribed marriage to persons barred by immigration law: “Except under very unusual circumstances, United States military personnel and civilians employed by the War Department, will not be granted permission to marry nationals who are ineligible to citizenship in the United States.”³¹²

³⁰⁶ *Id.* (quoting without attribution 8 U.S.C. § 703 (Supp. IV 1945)).

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ See Memorandum from R.T. Charlesworth, Lt. Colonel, A.C., Dir. of P&T, to CG, Base Air Depot Area, ASC, US Strategic Air Forces in Europe (Dec. 26, 1944) (on file with the *New York University Law Review*) (rejecting a marriage application filed by “EM (colored) desir[ing] to marry white girl” and requesting a remark on the continued policy with regard to the “marriage of colored personnel of this command”). Col. James D. Givens, the Deputy Commander, responded that the marriage application was not “favorably considered” and “the policy of this headquarters regarding mixed marriages has not changed[;] such marriages are considered to be against the best interest of the parties concerned and of the service.” Memorandum from James D. Givens, Colonel, A.C., Deputy Commander, to CG, Base Air Depot Area, ASC, US Strategic Air Forces in Europe (Jan. 9, 1945) (on file with the *New York University Law Review*).

³¹⁰ CIRC. 6, *supra* note 1.

³¹¹ *Id.* ¶ 2.

³¹² *Id.* ¶ 2(c).

As evidenced in this circular, immigration and citizenship laws converged with military policy to restrict marriage along racial lines. In particular, because the terms “ineligible to citizenship” generally applied to Japanese and Circ. 6 was enacted and applied by the General Headquarters of the Far East Command, there was no doubt that Circ. 6 served to deny marriage applications to Japanese spouses of U.S. military personnel.

After these circulars, the military issued regulations with further guidelines for officers approving or rejecting marriage applications. S.R. 600-240-5 required that soldiers who wished to marry should be provided with a “full appreciation” of the “rights and restrictions imposed by [f]ederal immigration laws”.³¹³ It also conferred upon military officers the authority to deny applications to marry racially inadmissible women. It explained that the military had a policy of approving applications for marriage between military personnel and noncitizens when “due examination and consideration do not indicate that the alien fiancée would certainly or probably be barred from entry to the United States” under immigration laws.³¹⁴ In other words, S.R. 600-240-5 required the rejection of marriage applications between binational couples if immigration law prohibited the entry of the noncitizen to the United States. In effect, then, the regulations conflated immigration law and military regulations,³¹⁵ requiring commanding officers to function as both supervisors to the service personnel and as immigration officers. Military officers had to know, among other things, who would be considered inadmissible to the United States prior to making a decision on whether or not to approve a marriage application.³¹⁶ A person’s inadmissibility at the border became synonymous with his or her inability to marry an American soldier.³¹⁷

Military authorities justified the regulations on several grounds,

³¹³ SPECIAL REGULATION, *supra* note 248, ¶ 5.a; *see also supra* notes 248–50 and accompanying text (discussing the Special Regulation).

³¹⁴ SPECIAL REGULATION, *supra* note 248, ¶ 4.a.

³¹⁵ For example, S.R. 600-240-5 explained that “the screening of applications for permission to marry by the commander is *substantially similar to the processing of requests for entry of alien wives.*” *Id.* ¶ 4.d (emphasis added).

³¹⁶ In addition to persons ineligible for citizenship, like the Japanese, persons inadmissible at the border included persons with mental retardation, persons who were mentally insane or had at least one attack of insanity, persons with psychotic or mental disorder, chronic alcoholics, persons with physical defects, paupers, prostitutes, and persons with contagious diseases. *See* E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965, 441–42 (1981) (listing the various inadmissibility categories in the 1940s); *cf.* Hollywood, *supra* note 227, at 184 (discussing the contemporary requirements that military superiors counsel soldiers regarding immigration law implications prior to approving marriages, and noting that military superiors are generally unqualified to provide such counsel).

³¹⁷ S.R. 600-240-5 expressly provided that the “lack of command approval [to marry] is indicative of probable unfavorable action by the United States consul and the Commissioner of Immigration and Naturalization.” SPECIAL REGULATION, *supra* note 248, ¶ 4.d (1949).

demonstrating their view that morale and discipline were intimately tied to marriage regulation. Chief among these, according to the regulations, was the military's desire to avoid divorces. S.R. 600-240-5 explained that discouragement of such marriages was necessary to avoid "the prospect of wholesale divorce and broken homes" that might be caused by the spouse's inability to immigrate to the United States.³¹⁸ Thus, military officers considered it in the best interest of the soldier to prevent him from marrying an inadmissible wife.

Moreover, military officials recognized that a noncitizen's inadmissibility at the border was an important factor weighing against the approval of marriage applications, believing that the military had to protect the sanctity of marriage itself. According to at least one military officer, "to grant permission to marry when the wife cannot enter the United States would be to flaunt the sanctity of the marriage ceremony."³¹⁹ Thus, under S.R. 600-240-5, the fiancée's anticipated inadmissibility constituted an "unnatural obstacle[] to a lasting marriage" and required the commanding officer to either reject or defer consideration of the application for marriage until another time.³²⁰

As a result of the foregoing circulars and regulations, American soldiers and Japanese nationals had difficulty obtaining permission from military officers to get married. The inadmissibility bars against persons in the Asiatic Barred Zone and persons ineligible for citizenship led commanding supervisors to discriminate against applications filed by military personnel desiring to marry Japanese women. A 1946 internal military memo, issued before Circ. 6 was implemented, recommended the adoption of a policy that would lead to the "automatic[] return [of] all requests by American Occupational personnel to marry Japanese."³²¹ According to the memo, such applications would not be "favorably considered" because the exclusion of "Japanese nationals from entry to the United States" indicated that the marriage would not have a "reasonable chance of success."³²² By contrast, the memo suggested approving "all requests for marriage . . . where both parties have American citizenship and

³¹⁸ *Id.* at 3. The military seemed concerned also for the service personnel who might not be "aware of the probable inadmissibility" of their wives. *Id.*; see also Ota, *Flying Buttresses*, *supra* note 40, at 719–22 (describing the military's concern over the viability of marriages to inadmissible women).

³¹⁹ SHUKERT & SCIBETTA, *supra* note 97, at 214–15 (citing Letter to John C. Stennis, Senator, from C.G. Blakeney, Colonel, GSC (Oct. 11, 1949)).

³²⁰ See SPECIAL REGULATION, *supra* note 248, ¶ 4.b (suggesting that the fiancée's inadmissibility to the United States under immigration law could lead to an unstable marriage).

³²¹ HEADQUARTERS EIGHTH ARMY, INFORMAL CHECK SLIP, MARRIAGE OF MILITARY PERSONNEL IN JAPAN (1946).

³²² *Id.*

are of the same race,” as long as they were in compliance with Circ. 70.³²³

The lived experiences of binational couples during this period illustrate the significant difficulty they faced in getting married. In a recently published book on Japanese war brides, historian Miki Ward Crawford wrote:

The process for marriage between American servicemen and Japanese women was intentionally made difficult in order to discourage these interracial relationships. There were numerous forms to complete; Japanese documents had to be translated into English at the couple’s expense; there was a thorough medical examination for the woman; and there was an investigation of the woman’s family, which involved checking for Communism, venereal diseases, tuberculosis, or anything that would label her as undesirable Numerous signatures were required for the paperwork as it progressed through the proper channels. At any point, the paperwork could be delayed or denied.³²⁴

The confluence of military regulations and immigration laws’ inadmissibility provisions rendered a Japanese person’s inability to enter the United States virtually conclusive on a marriage application. Citing racial inadmissibility provisions of federal immigration laws, supervising officers typically rejected marriage applications between military personnel and Japanese.³²⁵

The equation of ineligibility for citizenship with the Japanese race reflected general conceptions about racial categories at the time. This stemmed in part from Supreme Court opinions about Whiteness and the Johnson-Reed Act’s national origins classifications.³²⁶ Although the Supreme Court’s opinions in *Ozawa* and *Thind* sought to classify Japanese and Indians with Chinese and other Asian groups under the “Asian” category, the federal government continued to consider Japanese a distinct race. The 1940 census illustrated the public conception of Japanese as a racial category, asking participants to self-identify as one of the following “color or race”: “W” (White), “Neg” (Negro), “In” (Indian), “Chi”

³²³ *Id.*

³²⁴ CRAWFORD ET AL., *supra* note 41, at xvii–xviii; *see also id.* at 57 (explaining that “getting permission to marry a Japanese woman took months and often more than a year” and that this “was a tactic used to discourage . . . interracial marriages”); *id.* at 69 (“The paperwork for marriage usually took months, and sometimes a year, to be approved.”).

³²⁵ William R. Burkhardt, *Institutional Barriers, Marginality, and Adaptation Among the American-Japanese Mixed Bloods in Japan*, 42 J. ASIAN STUD. 519, 526 (1983) (stating that the veterans who served in Japan faced significant obstacles to getting their marriages approved). Burkhardt noted the “enormous unofficial dissuasive power at the level of the GI’s own military unit,” “[c]haplains usually counsel[ing] against intermarriage,” and the ability of unit commanders to “unofficially but effectively block [] marriage” by changing the soldier’s assignment, transferring the soldier, and denying promotion and leave opportunities. *Id.*

³²⁶ *See supra* Part II (discussing the Supreme Court’s decisions in *Ozawa* and *Thind*, as well as Congress’s enactment of the Johnson-Reed Act).

(Chinese), “Jp” (Japanese), “Fil” (Filipino), “Hin” (Hindu), or “Kor” (Korean).³²⁷

Thus, although military regulations that placed restrictions on marriages to persons ineligible for citizenship did not articulate race-based justifications against such marriages, military officers explicitly relied on the regulations to curb the increasing number of marriages of servicemen to Japanese women. The use of immigration law in this context went beyond the scope of immigration law’s traditional goals of exclusion of inadmissible noncitizens at the border. Although immigration law had played—and continues to play—a role in various aspects of marriage,³²⁸ its regulatory function has not typically included denying a person’s right to marry in the first instance. The military regulations essentially extended immigration law’s exclusionary purpose at the border into the regulation of citizens’ lives. Moreover, the military regulations broadened the scope of immigration law’s enforcement by essentially giving military officers the discretion to determine a noncitizen’s eligibility for admission. Under immigration law, such discretionary decisions belonged to U.S. Embassy and immigration officials.³²⁹ Both marriage and admission requests intertwined and fell within the discretion of the commanding officer.

Soldiers did not have any right to appeal their commanding officers’ decisions rejecting their marriage proposals.³³⁰ As explained in the *Radloff* case,³³¹ failure to comply with a commanding officer’s decision constituted insubordination and subjected the soldier to punishment.³³²

The military’s reliance on immigration law severely restricted binational marriages and, particularly, interracial marriages. The military not only disapproved of Japanese-American marriages but also sought to prevent them by reassigning the soldier to another base. As one former Japanese war bride explained, when marriage applications were submitted, the military “tried to transfer the American soldier to another country, especially one who was Caucasian” and “[s]ome were transferred to the

³²⁷ See 1940 Federal Census Form, U.S. Census Bureau (on file with the *New York University Law Review*) (identifying racial categories and instructing “[o]ther races, spell out in full”). The 1920 census similarly had the following racial categories: White, Black, Mulatto, Indian, Chinese, Japanese, and Hindu. See NGAI, *supra* note 17, at 26 (listing categories).

³²⁸ See generally Abrams, *Regulation of Marriage*, *supra* note 39 (providing the taxonomy of congressional regulation of marriage through immigration law, and analyzing the legitimacy of such federal involvement).

³²⁹ See *Ekiu v. United States*, 142 U.S. 651, 660 (1892) (explaining that Congress conferred on immigration officers the discretion to make determinations about noncitizens’ admissibility to the United States).

³³⁰ See *supra* note 256 and accompanying text (referencing the discretion of officers to deny approval to marry).

³³¹ *United States v. Radloff*, 2 B.R. (ETO 567) 143 (1943).

³³² See *supra* notes 258–68 and accompanying text (discussing the *Radloff* case in further detail).

battlefield in Korea, and others were sent back to the United States.”³³³ Even service personnel who obtained permission to marry suffered detrimental consequences: Army policy prohibited the reenlistment of service personnel who married Japanese nationals.³³⁴

Anecdotal letters from soldiers deployed in Japan and civil rights leaders in the United States indicate that the military prevented Americans from marrying Japanese women in ways that affected mixed-race marriages. For example, one letter written by a soldier explained,

I am a [sic] Army Corporal serving with the Occupation Forces in Japan. . . . During this time, I have become one of the hundreds of GIs, who have become fathers to children born of Japanese mothers. As you know, the laws of the Army and of the country make it almost entirely impossible for GIs to marry women of Japanese blood. . . . Everyday, I come in contact with soldiers of my unit and of others that, [sic] are suffering from broken hearts and are left helpless when they inquire for advice or consideration from authorities.³³⁵

Another letter expressed frustration with the inability of American soldiers to marry Japanese nationals. It explained, “In my outfit alone which consists of less than a hundred men, there are eight soldiers that have children born of Japanese mothers, and each and everyone of them are praying for our country to lift the barrier that is keeping them from being united with their children.”³³⁶

In addition to citing immigration law’s bar against persons ineligible for citizenship, military officers relied on state antimiscegenation laws as grounds for denying marriage applications filed by interracial couples.³³⁷ Although state antimiscegenation laws typically prohibited marriages between Whites and Blacks, there were also states that proscribed marriage between Whites and Asians.³³⁸ Thus, marriage between a White American

³³³ CRAWFORD ET AL., *supra* note 41, at 89.

³³⁴ *Most of Summer Marriages Between GIs, Japan Girls Not Faring Well, Says Writer*, PAC. CITIZEN, Nov. 1, 1947, at 2 [hereinafter *Summer Marriages*].

³³⁵ Letter from George D. Brown, Corporal, U.S. Army, to NAACP Legal Committee (Nov. 20, 1949) (on file with the *New York University Law Review*).

³³⁶ Letter from Jack Greenberg, Assistant Special Counsel, NAACP, to James C. Evans, Office of the Secretary of Defense (Dec. 1, 1949) (on file with the *New York University Law Review*) (quoting correspondence received from a serviceman).

³³⁷ See CRAWFORD ET AL., *supra* note 41, at 89 (“Because of the federal and state [antimiscegenation] laws, marriages of American servicemen to Japanese women were regarded as trouble.”); PASCOE, *supra* note 19, at 198–99 (discussing instances of marriage applications being rejected because of state antimiscegenation laws); Hollywood, *supra* note 227, at 166 (“[G]iven the number of states with anti-miscegenation laws, it was relatively facile for a commander to conclude that an interracial marriage would not succeed.”); Ota, *Flying Butteresses*, *supra* note 40, at 722 (stating that a commanding officer “could determine that based on anti-miscegenation laws, the marriage would not legally survive” and thus deny a soldier’s marriage application).

³³⁸ See PASCOE, *supra* note 19, at 81, 92 (providing a map of the United States that showed

service personnel and a Japanese woman would not be recognized in those states,³³⁹ supporting the military officer's decision to reject their marriage applications. Additionally, the military recognized that such marriages would limit its own ability to assign military personnel to various bases.³⁴⁰

By contrast, the military treated relationships between Japanese-American soldiers and Japanese women differently. Despite the policy against the approval of marriages between U.S. citizens and Japanese, military officers recognized that "unusual circumstances" warranted exceptions to the policy.³⁴¹ These "unusual circumstances" typically involved approving marriage applications involving Japanese Americans and Japanese women.³⁴² The approval of these applications indicates the military's differential treatment of interracial couples as opposed to couples in which both partners were racially Japanese.³⁴³

Soldiers in Japan understood that the military was engaging in discrimination based on race on other fronts as well. Military personnel in Japan complained about the disparate treatment that they and their Japanese girlfriends faced in comparison to military personnel who were deployed in Europe. According to one soldier:

[T]he US Army is granting permission to GIs in the same situation, but [who] are serving in the [European Theater] I am sure you will agree to the fact that this is entirely an unfair act, as far as discriminating against the GIs with children of Japanese blood. . . . If it is alright for Legislative Laws permit [sic] the GIs with German or other European wives and children to marry and enter in our country, why should a line be drawn against people of the East?³⁴⁴

In an exception to this discrepancy, Black soldiers stationed in Europe

states that banned marriages between Whites and Asians by 1869 and 1979, respectively).

³³⁹ See *id.* at 194 (noting that as late as 1942, the Montana Supreme Court held that state law proscribed any marriage between White persons and Japanese, including such marriages by residents both within and out of the state). Indeed, as Pascoe noted, some states that did not have antimiscegenation laws nevertheless enacted laws that prohibited interracial couples from getting married in their states if their unions would be considered illegal in their home states. See *id.* at 194 (commenting that Vermont and Massachusetts were among those states that banned out-of-state couples from getting married in their states if the couple's resident states had antimiscegenation laws).

³⁴⁰ CRAWFORD ET AL., *supra* note 41, at 35 ("To remain lawful and protect military families, the military had a policy not to station those with interracial marriages in the South.").

³⁴¹ SHUKERT & SCIBETTA, *supra* note 97, at 215 (citing Letter to John C. Stennis, Senator, from C.G. Blakeney, Colonel, GSC (Oct. 11, 1949)).

³⁴² *Id.* (reporting a military officer's approval of the application of "a Nisei, an American citizen of Japanese extraction whose residence was in Hawaii . . . to marry a Japanese girl").

³⁴³ See *id.* (noting that, due to unusual circumstances of a Nisei seeking to marry a Japanese girl, "it was deemed to be in the best interest of the soldier and the country as a whole to approve the marriage").

³⁴⁴ Letter from George D. Brown, Corporal, U.S. Army, to Legal Committee, NAACP (Nov. 20, 1949).

faced problems obtaining marriage approvals when their girlfriends were White. The NAACP reportedly received “several communications . . . from fiancées of [Black] servicemen in France, Italy, England and other places reporting that American officers have refused permission to these individuals to marry.”³⁴⁵ These differentiated racial regulations both within the distinct military theaters and across the continents reflected the broader federal antimiscegenation regulation that operated in the 1940s and early 1950s.³⁴⁶

C. *Immigration Law’s Bar Against Racially Inadmissible Wives*

Those couples who were able to get married faced another obstacle to their union: the inability of racially inadmissible wives to immigrate to the United States. On the whole, the War Brides Act facilitated the unprecedented immigration of thousands of noncitizens. Indeed, within six months of its passing, the War Brides Act led to the entry of 45,557 wives, husbands, and children.³⁴⁷ The majority of spouses who entered under the War Brides Act during that time were European women from Germany and Great Britain.³⁴⁸ Overall, between 1946 and 1950, more than 114,000 brides entered the United States under the War Brides Act.³⁴⁹ The majority of them (84,517) were from Europe, although there were also quite a number from Canada (7254), Australia, and New Zealand (7678).³⁵⁰

By contrast, only 7049 Asians entered the United States as war brides.³⁵¹ Unsurprisingly, given the racial inadmissibility bars, between 1947 and 1950 only 766 Japanese war brides were admitted to the United States.³⁵² Using statistics from the U.S. Department of Justice Annual

³⁴⁵ Letter from Walter White, Secretary, NAACP, to James Forrestal, Secretary, U.S. Navy (Dec. 20, 1945) (on file with the *New York University Law Review*); see also PASCOE, *supra* note 19, at 198–99 (discussing examples of the discriminatory treatment of Black men and White European women).

³⁴⁶ Cf. ZEIGER, *supra* note 41, at 72 (2010) (“The largest number of war bride marriages were produced in the Allied nations between white women and white men The fewest marriages emerged or were permitted with women of color, from colonial or vanquished nations . . .”).

³⁴⁷ See INS, DOJ, ALIEN SPOUSES AND ALIEN CHILDREN OF CITIZEN MEMBERS OF THE UNITED STATES ARMED FORCES ADMITTED UNDER THE ACT OF DEC. 28, 1945, BY COUNTRY OF BIRTH, YEAR ENDED JUNE 30, 1946, tbl. 9 (1946) (on file with the *New York University Law Review*) [hereinafter DOJ, ALIEN SPOUSES 1946 REPORT].

³⁴⁸ *Id.*

³⁴⁹ INS, DOJ, tbl. 9A (1950), available at <http://ia700308.us.archive.org/7/items/annualreportofim1950unit/annualreportofim1950unit.pdf> [hereinafter DOJ, ALIEN SPOUSES 1950 REPORT] (documenting the number of noncitizen spouses of citizen members of the United States armed forces by country and region of birth). Out of the 119,693 noncitizens who entered the United States between 1945 and 1950, 114,691 were “war brides,” and 333 were male spouses. *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.* at 27.

Report of the Immigration and Naturalization Service from 1946 to 1950, the following chart illustrates the significant impact of immigration law's bar against Japanese women as compared to their German and English counterparts.

TABLE 1
IMMIGRANT BRIDES ADMITTED INTO THE UNITED STATES³⁵³

Year (ending June 30)	Japanese War Brides Admitted	German War Brides Admitted	English War Brides Admitted
1946	Not specified	232	23,041
1947	12	451	5,808
1948	296	3,316	1,467
1949	443	9,316	645
1950	6	860	43
TOTAL	757	14,175	31,004

It was not until 1952, when Congress lifted the “ineligible for citizenship” bar to admission, that Japanese war brides began entering in significant numbers. In particular, that year alone saw more than 4000 Japanese war brides entering the United States.³⁵⁴

³⁵³ The federal government calculated the number of wives who entered the United States based on their marriage to “citizen members of the Armed Forces admitted under the Act of December 28, 1945 [the War Brides Act]” at the end of June of a particular year. Thus, these numbers reflect the number of admissions in June 1946, June 1947, June 1948, June 1949 and June 1950. See DOJ, ALIEN SPOUSES 1950 REPORT, *supra* note 349, at 27; see also CRAWFORD ET AL., *supra* note 41, at 15 (listing similar numbers, derived from the Office of Immigration Statistics, of Japanese Nationals classified as “Wives of Citizens” who immigrated to the United States during the same years).

³⁵⁴ See CRAWFORD ET AL., *supra* note 41, at 15 (listing the “Wives of Citizens” for 1947–1965, further reflecting immigration law’s role in discriminating against Japanese women). It was not only Japanese women who experienced difficulty in entering the United States. Although Chinese nationals became eligible for citizenship in 1943, Act of Dec. 17, 1943, ch. 344, Pub. L. No. 78-199, 57 Stat. 600, 601 (repealing the Chinese Exclusion Act), they were subject to an annual national quota of 105 persons. See H.R. REP. NO. 79-1325, at 105 (1945) (stating that Congress repealed the Chinese Exclusion laws and gave “the Chinese race a small annual quota of 105”). Accordingly, they continued to have difficulty immigrating to the United States.

In 1946, after much lobbying from Chinese Americans and other supporting organizations, Congress eventually passed a law that “place[d] Chinese wives of American citizens on a nonquota basis,” which meant that there would be no restrictions on the number of Chinese spouses. Act of Aug. 9, 1946, ch. 945, Pub. L. No. 79-713, 60 Stat. 975. Not coincidentally, of the 6527 Asians who entered the United States as war brides between 1945 and 1950, 4875 were Chinese. DOJ, ALIEN SPOUSES 1950 REPORT, *supra* note 349. According to Zhao, however, many of these women were not “war brides” whose marriages were formed during World War II. Most of them had been married to Chinese and Chinese-American husbands for several years prior to their husbands’ service in the war. Indeed, some had been married for ten to twenty years. See ZHAO, *supra* note 243, at 83 (explaining the “unique situation of the Chinese war brides”). Thus, for Chinese women, the War Brides Act merely opened the door to the U.S. border that was previously closed by the Chinese Exclusion Act. See *id.* (“[T]he War Brides Act incidentally opened the door for already married Chinese women.”).

As a result of immigration laws, reports indicated that an estimated 100,000 Japanese women married to American servicemen were left behind.³⁵⁵ Their separation also had other unfortunate consequences. Many unmarried couples had children and, as a result of their inability to marry, many children in Japan grew up fatherless.³⁵⁶ These particular harms will be explored further in Part V to show the inherent dangers attendant to federal involvement in regulating the family.

Parts II and III demonstrated the ways in which immigration, citizenship, and military regulations combined to regulate miscegenated relationships. To be sure, this federal regulation of interracial marriages functioned differently from state antimiscegenation laws in that it did not explicitly bar interracial marriages. Yet, it effectively restricted the formation of mixed unions and families. Recognizing this marginalized federal role enables us to reconfigure the legal historical landscape of our racial past. The new dimension of history that I have narrated thus far—through the Bouissés' story and the varied federal laws that created barriers to marriage to thousands of interracial couples—highlights a federal government that was deeply involved in the racial construction of American families. Acknowledging this federal antimiscegenation framework underscores the problematic consequences of direct federal restriction of marriage.

IV

BOUISS AS THE OTHER LOVING

Despite the formidable federal legal barriers to marriage formation and enjoyment of married life discussed in the previous sections, many interracial White-Japanese couples chose to defy the legal restrictions and found ways of getting married.³⁵⁷ It is against this backdrop that this Article returns to the *Bouiss* case. While I do not suggest that *Bouiss* instantiated

³⁵⁵ See CRAWFORD ET AL., *supra* note 41, at 89; *id.* at 135 (“Intentionally or unintentionally, many women were left behind in Japan.”); *id.* at 249 (stating that about 100,000 women were deserted by American soldiers in Japan); see also SHUKERT & SCIBETTA, *supra* note 97, at 208 (“Possibly as many as 100,000 ‘Madama Butterflies’ were left behind . . .”).

³⁵⁶ See KOSHIRO, *supra* note 301, at 160–200 (discussing the ways in which military barriers to marriage led to children being born out of wedlock and the implications for children of these couples); Burkhardt, *supra* note 325, at 526 (1983) (explaining that the American policy of preventing marriages to Japanese “had the latent effect of increasing the number of illegitimate Amerasian children”).

³⁵⁷ See SHUKERT & SCIBETTA, *supra* note 97, at 205–08 (describing soldiers who chose to get married in “traditional Japanese ceremonies” even though “military permission was out of the question”). Such decisions to marry despite legal restrictions were not unlike what Richard and Mildred Loving did when they chose to go to Washington, D.C., to get married. See *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

fundamental changes to family law in the ways that *Loving* did,³⁵⁸ I argue in this Section that *Bouiss*, like *Loving*, led to the dismantling of discriminatory obstacles to marriage. Further, *Bouiss* highlighted the hardship caused by discriminatory laws, spurring congressional action that enabled hundreds of binational and interracial couples in Japan to marry and move to the United States together.

A. *Bouiss and the Amendments to the War Brides Act*

The deployment of immigration, citizenship, and military laws and regulations to restrict marriage did not go unnoticed. Eventually, lobbying from individual soldiers, their families, and groups—including the Japanese American Citizens League (JACL)—led Congress to temporarily permit Japanese to enter the United States despite their ineligibility for citizenship.³⁵⁹ Specifically, in 1947, Congress amended the War Brides Act to provide that the “alien spouse of an American citizen . . . shall not be considered as inadmissible because of race, if otherwise admissible.”³⁶⁰ Indeed, the legislative history of the 1947 Amendment specifically identified that the purpose of the law was to allow the entry of “racially inadmissible spouses of United States citizen members of the armed forces” under the “so-called Brides Act.”³⁶¹

Although the law only applied to couples that were already married or able to marry no later than thirty days after the passage of the Amendment,³⁶² the ability of Japanese spouses to enter the United States marked an important step toward breaking ongoing racial barriers against Japanese in immigration law.

Notably, *Bouiss* played an important role in the enactment of the 1947

³⁵⁸ To be sure, it remains unresolved whether *Loving* propagated the type of significant change to marriage and family formations that was envisioned on both sides of the antimiscegenation debate in the mid-1960s. See *LOVING V. VIRGINIA IN A “POST-RACIAL” WORLD*, *supra* note 51, at 2–3 (discussing that although the census shows an increase in interracial marriages and relationships, the numbers are still not very significant when compared to the overall general population).

³⁵⁹ See BILL HOSOKAWA, *JACL IN QUEST OF JUSTICE* 277–78, 288 (1982) (noting JACL’s efforts in amending the immigration laws to enable the admission of noncitizen spouses of military personnel); *Masaoka Says GI Brides Law Discriminatory*, *PAC. CITIZEN*, May 17, 1946, at 1 (reporting on JACL legislative director Mike Masaoka’s congressional testimony seeking to amend the War Brides Act); Regina F. Lark, *They Challenged Two Nations: Marriages Between Japanese Women and American GIs, 1945 to the Present 198–201* (Aug. 1999) (unpublished Ph.D. dissertation, University of Southern California) (on file with the *New York University Law Review*) (discussing the lobbying efforts of JACL in seeking to amend the War Brides Act to enable the Japanese wives of Japanese-American soldiers to enter the United States).

³⁶⁰ Act of July 22, 1947, ch. 289, Pub. L. No. 80-213, 61 Stat. 401, 401 (amending the War Brides Act).

³⁶¹ S. REP. NO. 80-501, at 1 (1947).

³⁶² See Ch. 289, 61 Stat. 401; S. REP. NO. 80-501, at 2 (1947).

Amendment. In particular, the reports in both the House and the Senate explained that as a result of immigration law, “a GI bride of the half-Japanese race” deemed admissible by a court on the “west coast” was excluded after the “Ninth Circuit sustained the appeal of the Department of Justice.”³⁶³ Since there was no other case about a war bride being excluded at the border, the reports were presumably referring to the *Bouiss* case. Congress passed the Amendment two months after the Ninth Circuit decided *Bouiss*.³⁶⁴

The 1947 Amendment led to positive results for hundreds of couples. Reports indicated that by November 1947, the military had authorized 823 marriage applications filed by military service personnel who desired to marry Japanese women.³⁶⁵ Interestingly, most of the marriage applications that the military approved consisted of same-race couples; 597 were marriages involving Nisei (or Japanese-American) soldiers, 211 involved White soldiers, and 15 involved Black soldiers.³⁶⁶ These numbers arguably reflect a pattern of favoring those applications filed by Japanese-American–Japanese couples.

Yet even after Congress amended the War Brides Act to facilitate some Japanese women’s entrance to the United States, the military continued to impose a policy against marriages to Japanese.³⁶⁷ Lieutenant Colonel H.K. Whalen, Chief of the Morale and Welfare Branch, sent a memo to commanders explaining “not to relax the usual standards for determining desirability of a marriage prior to granting approval.”³⁶⁸ Undergirding this policy was the recognition that the waiver provided in the amended law was limited in nature and did not address servicemen and others who were contemplating marrying a Japanese woman but who had not yet wed.³⁶⁹ Additionally, at least one news article reported that military officers considered a “Japanese-American wedding a disgrace to their record.”³⁷⁰ Accordingly, after the law expired, the military reissued its

³⁶³ See S. REP. NO. 80-501, at 2 (1947) (using the facts of the case to explain why the Amendment to the War Brides Act was needed); H.R. REP. NO. 80-478 (1947) (same).

³⁶⁴ *Bouiss* was decided on May 7, 1947. *Bonham v. Bouiss*, 161 F.2d 678 (9th Cir. 1947). The congressional reports accompanying the 1947 Amendments, H.R. REP. NO. 80-478 (1947) and S. REP. NO. 80-501 (1947), were issued on May 28, 1947, and July 10, 1947, respectively. Congress passed the 1947 Amendment to the War Brides Act on July 22, 1947. Ch. 289, § 6, 61 Stat. 401.

³⁶⁵ See *Summer Marriages*, *supra* note 334, at 2.

³⁶⁶ *Id.*

³⁶⁷ See *Army Policy Will Restrict Japan Weddings: Discourage Marriages to Women Ineligible for U.S. Citizenship*, PAC. CITIZEN, Nov. 1, 1947.

³⁶⁸ SHUKERT & SCIBETTA, *supra* note 97, at 211 (summarizing Lt. Col. H.K. Whalen’s memo).

³⁶⁹ See *id.* (citing Lt. Col. H.K. Whalen’s memo to General Paul, written on August 26, 1947, stating that “difficulties will arise . . . from personnel who wish to marry Japanese at a later date”).

³⁷⁰ See *Summer Marriages*, *supra* note 334, at 1.

policy of not permitting marriages between American service personnel and Japanese women.³⁷¹

Three years later, in 1950, Congress passed another amendment that once again temporarily lifted the bar against persons ineligible for citizenship.³⁷² As previously noted, admission to the United States under the 1947 Amendment was available under narrow circumstances—to those couples that had married by August 22, 1947, thirty days after the Amendment's passage.³⁷³ As a result, those couples who had married after that date faced separation upon the military personnel's return to the United States because of their spouses' racial inadmissibility. Indeed, legislative history of the Amendment explained that “[a] number of these servicemen have already returned to the United States but were obliged to leave their wives and children in Japan.”³⁷⁴ Thus, Congress passed another amendment, which enabled American service personnel to obtain permission to marry their Japanese fiancées and petition for the entry of their spouses to the United States.³⁷⁵

Once again, Congress imposed a deadline. The 1950 Amendment, which was enacted on August 19, 1950, provided that it would apply only to couples who married within six months of the law's enactment.³⁷⁶ In the report, Congress explained that “[t]he purpose of the bill is to waive the excluding provisions of the [immigration law] relating to inadmissibility because of race in the case of alien spouses and minor children of United States citizens serving in, or having been honorably discharged from the Armed Forces of the United States.”³⁷⁷

As a result of the 1950 Amendment, 8381 couples successfully registered with the U.S. Consulate.³⁷⁸ Only persons who obtained permission from commanding officers were allowed to register with the Consulate.³⁷⁹ This time, seventy-three percent of the couples were mixed

³⁷¹ See SHUKERT & SCIBETTA, *supra* note 97, at 214–15 (noting that couples who were unable to meet the deadline imposed by the 1947 Amendment could only “hope for a change of policy” and that soldiers continued to lobby congressmen for private legislation on behalf of their Japanese wives).

³⁷² Act of Aug. 19, 1950, ch. 759, Pub. L. No. 81-717, 64 Stat. 464 (permitting the admission of alien spouses and alien minor children).

³⁷³ H.R. REP. NO. 81-2768 (1950) (stating that marriage between the U.S. citizen soldier and racially ineligible spouse had to occur prior to August 22, 1947, to be eligible under the previous Amendment).

³⁷⁴ See *id.*

³⁷⁵ Ch. 759, 64 Stat. 464 (facilitating the entry of alien spouses and unmarried minor children of U.S. citizen military personnel).

³⁷⁶ *Id.* (“[T]he marriage shall have occurred before six months after enactment of this Act.”).

³⁷⁷ H.R. REP. NO. 81-2768, at 1 (1950).

³⁷⁸ See Peter Kalischer, *Madame Butterfly's Children*, COLLIERS, Sept. 20, 1952, at 17 (stating that 8381 American-Japanese couples were able to register at five U.S. Consulates in Japan).

³⁷⁹ See SHUKERT & SCIBETTA, *supra* note 97, at 211 (describing the necessity of obtaining

White-Japanese couples.³⁸⁰ About twelve percent involved Black-Japanese couples and the other fifteen percent involved Japanese-American and Japanese-national couples.³⁸¹ More than six months later, Congress extended the 1950 Amendment to apply to marriages that were entered into before or within twelve months of the passage of the 1950 Amendment.³⁸² Recognizing that military personnel would face hardship from being separated from their “alien families,” the report that accompanied the 1951 extension noted the need to continue waiving racial inadmissibility.³⁸³

Through these amendments to the War Brides Act—facilitated in part by *Bouiss*—thousands of couples, many of whom were interracial, were allowed to obtain a valid marriage and enjoy the benefit of moving to the United States together. Indeed, Helene, whose marriage to John occurred well within the statutory requirement under the 1947 Amendment, eventually was admitted to the United States on April 15, 1948.³⁸⁴ The

permission from a commanding officer as “a difficult task to say the least”).

³⁸⁰ See Kalsicher, *supra* note 377, at 17 (citing a survey by Tokyo Consul General James B. Pilcher). Other sources estimated that, of the total 10,517 American citizens who married Japanese women between June 22, 1947, and December 31, 1952, over seventy-five percent of the Americans were Caucasian. See Anselm L. Strauss, *Strain and Harmony in American-Japanese War-Bride Marriages*, 16 MARRIAGE AND FAM. LIVING 99, 99 n.1 (1954) (citing a private communication from February 1953, written by J.B. Pilcher, the American Consul General).

³⁸¹ See Kalsicher, *supra* note 377, at 17 (discussing a survey conducted by the Tokyo Consul General).

³⁸² Act of Mar. 19, 1951, ch. 9, Pub. L. No. 6, 65 Stat. 5; see also H.R. REP. NO. 82-117, at 1 (1951) (explaining that the purpose of the bill is to extend the benefits of the 1950 Amendment, which was passed by the 81st Congress and waived the racial inadmissibility of noncitizen spouses and minor children).

³⁸³ See H.R. REP. NO. 82-117, at 2.

³⁸⁴ See S. REP. NO. 81-1444, at 2 (1950) (explaining that Helene Bouiss was “admitted to the United States on April 15, 1948 under [the War Brides Act which permitted] admission of alien wives of veterans of World War II”). In a twist of fate, Senate Report No. 81-1444 was actually a report supporting the enactment of a private bill that would grant admission to “Vivienne Joy Wilson and [her] minor daughter, Mary Ann Vaughn,” who happened to be Helene’s daughter and granddaughter. *Id.* Vivienne was Helene’s child from her marriage to her first husband, a Swedish citizen. See *supra* Part I.B (discussing Helene’s previous marriage to a Swedish man). Vivienne was engaged to an American civilian who had resided in Japan but had since returned to the United States. See S. REP. NO. 81-1444, at 2 (explaining that the couple sought to get married in Japan, but the “American consulate would not give them permission,” and that they eventually obtained a civil, Japanese ceremony, lived together as husband and wife, and had a child). Vivienne needed a private bill to enter the United States because she too was “half-Japanese” and thus “ineligible for citizenship” and not admissible to the United States. *Id.* at 3. Vivienne’s father (Helene’s first husband, John Walgren Wilson), was a Swedish citizen. Appellant Brief, *supra* note 110, at 10. It appears that Vivienne’s father, John Wilson, was also half-Japanese. See S. REP. NO. 81-1444, at 2 (stating that Vivienne Wilson was born in Japan “of half-Japanese parents”). Accordingly, because Helene was half-German and half-Japanese and John Wilson was also half-Japanese and presumably half-Swedish, Vivienne was, for purposes of immigration law, half-Japanese as well. See *id.* at 3 (stating that Vivienne Wilson is “racially inadmissible to the United States for permanent residence since she is half-Japanese”).

conferral of immigration benefits stemming from marriage between a White man and a Japanese woman marked an important point in legal history. Theirs was an interracial marriage that would not have been legal in many jurisdictions and one that was not only validated by the federal government but also one that accorded federal benefits.

B. Congressional Recognition and Remedy of Obstacles to Interracial Marriages

Reports accompanying the War Brides Act amendments acknowledged that the combination of military regulations and immigration law affected the ability of American soldiers to marry Japanese women and return to the United States with their wives. Congress initially highlighted the impact the laws and regulations had on American soldiers of Asian descent. Specifically, the reports noted that several Japanese-American and Korean-American soldiers “married girls of their own race” who are inadmissible to the United States except by private legislation.³⁸⁵ However, by acknowledging *Bouiss*, Congress recognized that immigration law’s inadmissibility provision also directly affected interracial marriages as well, which constituted the majority of the marriages.³⁸⁶

The congressional reports thus reflected two overlapping purposes in the 1947 and 1950 amendments to the War Brides Act. First, Congress understood that allowing persons who were not eligible for citizenship to enter the United States would promote disfavored racial marriages, including many interracial marriages. Accordingly, it restricted the law’s coverage by imposing time limitations on the marriages that would be recognized under the amendments.³⁸⁷ The House Report accompanying the 1947 Amendment explained that “[i]n order not to encourage marriages between United States citizen service people and racially inadmissible aliens,” only those couples who married within thirty days of the Act would benefit from the law.³⁸⁸ The 1950 Amendment recognized marriages that were entered into within six months after the passage of the law.³⁸⁹

Second, Congress acknowledged that recognition of such marriages was necessary as a means of protecting the rights of citizen soldiers. Indeed, as initially introduced, the 1947 Amendment would have applied

³⁸⁵ S. REP. NO. 80-501, at 2 (1947); H.R. REP. NO. 80-478, at 2 (1947).

³⁸⁶ See *supra* Part III.B–C (discussing the impact of immigration laws on marriages between American soldiers and Japanese nationals, most of which were between White male soldiers and Japanese women).

³⁸⁷ See Act of July 22, 1947, ch. 289, Pub. L. No. 80-213, 61 Stat. 401 (amending the War Brides Act).

³⁸⁸ H.R. REP. NO. 80-478, at 1.

³⁸⁹ Act of Aug. 19, 1950, ch. 759, Pub. L. No. 81-717, 64 Stat. 464; see H.R. REP. NO. 81-2768, at 1 (1950) (describing the reasons for the six month extension of the admissibility waiver).

only to those marriages that were entered into by January 1, 1947.³⁹⁰ When the Senate report proposed extending the deadline, it did not reference the discriminatory implications of this limited timeframe. Rather, it cited evidence that many service personnel were waiting for the Amendment's enactment before getting married, and that commanding officers in the Pacific were withholding permission for marriages until the Amendment was passed.³⁹¹ Accordingly, Congress extended the applicable date to thirty days after the law was passed.³⁹²

Admittedly, the legal changes that *Bouiss* brought were short-lived³⁹³ and thus did not cause exceptional change in the same way that *Loving* did. Far from keeping the gates of America open to Japanese immigrants through its 1947 Amendment to the War Brides Act, Congress provided that the Amendment would only be a temporary measure so as not to encourage further marriages.³⁹⁴

Yet, *Bouiss*'s provisional changes should not take away from its important historical moment. The federal government's recognition and validation of mixed-race marriages for purposes of immigration law constituted a remarkable transformation of policy in the 1940s.³⁹⁵ Such federal acknowledgment of interracial married couples, according them the same rights and privileges enjoyed by same-race couples, occupied a time and space in which several states maintained and enforced antimiscegenation laws.³⁹⁶

V

THE CONSEQUENCES OF THE FEDERAL ANTIMISCEGENATION REGULATORY SCHEME

The foregoing sections' expansion of our understanding of the public regulation of mixed marriage sought to enrich the legal history of the racial restriction of marriage, and particularly of antimiscegenation regulation. As

³⁹⁰ See S. REP. NO. 80-501 (discussing deadline modification); H.R. REP. NO. 80-478 (same).

³⁹¹ S. REP. NO. 80-501; H.R. REP. NO. 80-478.

³⁹² See 61 Stat. at 401 (explaining that the admission of Japanese immigrants had to be based on marriages that were entered into within thirty days of passage of the law).

³⁹³ See *supra* notes 158–66 and accompanying text (detailing the Ninth Circuit's reversal).

³⁹⁴ See *supra* notes 389–91 and accompanying text.

³⁹⁵ In at least one other instance, the federal government has recognized interracial marriages and conferred benefits attendant to such mixed-race marriages. In particular, in 1888, the federal government passed a law that conferred U.S. citizenship to American Indian women who married White men. Act of Aug. 9, 1888, ch. 818, 25 Stat. 392 ("An act in relation to marriage between white men and Indian women."); see also Bethany Ruther Berger, *After Pocahontas: Indian Women and the Law, 1830-1934*, 21 AM. INDIAN L. REV. 1, 30 & n.146 (1997) (discussing the rationales for the 1888 law). I am grateful to Kerry Abrams for pointing out the connection of this law to the amendments to the War Brides Act.

³⁹⁶ See *supra* Part I.A (discussing various state antimiscegenation laws).

this Part contends, excavating this buried past offers more than merely a complete historical record. As a normative and prescriptive matter, this Part aims to illuminate the dangers of federal involvement in the restriction of marriage. Specifically, I illustrate some of the troubling dimensions of mixed-race regulation that have been elided by our state-centered view of how interracial marriage has been policed. Through immigration law, the federal government promoted White supremacy in marriage restrictions in an entirely distinct and pernicious manner. Moreover, it transported antimiscegenation norms abroad and forced soldiers to choose between their country and their spouses. Finally, it led to the abandonment of thousands of mixed-race children fathered by White soldiers who were unable to transmit their American citizenship to their children. The countervailing story told here prompts us to be more attentive and critical of federal restriction of marital relations.

A. *Immigration Law's Promotion of White Supremacy Through Marriage Restrictions*

Recognizing the federal government's role in restricting interracial marriages adds new depth to our understanding of the ways in which antimiscegenation regulation promoted White supremacy. As the Supreme Court acknowledged in *Loving*, central in the enactment of Virginia's antimiscegenation law, entitled "An Act to Preserve Racial Integrity,"³⁹⁷ was the state's intent to further perpetuate White domination.³⁹⁸ Quoting the Virginia Supreme Court's 1955 opinion in *Naim*, the *Loving* Court explained that Virginia's antimiscegenation law sought more than to "preserve the racial integrity of its citizens."³⁹⁹ By prohibiting Blacks from marrying only Whites, the Court noted that the law's investment in protecting against the "corruption of blood" constituted an "endorsement of the doctrine of White supremacy."⁴⁰⁰ Critical to maintaining the "purity" of White blood was ensuring against "contamination" by Black blood.⁴⁰¹ Blackness functioned as the antithesis of Whiteness⁴⁰² such that

³⁹⁷ Act of Mar. 20, 1924, ch. 371, § 4, 1924 Va. Acts 534–35 (requiring the state to verify both partners' race before issuing a marriage license).

³⁹⁸ *Loving v. Virginia*, 388 U.S. 1, 7 (1967).

³⁹⁹ *Id.* (quoting *Naim v. Naim*, 197 Va. 80, 90 (1955)).

⁴⁰⁰ *Id.*

⁴⁰¹ See Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 26 (1991) (noting the use of the metaphors of purity and contamination to explain laws designed to deter "Black ancestry" that functioned as a "contaminant that overwhelm[s] White ancestry"); Eva Saks, *Representing Miscegenation Law*, 8 RARITAN 39, 40–42 (1988).

⁴⁰² See Carbado, *supra* note 192, at 1311 (defining "Black exceptionalism," as "the notion that Black people are and historically have been the racially subordinated amongst the racially subordinated" and arguing that White identity is constructed in opposition to this concept in that "White is what Black is not (and can never be), and Black is not (and can never be) what White

antimiscegenation laws had to be passed to maintain racial boundaries between the two.⁴⁰³

Similarly, the federal government's intention to bar marriage to "racially inadmissible wives" functioned to maintain White supremacy. As scholars have maintained, immigration law treated the borders of the United States as boundaries designed to maintain White supremacy.⁴⁰⁴ By prohibiting persons ineligible for citizenship from entering the United States, while simultaneously allowing Europeans to immigrate to the country, the federal government strove to engineer the racial makeup of the nation.⁴⁰⁵ Further, the confluence of immigration, citizenship, and military laws conferred on the federal government the capacity to orient the racial configuration of American families. While approving vast numbers of marriages with noncitizens from majority White countries, the federal government generally denied applications to marry racially Japanese noncitizens—particularly those submitted by biracial couples.

Accordingly, the deployment of immigration law's racially exclusionary measures in the context of marriage served to promote and protect both the White nation and purity of White blood. Same-race White couples exercised not only the right to marry, but also enjoyed the privileges of marriage, including the right to live together as a family in the United States. By contrast, couples in Japan were barred from residing together in the United States, and interracial couples were generally barred from marrying at all.

The convergence of immigration, citizenship, and military laws and regulations thus created a distinct form of promoting White supremacy through marriage restrictions. Through its authority to approve marriage applications, the federal government considered marriage an extension of the literal and figurative border that protected against the contamination of the White nation.⁴⁰⁶ Marriage to a U.S. citizen could have potentially created an opening for undesirable noncitizens, despite restrictive

is").

⁴⁰³ To be sure, antimiscegenation laws also prohibited other non-Black persons of color from marrying Whites. *See, e.g.,* Volpp, *supra* note 19, at 825–27 (describing scholarship on antimiscegenation laws that targeted Chinese, Japanese, Filipinos, and other people of color). However, states' bans on interracial marriage that targeted non-Black persons illustrate "differing racializations," distinct both from each other and from the project of preserving White racial purity. *Id.* at 826.

⁴⁰⁴ *See* Chin, *supra* note 171, at 22–50 (explaining the ways in which immigration law constructed a White nation); Mendelson, *supra* note 207, at 1025 (same).

⁴⁰⁵ NGAL, *supra* note 17, at 26–27.

⁴⁰⁶ *See* Chin, *supra* note 171, at 22 (arguing that Asian exclusion laws were not "motivated by a desire to influence foreign policy," but rather to "foster [W]hite supremacy by defending [W]hite civilization against an undesirable race"); *cf.* Mendelson, *supra* note 207, at 1024–26 (explaining how the national origin quota system "and its incumbent political discourse provided an opportunity not just to construct homogeneity, but also to reassert its superiority").

immigration policies, which the confluence of military regulations and immigration served to close. The federal antimiscegenation regulatory scheme demonstrates the ways in which the federal government merged immigration law's project of maintaining a White nation with state legal norms against exogamy designed to promote White supremacy.

This federal regulation of interracial marriages shows the historical limits of equality and due process principles against discriminatory treatment by the federal government.⁴⁰⁷ Racially inadmissible women like Helene Bouiss had little recourse for challenging their exclusion based on race. More than fifty years before Helene's entry, the Supreme Court in *Chae Chan Ping v. United States* upheld Congress's authority to pass a racially based exclusionary law.⁴⁰⁸ Since then, Congress's power over immigration law has been deemed plenary, which has made it difficult for noncitizens to invoke the equal protection and due process claims that were available to interracial couples who challenged state antimiscegenation laws.⁴⁰⁹ Although equal protection and due process arguments initially failed to invalidate racial barriers in marriage, they ultimately proved successful in *Perez* and *Loving*. By contrast, the federal government's plenary power to exclude noncitizens continues today and maintains critical power to limit the boundaries of marriage, albeit in different ways.⁴¹⁰

B. Extraterritorial Antimiscegenation Regulation

The federal policing of interracial marriages was also troubling because of its expansion of the domains of antimiscegenation regulation. By interpreting the prohibition on racially inadmissible wives to apply primarily in cases of interracial marriages, the federal government effectively federalized state antimiscegenation laws. Not all states barred

⁴⁰⁷ Cf. *Hollywood*, *supra* note 227, at 188–89 (arguing that the procedure for soldiers stationed in the Republic of Korea who wish to marry non-U.S. citizens contradicts established constitutional principles).

⁴⁰⁸ *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889). According to the Court: [When Congress] considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.

Id.

⁴⁰⁹ See *Loving*, 388 U.S. at 12 (holding that a state antimiscegenation law violates both the Equal Protection and Due Process Clauses of the Fourteenth Amendment); *Perez v. Lippold*, 198 P.2d 17, 19 (Cal. 1948) (basing a lawsuit against California's antimiscegenation laws on equal protection principles).

⁴¹⁰ See *infra* Part VI (examining the contemporary relevance of immigration regulation of marriage); see also Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1657 (1992) (noting that "strict application of the plenary power doctrine forecloses your assertion of equal protection" in immigration admission or expulsion cases).

interracial marriage.⁴¹¹ Yet, the application of immigration law's proscription against racially inadmissible persons primarily on overseas interracial marriage deprived Americans who were from states that permitted interracial marriage the ability to marry their Japanese fiancées. That is, had they been civilians located in one of the states that permitted such marriages, they would have been legally permitted to marry. Because of their service in the military, however, soldiers who resided in states that allowed mixed marriage found themselves unable to exercise their right to marry under their own state's laws.⁴¹²

The federal antimiscegenation regulatory scheme left few options for binational interracial couples outside of the United States. In contrast, interracial couples within the United States found ways of overcoming legal barriers to marriage. Some chose to travel to a jurisdiction that allowed interracial marriages. For instance, Richard and Mildred Loving were able to leave Virginia and obtain a legal marriage in Washington, D.C.⁴¹³ Other interracial couples used other strategies—such as misrepresenting their identities—to gain marriage approval.⁴¹⁴ Interracial couples in Japan, however, did not have meaningful alternatives to obtain a valid marriage, because the military regulations applied throughout Japan. American soldiers stationed there had limited opportunities to leave their assignments to travel elsewhere and obtain a valid marriage. Moreover, Japanese nationals had travel restrictions in post-Occupied Japan.

C. *Country and Citizenship Versus Wives and Children*

The federal regulatory antimiscegenation scheme also led to distinct harms not experienced by interracial couples barred from getting married by state antimiscegenation laws. As *Bouiss* highlighted, immigration law's exclusion of racially inadmissible wives at the border presented the likely prospect of physical separation of couples for years.⁴¹⁵ Interracial couples abroad were faced with the choice of living in separate countries or remaining in Japan; American soldiers were forced to choose between their country and their wives (and, in many instances, their children). Whereas

⁴¹¹ See *supra* note 57 (listing colonies and states that had enacted antimiscegenation statutes).

⁴¹² See *supra* Part III (explaining how military regulations and immigration law together function like a federal antimiscegenation law).

⁴¹³ See *Loving*, 388 U.S. at 2–3 (recounting Mildred and Richard Loving's marriage in the District of Columbia, and their subsequent return to the District of Columbia as residents after they were convicted of violating Virginia's ban on interracial marriage).

⁴¹⁴ See Lenhardt, *Beyond Analogy*, *supra* note 46, at 842 n.18 (discussing the ways in which misrepresenting one's identity or "passing" enabled some interracial couples to avoid state antimiscegenation laws).

⁴¹⁵ See *supra* Part IV (explaining the ways in which immigration law enforced the separation of married couples and families).

interracial couples located in the United States had the option of taking up residence in another state without having to abandon their home country,⁴¹⁶ binational couples in Japan, by contrast, could only stay together outside of the United States. Because many U.S. soldiers wished to return to their home country, thousands of soldiers abandoned their wives and children altogether.⁴¹⁷

Soldiers who did return to the United States without their wives solicited help from their congressional leaders to submit private bills that enabled their wives to enter the United States.⁴¹⁸ Such processes could take many years of separation before some wives were able to finally immigrate to the United States.⁴¹⁹ Other soldiers chose not to risk separation and decided to stay in Japan to be with their wives.⁴²⁰ Indeed, many decided to renounce their citizenship.⁴²¹

This Hobson's choice—between nation and citizenship, wife and marriage—represented a gendered form of repatriation that is not generally known. While scholars have examined the loss of citizenship of women married to foreign men, both before and after the Cable Act,⁴²² little work has been done to explore how men chose to abandon their citizenship because of marriage to noncitizens who were ineligible for citizenship. There are important differences, of course. Among these is the fact that the men chose to abandon their country and citizenship, while women who married ineligible noncitizens had their citizenship automatically divested. Yet, there is a surprising lack of scholarly inquiry into the link between abandonment of formal citizenship and interracial marriage regulation. The

⁴¹⁶ See *supra* Part I.A (elaborating on the traditional state-centered history of antimiscegenation laws).

⁴¹⁷ See *supra* notes 354–55 and accompanying text (describing families that were separated when soldiers returned from Japan to the United States).

⁴¹⁸ See Kalischer, *supra* note 377, at 16 (noting veterans' attempts to lobby for individual bills to allow their families to immigrate to the United States); Ota, *Private Matters*, *supra* note 41, at 216 (“Hundreds of wives, fiancées, and noncitizen children of Asian descent, or [individuals] who were ineligible for admission because of past crimes, had to use the private petitions process because Congress had not extended the benefits of the various War Brides Acts to them.”).

⁴¹⁹ See S. REP. NO. 81-1469 (1950) (noting that a private bill was needed because a couple missed the deadline under the War Brides Act 1947 Amendment and stating that the soldier had been discharged since 1948 and the couple had been physically separated since then).

⁴²⁰ See PAUL R. SPICKARD, *MIXED BLOOD, INTERMARRIAGE AND ETHNIC IDENTITY IN TWENTIETH-CENTURY AMERICA* 138 (1989) (discussing obstacles to Japanese immigration to the United States, and noting that many couples chose to stay together in Japan).

⁴²¹ See SHUKERT & SCIBETTA, *supra* note 97, at 207 (explaining that “[g]overnment files reveal that many soldiers contemplated giving up their American citizenship in order to remain with their Japanese fiancées and brides,” and noting that there were American soldiers who stayed behind in Japan and renounced their citizenship).

⁴²² See *supra* notes 197–200 and accompanying text (discussing ways in which women lost their citizenship based on marriage to men who were not eligible for citizenship).

period in which men chose to remain in Japan in order to stay with their racially inadmissible wives was a time when Congress issued a number of life-transforming opportunities for those who served in the military, primarily through the G.I. Bill.⁴²³ However, such opportunities did not include the evisceration of discriminatory barriers in marriage.

The potential for separation and loss of citizenship sheds light on John's decision to challenge Helene's exclusion. Specifically, immigration officers' quest to expel Helene from the country essentially placed John in the position of having to choose between abandoning his home country—and perhaps his citizenship—to be with his wife in Japan and remaining in the United States without her. Their case was similar to *Loving* in that, much like Richard and Mildred Loving, the Bouisses had limited options of residence.⁴²⁴ Both couples experienced legal barriers to their movement because the laws that governed their marriage impeded their ability to choose their place of residence.⁴²⁵ The Lovings voluntarily left Virginia in order to avoid being placed in jail for violating the state's antimiscegenation law.⁴²⁶ The Bouisses could have chosen to leave the United States in order to evade Helene's detention. Yet, that would not have been a meaningful option for John, who evidently wanted to return to his home country, or for Helene, who wanted to live with her husband in the United States.

Indeed, the immigration dimension of federal interracial marriage regulation also offers a nuanced perspective on a legal issue that was obscured in *Naim*.⁴²⁷ *Naim* involved a White woman, a resident of Virginia, and a Chinese national, who got married in North Carolina.⁴²⁸ The two returned to Virginia after they got married and resided there together.⁴²⁹

⁴²³ See Servicemen's Readjustment Act of 1944, ch. 268, Pub. L. No. 78-346, 58 Stat. 284. See generally SUZANNE METTLER, *SOLDIERS TO CITIZENS: THE G.I. BILL AND THE MAKING OF THE GREATEST GENERATION* (2005) (examining various opportunities that the G.I. Bill created for war veterans after World War II). But see Melissa Murray, *When War Is Work: The G.I. Bill, Citizenship and the Civic Generation*, 96 CAL. L. REV. 967, 978-93 (2008) (discussing the limits of the G.I. Bill for women, African Americans, and other racial minorities).

⁴²⁴ See Victor C. Romero, *Crossing Borders: Loving v. Virginia As a Story of Migration*, 51 HOW. L.J. 53, 59-61 (2007) (exploring the parallels between Richard and Mildred Loving's story and modern-day immigration restrictions). Indeed, the Bouiss couple arguably was in a worse position because John was faced with the choice of abandoning his country due to Helene's racial inadmissibility. The Lovings, by contrast, had places within the United States that allowed interracial couples to live.

⁴²⁵ *Id.* at 59 (emphasizing the severe restrictions on the Lovings' freedom of movement).

⁴²⁶ See *Loving v. Virginia*, 388 U.S. 1, 3 (1967).

⁴²⁷ *Naim v. Naim*, 87 S.E.2d 749 (Va. 1955), *vacated*, 350 U.S. 891 (1955), *aff'd*, 90 S.E.2d 849 (Va. 1956), *appeal dismissed*, 350 U.S. 985 (1956) (per curiam).

⁴²⁸ See Wallenstein, *supra* note 59, at 416 (1994) (explaining that Chinese sailor Ham Say Naim married a White woman in North Carolina and that North Carolina allowed marriage between Whites and Asians, though not between Whites and Blacks).

⁴²⁹ *Id.*

The wife subsequently sought to annul their marriage under Virginia's antimiscegenation law.⁴³⁰ The Virginia Supreme Court upheld the lower courts' decisions that voided their marriage.⁴³¹

The primary question in *Naim*, of course, was whether the marriage of the interracial couple could be annulled based on Virginia's antimiscegenation law.⁴³² Yet, it raised the collateral issue of the immigration consequences of the annulment of their marriage. Mr. Naim, as a noncitizen, had applied for an immigrant visa based on his marriage to his U.S.-citizen wife.⁴³³ The voiding of their marriage implicated the viability of his immigrant visa application, which was dependent on their ongoing marriage. The lack of a valid visa would have subjected him to deportation.⁴³⁴ The validation of a noncitizen's mixed marriage represented the difference between being able to stay in the United States and being removed from the country.

Without a doubt, Naim's potential expulsion from the country differed from the "choice" that American soldiers exercised when they decided to stay in Japan rather than return to the United States without their wives. Nonetheless, his case illuminates some of the distinct harms that emerge when interracial marriage intersects with immigration law. The injury here—exclusion from the country—was one that escaped interracial couples who were both U.S. citizens.

D. *Mixed-Race Children and Lack of Citizenship*

One of the most compelling and troubling aspects about the deployment of immigration and citizenship law in the restriction of overseas marriage was the effect that the inability to marry in Japan had on the children of American soldiers. Children of American-Japanese couples, like their counterparts in the United States, faced discrimination in Japan and were considered inferior because of their mixed racial background.⁴³⁵ As the Supreme Court noted in *Loving*, bans against interracial marriage

⁴³⁰ *Id.*

⁴³¹ The U.S. Supreme Court subsequently vacated the opinion of the Supreme Court of Appeals of Virginia because of the "inadequacy of the record." *Naim v. Naim*, 350 U.S. 891, 891 (1955). On remand, the Supreme Court of Appeals of Virginia affirmed both its jurisdiction to hear the case and its original ruling that the Naims' marriage was void. *Naim v. Naim*, 90 S.E.2d 849, 850 (Va. 1956).

⁴³² *Naim*, 87 S.E.2d at 756 (identifying the question at issue in the case, which raised both Fourteenth Amendment and jurisdictional questions).

⁴³³ Wallenstein, *supra* note 59, at 417.

⁴³⁴ There is no record of Mr. Naim being deported from the United States. For a more in-depth analysis of *Naim*, see Gregory Michael Dorr, *Principled Expediency: Eugenics, Naim v. Naim, and the Supreme Court*, 42 AM. J. LEGAL HIST. 119 (1998).

⁴³⁵ See Kalischer, *supra* note 377, at 15–16 (discussing the societal discrimination encountered by mixed-race American-Japanese children).

were rationalized as helping to prevent “obliteration of racial pride” and a “mongrel breed of citizens.”⁴³⁶ Mixed children evidenced the “corruption of blood” that would have destroyed the “quality of . . . [Virginia’s] citizenship.”⁴³⁷ Indeed, such fear compelled a judge in Louisiana to refuse to issue a marriage license to an interracial couple as recently as October 2009.⁴³⁸ According to the judge, “[t]here is a problem with both groups accepting a child from such a marriage.”⁴³⁹ Ample scholarship has been devoted to the various social and legal problems that confronted mixed-race children.⁴⁴⁰ These problems included the illegitimate status of children whose parents were legally prohibited from marrying.⁴⁴¹

The federal regulation of interracial marriage similarly led to a generation of out-of-wedlock children in Japan, who were referred to as “GI babies,”⁴⁴² “Occupation babies,” or “half-half babies.”⁴⁴³ As already explained, many American soldiers were prohibited from marrying their Japanese girlfriends. Other couples chose to marry without the military’s approval. In both situations, the relationships lacked the official recognition of a valid marriage. As a result, children of these American-Japanese couples were considered illegitimate.⁴⁴⁴ To be sure, the precise numbers of illegitimate Occupation babies whose parents either unsuccessfully sought to marry or married without the official approval of the military are unknown. Indeed, one scholar noted that the U.S. military prohibited both military and Japanese officials from conducting a census of Occupation children.⁴⁴⁵

⁴³⁶ *Loving*, 388 U.S. at 7–8 (quoting *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955)).

⁴³⁷ *Naim*, 87 S.E.2d at 756.

⁴³⁸ *La. Justice of Peace Denies Interracial Couple Their Marriage License*, CHI. DEFENDER, Oct. 21, 2009, at 10.

⁴³⁹ *Id.*

⁴⁴⁰ See Kevin Noble Maillard, *The Color of Testamentary Freedom*, 62 SMU L. REV. 1783 (2009) (examining the exclusion of mixed-race children from inheriting property left to them by their White fathers).

⁴⁴¹ See *id.* at 1792–93 (explaining that antimiscegenation laws “thwarted a secure interest of black and mulatto beneficiaries in the estates of white testators”).

⁴⁴² See Kalischer, *supra* note 377, at 15 (“The term ‘GI baby’ is used by both Americans and Japanese to describe the illegitimate offspring of Japanese mothers and occupation-force fathers.”).

⁴⁴³ See KOSHIRO, *supra* note 301, at 161 (explaining the terms used to describe children of American soldiers and Japanese women).

⁴⁴⁴ Admittedly, many of these “GI babies” could have been children of soldiers who did not intend to marry the Japanese mothers of these children. Many have long criticized U.S. soldiers for engaging in sexual relations and fathering children without marrying the children’s mothers or fulfilling their parental obligations. See Ranjana Natarajan, *Americans and Gender-Based Equal Protection Under U.S. Citizenship Law*, 30 COLUM. HUM. RTS. L. REV. 123, 125–26 (1998) (discussing military personnel’s abandonment of their children).

⁴⁴⁵ See KOSHIRO, *supra* note 301, at 161 (explaining that U.S. military officers prohibited Japanese officials from obtaining statistics of the number of children of American soldiers in Japan in 1947).

Nevertheless, public officials attempted to gauge the population of GI babies and, notably, mixed-race children, although the numbers reported were imprecise and contested. Japanese government officials initially estimated that between 5000 and 15,000 children were born to Japanese mothers and Occupation-force fathers during the Occupation period, while the Japanese media reported a significantly higher number—150,000 to 200,000.⁴⁴⁶ It was not until 1952 that the Japanese government conducted an official census count and reported a significantly lower figure—5013 mixed-race children.⁴⁴⁷ Of this figure, 4205 were half-White.⁴⁴⁸ In 1953, the government released an even lower population estimate—3490 mixed-race children⁴⁴⁹—of which eighty-six percent were half-White.⁴⁵⁰

Numbers notwithstanding, like mixed-race children whose illegitimate status was legally constructed by antimiscegenation laws, biracial children in Japan were denied legitimacy as a result of the confluence of immigration and military regulations that barred their parents from getting married.

Yet, in one significant way, multiracial children in Japan encountered a different type of injury that mixed-race children in the United States were spared. In particular, unlike the children of interracial couples who were born in the United States and gained U.S. citizenship as a birthright, children born in Japan whose fathers were American soldiers were not automatically deemed to be U.S. citizens at birth. Instead, in order for them to establish their citizenship, their American fathers had to prove their paternity.⁴⁵¹ Several fathers chose not to declare their parental relationship,

⁴⁴⁶ See Kalischer, *supra* note 377, at 15 (noting the estimates of the Japanese press).

⁴⁴⁷ See KOSHIRO, *supra* note 301, at 164 (explaining the Japanese Ministry of Welfare findings of mixed-race children born in Japan during the Occupation period). The Japanese Ministry of Welfare sent questionnaires to obstetricians and midwives who delivered babies during the Occupation period in Japan outside of military hospitals, and it reported that seventy-seven percent of those surveyed returned the questionnaires. Based on these responses, the Ministry of Welfare reported that there were 5013 mixed-race children.

⁴⁴⁸ See *id.* (reporting that the Ministry of Welfare found that 4205 of the 5013 mixed-blood children were half-White).

⁴⁴⁹ See *id.* at 164 (noting that a Division of Health and Welfare Statistics report stated that there were 3490 mixed-blood children).

⁴⁵⁰ See *id.* at 266 n.17 (stating that eighty-six percent of the 3490 mixed-blood children were half-White).

⁴⁵¹ See Nationality Act of 1940, ch. 876, §§ 201(g), 205, 54 Stat. 1137, 1138–40, *amended by* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, 235 (codified as amended at 8 U.S.C. § 1401 (2006)) (granting citizenship to a foreign-born child of a citizen-alien couple born out of wedlock, provided paternity is established). The strict requirements that U.S.-citizen males in Japan faced in their attempts to establish their paternity and thus pass down U.S. citizenship to their Japan-born out-of-wedlock children exemplify the differential treatment in U.S.-citizenship law imposed on U.S.-citizen fathers but not U.S.-citizen mothers. See *Flores-Villar v. United States*, 131 S. Ct. 2312, 2313 (2011) (per curiam) (affirming *United States v. Flores-Villar*, 536 F.3d 990, 995–97 (9th

which further exacerbated their children's vulnerable position in post-Occupied Japanese society.⁴⁵²

Because they were half-Japanese, the children were precluded from entering the United States, just like their mothers. Indeed, they were also ineligible to naturalize. Their only means of gaining admission to the United States outside of the narrow windows offered through war brides legislation was by private legislation.⁴⁵³ Ultimately, like many Japanese women, thousands of children of American soldiers were abandoned. Mixed-race children were left to deal with Japan's own racial barriers, and many were abandoned in orphanages.⁴⁵⁴

In brief, the foregoing analyses of the differentiated harms imposed by the federal regulation of interracial marriages aimed to highlight the ways in which interracial couples and families outside of U.S. borders faced similar yet distinct problems because of legal barriers to interracial marriages. The federal regulatory scheme examined in this Article and the legal injuries it caused exemplify the need to go beyond the state-centered view of domestic relations.

VI

CONTEMPORARY IMPLICATIONS

This Article's primary contribution is to fill a void in the historical narrative of the regulation of interracial marriages. By examining how the convergence of immigration, citizenship, military laws, and the War Brides Act shaped the lived experiences of White-Japanese couples in Japan, the Article seeks to expand our historical legal landscape. Yet, the Article also argues that this overlooked history has implications for contemporary federal restrictions on marriage in at least three ways.

First, from a broader perspective, this new knowledge about our racial past should prompt an exploration of current federal laws that implicitly restrict the ability of interracial and other nontraditional couples to form families today. Despite *Loving's* more than forty-year proscription against state-sanctioned bans on interracial marriage, mixed marriages today

Cir. 2008), and holding that the requirement under 8 U.S.C. § 1409 that U.S. citizen fathers had to reside in the United States for five years after the age of fourteen years old while mothers only had to reside in the United States for one year in order for either one to transmit citizenship to their children born out-of-wedlock was constitutional); *Nguyen v. INS*, 533 U.S. 53, 59–61 (2001) (holding the 8 U.S.C. § 1409(a) statutory requirements for proving paternity for the purposes of conferring citizenship to the children of U.S.-citizen fathers born out of wedlock, which were more onerous than requirements for U.S.-citizen mothers, to be constitutional).

⁴⁵² Kalischer, *supra* note 377, at 15–17 (discussing American soldiers who abandoned their children in Japan).

⁴⁵³ See *supra* note 5 (noting that children were included in the War Brides Act).

⁴⁵⁴ Kalischer, *supra* note 377, at 15.

continue to be out of the norm.⁴⁵⁵ In 2008, for example, only 14.6 percent of couples who got married that year were interracial.⁴⁵⁶ To be sure, that figure constitutes an increase from the previous generations.⁴⁵⁷ Nevertheless, a closer look at the marriages entered in 2008 suggests that race as well as other factors (including gender) shape and limit marriage choices along racial lines. For instance, only 11 percent of the approximately 280,000 mixed marriages in 2008 were Black-White unions.⁴⁵⁸ When broken down along gender lines, Black men were more likely to outmarry than Black women.⁴⁵⁹ In 2008, 22 percent of Black men married a non-Black, while only 8.9 percent of Black women married a non-Black.⁴⁶⁰ In contrast, Asians and Latinas/os have not experienced an increase in interracial marriages rates since 1980,⁴⁶¹ with immigration patterns leading them toward endogamous unions.⁴⁶²

Admittedly, states and the federal government on the whole are no longer directly invested in restricting marriage along racial lines.⁴⁶³ Yet, laws passed by the government have shaped social and cultural factors that continue to contribute to the dominance of same-race relationships.⁴⁶⁴ As Elizabeth Emens elegantly noted, the law continues to “determine[] the accidents of sex and love, because it controls the infrastructure of our

⁴⁵⁵ See JEFFREY S. PASSELL ET AL., PEW RESEARCH CTR., MARRYING OUT: ONE-IN-SEVEN NEW U.S. MARRIAGES IS INTERRACIAL OR INTERETHNIC (2010), available at <http://pewresearch.org/pubs/1616/american-marriage-interracial-interethnic> (reporting that 14.6 percent of new marriages in the United States in 2008 were between spouses of different races or ethnicities).

⁴⁵⁶ *Id.*

⁴⁵⁷ See *id.* (reporting that the 14.6 interracial marriage percentage is an “estimated six times the intermarriage rate among newly weds in 1960 and more than double the rate in 1980”).

⁴⁵⁸ See *id.*; Sam Roberts, *Black Women See Shrinking Pool of Black Men at the Marriage Altar*, N.Y. TIMES, June 4, 2010, at A12 (stating that marriages between Black and White spouses are the least common type of interracial marriages).

⁴⁵⁹ See PASSELL, *supra* note 454, at 11 (reporting the gender differences in marriage patterns between Black men and Black women).

⁴⁶⁰ *Id.* at 12. Notably, there is a decline in marriage among young Blacks. *Id.* at 13 (explaining that 62 percent of Black women were married in 1970 compared to 33 percent in 2007 and 74 percent of Black men were married in 1970 compared to 44 percent in 2007).

⁴⁶¹ *Id.* at 2. In 2008, 26 percent of Latinas/os and 31 percent of Asians married someone of a different race, which represented only a small change from the 1980 outmarrying rates for those two groups. In stark contrast, the outmarrying rates for Whites and Blacks doubled and tripled, respectively, from 1980 to 2008. *Id.*

⁴⁶² See *id.* (stating that the “ongoing immigration wave has greatly enlarged the pool of potential partners for in-group marrying”).

⁴⁶³ *But see Interracial Couple Denied Marriage License by Louisiana Justice of the Peace*, HUFFINGTON POST, Oct. 15, 2009, http://www.huffingtonpost.com/2009/10/15/interracial-couple-denied_n_322784.html (describing a Louisiana justice of the peace who refuses to issue marriage licences to interracial couples).

⁴⁶⁴ See Elizabeth F. Emens, *Intimate Discrimination: The State’s Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1308–09 (2009) (arguing that although law formally prohibits discrimination, discrimination within intimate relationships continues).

lives—neighborhoods, schools, workplaces, public spaces, and more—in ways that affect affiliations along the lines of race.”⁴⁶⁵ These factors need not be limited to physical space, however. Although segregated neighborhoods play important roles in determining the structure of our social environment that influence romantic pairings,⁴⁶⁶ online dating networks, for instance, also affect the ways that people form intimate relationships along racial, gender and sexual orientation lines.⁴⁶⁷ It is thus necessary to look beyond explicit laws and regulations that impede the free choice of marital partners and to be attentive to how legal and cultural influences operate cumulatively to affect marriage composition along racial lines.

Second, gaining a fuller understanding of the role of the federal government in restricting interracial marriages and the harms that such policing imposed encourages a more critical look at contemporary federal marriage limitations. Today, such federal restriction of marriage of nontraditional couples is evident in the enactment of the Defense of Marriage Act (DOMA) in 1996,⁴⁶⁸ which limited the definition of marriage to a “legal union between one man and one woman.”⁴⁶⁹ It should be noted, however, that even before DOMA, the federal government wielded its powers over immigration to reject the validity of same-sex marriages, at least for purposes of obtaining immigration benefits.⁴⁷⁰ In *Adams v. Howerton*,⁴⁷¹ a gay U.S. citizen married his noncitizen partner and filed an unsuccessful petition seeking to sponsor his husband as the spouse or immediate relative of a U.S. citizen.⁴⁷² The U.S. Court of Appeals for the Ninth Circuit upheld immigration authorities’ rejection of the petition, holding that the couple did not have a valid marriage for purposes of

⁴⁶⁵ See Emens, *supra* note 463, at 1311.

⁴⁶⁶ See Russell K. Robinson, *Structural Dimensions of Romantic Preferences*, 76 *FORDHAM L. REV.* 2787, 2788–89 (2008) (explaining the ways in which segregated residential patterns limit the pool of potential romantic partners).

⁴⁶⁷ See *id.* at 2791–2803, 2008–19 (reporting the results of an empirical study of an online male-seeking-male website indicating members’ preference for dating White and Latino males over Black and Asian men).

⁴⁶⁸ Defense of Marriage Act, Pub. L. No. 104-199, §§ 1–3, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2006)).

⁴⁶⁹ *Id.*

⁴⁷⁰ *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982). *Adams* was also cited in the DOJ’s brief that was filed in *Massachusetts v. United States Department of Health and Human Services*, 698 F. Supp. 2d 234 (D. Mass. 2010). Consolidated Memorandum of Points & Authorities in Further Support of Defendants’ Motion to Dismiss and in Opposition to Plaintiffs’ Motion for Summary Judgment at 5, *Massachusetts*, 698 F. Supp. 2d 234 (No. 1:09-11156) [hereinafter DOJ Consolidated Memo].

⁴⁷¹ 673 F.2d 1036 (9th Cir. 1982).

⁴⁷² *Id.* at 1038 (explaining that immigration authorities rejected the couple’s petition to classify the gay noncitizen husband as the spouse of a U.S. citizen).

immigration law.⁴⁷³ To reach its conclusion, the court conducted a two-step analysis to determine the validity of the marriage in the context of immigration law.⁴⁷⁴ The first step provides that the marriage must be legitimate in the state in which it was entered.⁴⁷⁵ Second, it must also be considered valid under the Immigration and Nationality Act (INA).⁴⁷⁶ Avoiding the first question, the court held that the marriage was not valid under the INA. Applying agency deference and statutory analysis, the court held that Congress must have intended the term “spouse” to refer to those couples who live together as “husband and wife.”⁴⁷⁷

Similar to the federal racial regulatory scheme of the 1940s, DOMA and immigration law are dictating the bounds of who may marry and what rights and privileges are attached to marital status. Notably, they have affected the ability of binational lesbian, gay, bisexual, and transgender (LGBT) couples from obtaining immigration benefits.⁴⁷⁸ In a case that is similar to *Adams*, a married binational couple sued the federal government for rejecting a citizen’s petition to sponsor his noncitizen husband as an immediate relative.⁴⁷⁹ This couple is only one of approximately 36,000 binational same-sex couples residing in the United States who are unable to enjoy immigration benefits that are available to their heterosexual married couple counterparts.⁴⁸⁰ Some couples have been forced to leave the United States, requiring the American citizen to choose between nation and spouse.⁴⁸¹ These ongoing struggles faced by same-sex binationals strikingly parallel the issues of separation experienced by interracial couples in the

⁴⁷³ *Id.*

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.* at 1040.

⁴⁷⁸ See *supra* note 44 and accompanying text (discussing instances in which DOMA has affected citizens’ marriage and immigration rights).

⁴⁷⁹ See Chris Geidner, *Defending DOMA, Fighting Back*, METRO WEEKLY, Sept. 6, 2011, <http://metroweekly.com/news/?ak=6543> (reporting the case of Hamdi Lui and Ernest Roberts against the federal government for rejecting Roberts’s immigration petition on behalf of Lui). As a recent news article reports, the U.S. House of Representatives has filed a motion to dismiss the case, which both the U.S. Department of Justice and U.S. Department of Homeland Security have opposed. See Defendants’ Opposition to Bipartisan Legal Advisory Group’s Motion to Dismiss, *Lui v. Holder*, No. CV 11-01267 SVW (JCGx) (filed Sept. 2, 2011), available at <http://metroweekly.com/poliglot/Defendants%20Opposition%20to%20MTD%20Lui%20v.%20H> older.pdf.

⁴⁸⁰ See *Couples and Families*, IMMIGRATION EQUALITY, <http://www.immigrationequality.org/issues/couples-and-families> (last visited Sept. 28, 2011) (stating that based on the 2000 U.S. Census, there are 35,820 binational couples in the United States).

⁴⁸¹ See *supra* note 44 and accompanying text (highlighting examples of gay married couples who had been separated as a result of immigration law).

1940s.⁴⁸² The lessons that may be drawn from the country's racial past—the significant harms imposed on couples and families caused by the federal government's arbitrary marital restrictions—encourage limiting the ways in which the combination of DOMA and immigration law is irrationally denying same-sex couples today the right to choose whom they may marry.

Third, and finally, the Article's argument that the federal government was far more involved in regulating marriage than previously thought may help crystallize the federalism issue undergirding Congress's enactment of DOMA.⁴⁸³ That issue raises the question of whether the federal government lacks constitutional authority in defining or restricting marriage given that states have historically regulated marriage and domestic relations. This federalism argument was presented by same-sex married couples in *Gill v. Office of Personnel Management*.⁴⁸⁴ The plaintiffs argued that DOMA represented Congress's unprecedented intrusion into an area of law normally controlled by the states.⁴⁸⁵ In their complaint, plaintiffs asserted that "[t]he federal government of the United States has, since its founding and at least until 1996, recognized the exclusive authority every state possesses . . . to prescribe the conditions upon which marriage relation[s] between its own citizens shall be created."⁴⁸⁶ The regulation of marriage and domestic relations belongs to the states, the argument goes, and the "federal government has always accepted what the states have said about it."⁴⁸⁷ The *Gill* court ultimately held for the plaintiffs under equal protection

⁴⁸² See *supra* Part V.C (discussing the ways in which citizen-noncitizen interracial couples were forced to choose between living in two separate countries and living together outside of the United States).

⁴⁸³ Defense of Marriage Act, 1 U.S.C. § 7, 28 U.S.C. § 1738C (2006).

⁴⁸⁴ 699 F. Supp. 2d 374 (D. Mass. 2010); see also *Commonwealth v. U.S. Dep't of Health & Human Serv.*, 698 F. Supp. 2d 234 (D. Mass. 2010).

⁴⁸⁵ *Id.* at 11, 15–16.

⁴⁸⁶ *Id.* at 11. Plaintiffs also argued that their right to equal protection was being violated. Plaintiffs contend that DOMA allows the federal government to disregard the recognized marital status that they legally obtained in Massachusetts and unlawfully denies them more than 1138 federal benefits that are available to heterosexual married couples. See Second Amended Complaint at 2–6, *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. May 25, 2010) (No. 1:09-cv-10309), available at <http://www.glad.org/uploads/docs/cases/gill-v-office-of-personnel-management/gill-amended-complaint-5-25-10.pdf> (explaining that because of DOMA, plaintiffs have been unable to obtain health insurance coverage for their spouses, take advantage of spousal status under the Internal Revenue Code, or get spousal protections under Social Security programs).

⁴⁸⁷ Marcia Coyle, *Wedding Plans; Massachusetts Case May Be Key in Gay Marriage Fight*, 31 NAT'L L.J. 1 (2009) (quoting the Legal Director of Gay & Lesbian Advocates & Defenders), available

at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202433430922&hblogin=1&loginloop=000>

principles and opted not to address the states' rights issue.⁴⁸⁸

Yet, in the companion case, *Massachusetts v. United States Department of Health and Human Services*,⁴⁸⁹ the court directly analyzed and answered the federalism question. In *Massachusetts*, the State of Massachusetts sued the federal government on the grounds that DOMA directly contradicts state law that allows same-sex couples to get married.⁴⁹⁰ The state argued that DOMA "interferes with the Commonwealth's sovereign authority to define and regulate marriage."⁴⁹¹ According to the state, the power to determine marital status is one that is exclusively reserved to the states under the Tenth Amendment.⁴⁹²

The U.S. Department of Justice (DOJ) countered that DOMA was constitutionally enacted under the Spending Clause, which confers the federal government the authority to pass laws intended to promote the general welfare.⁴⁹³ Notably, the DOJ explained that for purposes of federal statutes, federal definitions of words such as "marriage" are controlling.⁴⁹⁴ Indeed, in *Massachusetts*, the DOJ pointed in particular to its previous regulation of marriage through immigration law.⁴⁹⁵ Relying on *Adams*, the DOJ asserted that the federal government has appropriately defined the boundaries of marriage.⁴⁹⁶

Rejecting the DOJ's argument, the court in *Massachusetts* held that DOMA is unconstitutional because it "touched upon an attribute of state sovereignty."⁴⁹⁷ Accepting evidence presented by the state that there has been a "historically entrenched tradition of federal reliance on state marital status determinations,"⁴⁹⁸ the court took a strong states' rights approach. It stated that "[s]tate control over marital status determinations" was grounded in the early history of the country, which predated "even the

⁴⁸⁸ *Gill*, 699 F. Supp. 2d at 387 ("This court need not address [the states' rights argument] because DOMA fails to pass constitutional muster even under the highly deferential rational basis test.")

⁴⁸⁹ *Massachusetts v. U.S. Dep't of Health & Hum. Serv.*, 698 F. Supp. 2d 234 (D. Mass. 2010).

⁴⁹⁰ *Id.* at 263.

⁴⁹¹ Complaint at 1, *Massachusetts*, 698 F. Supp. 2d 234 (No. 1:09-cv-11156), available at http://www.mass.gov/Cago/docs/press/2009_07_08_doma_complaint.pdf [hereinafter Complaint, *Massachusetts*].

⁴⁹² *See id.* at 3.

⁴⁹³ *See* DOJ Consolidated Memo, *supra* note 469 at 4.

⁴⁹⁴ *Id.* at 4–6.

⁴⁹⁵ *Id.*; *see also Massachusetts*, 698 F. Supp. 2d at 251 n.152 (rejecting arguments made by defendants that "courts have long recognized that federal law controls the definition of 'marriage' and related terms" (internal citations omitted)).

⁴⁹⁶ *See* DOJ Consolidated Memo, *supra* note 469, at 5 ("[C]ourts have long recognized that federal law controls the definition of 'marriage' and related terms in, e.g., the immigration context." (citing *Adams*, 673 F.2d at 1038–39)).

⁴⁹⁷ *Massachusetts*, 698 F. Supp. 2d at 248–49 (D. Mass. 2010) (holding that Congress did not have the constitutional power to enact DOMA).

⁴⁹⁸ *Id.* at 250.

American Revolution.⁴⁹⁹ Thus, by enacting DOMA and determining what constituted a valid marriage, Congress intruded in an area that fell within the domain of the state.⁵⁰⁰ Indeed, the court described the federal government's role in marriage and family law as a largely passive one. Referring to historical debates among states regarding interracial marriages, the court explained that the federal government "consistently yielded to marital status determinations established by the states."⁵⁰¹ By evading recognition of marriages validated in Massachusetts through DOMA, Congress overstepped its boundaries.

To be sure, President Barack Obama's administration has opted to stop defending Section 3 of DOMA⁵⁰² in two cases that were filed in New York⁵⁰³ and Connecticut.⁵⁰⁴ In a letter addressed to the Speaker of the House, Attorney General Eric Holder explained that these two states fall within the U.S. Court of Appeals for the Second Circuit, which has yet to determine what level of scrutiny should be applied to classifications based on sexual orientation.⁵⁰⁵ Attorney General Holder then explained that both he and President Obama believe that the higher level of intermediate scrutiny should be applied and that Section 3 of DOMA would likely fail that scrutiny.⁵⁰⁶ Accordingly, the administration will cease its defense of Section 3 not only in these two cases but in other pending litigation as well.⁵⁰⁷

The administration's withdrawal from the case does not mean that litigation of DOMA has ended. The U.S. House of Representatives has hired counsel to defend DOMA's constitutionality.⁵⁰⁸ Moreover, Attorney General Holder did not address the question of whether the federal government usurped the power of states to regulate marriage, leaving open the federalism issue for courts to decide.

⁴⁹⁹ *Id.*

⁵⁰⁰ *See id.* (stating that the marital status determination is an "attribute of state sovereignty").

⁵⁰¹ *Id.*

⁵⁰² *See* Letter from Eric Holder, Att'y Gen., DOJ to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011) (arguing that heightened scrutiny should be utilized to examine governmental conduct that discriminates based on sexual orientation).

⁵⁰³ *Windsor v. United States*, No. 1:10-cv-84352011, WL 2207572 (S.D.N.Y. June 2, 2011).

⁵⁰⁴ *See* Complaint, *Pedersen v. OPM*, No. 3:10-cv-1750 (D. Conn. Nov. 11, 2010).

⁵⁰⁵ *See* Letter from Eric Holder, *supra* note 501 (explaining that the Obama Administration has defended DOMA in jurisdictions where there was established precedent with respect to the level of judicial scrutiny that should be applied in governmental classifications based on sexual orientation).

⁵⁰⁶ *See id.*

⁵⁰⁷ *See id.*

⁵⁰⁸ Chris Johnson, *Clement To Defend DOMA With Different Firm*, WASH. BLADE, Apr. 25, 2011, <http://www.washingtonblade.com/2011/04/25/king-spalding-withdraws-from-defending-doma-in-court/> (reporting that the U.S. House Speaker, John Boehner, hired Paul Clement to represent the government in defending DOMA's constitutionality).

In sum, that the federal government actively participated in restricting and regulating interracial marriage in the past, as this Article reveals, challenges the view that Congress mainly yielded to the states in marital matters. In some ways, congressional, immigration, and military officials' actions in the 1940s with respect to marriages between American men and Japanese women illustrate a form of "federal family law"⁵⁰⁹ that predated DOMA. Without doubt, DOMA constitutes an exceptional extension of previous federal regulation in marriage and family formation. Yet, the discussion of restrictions on marriage today would be more robust if it goes beyond the question of simply whether the federal government has ever participated in marriage regulation. Instead, the lessons that we may draw from the federal regulatory antimiscegenation scheme inform us that there is a need to impose limits on the federal government's wielding its powers to police marriage. The federal government's potential to expand the harms of marriage restrictions beyond the typical boundaries of states, and even the country, illuminates the uniquely troubling aspects of federal participation in domestic relations.

CONCLUSION

This Article calls for greater recognition of the federal government's participation in antimiscegenation regulation. Identifying the gap in the legal and doctrinal narrative of the public policing of marriage along racial lines, this Article aims to provide a more complete account of the historical race-based public policing of marriage, with its selective enforcement and disparate impact on interracial couples. In particular, this Article demonstrates the ways in which the federal government erected barriers to marriage and family formation faced by transnational couples, especially White citizen soldiers deployed in Asia and local Japanese women, during the two decades that preceded *Loving*.

The Article contends that immigration and citizenship laws converged with military regulations and family law to operate functionally as a federal counterpart to state antimiscegenation laws. Although these laws did not formally prohibit interracial couples from getting married in the same

⁵⁰⁹ See Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 645 (2001) (listing and describing examples of federal statutory law that "create substantive federal family law policies"); Judith Resnik, "Naturally" Without Gender: Women, Jurisdiction, and The Federal Courts, 66 N.Y.U. L. REV. 1682, 1698–1700 (1991) (describing how both the "equation of women with family" and the idea that family matters are not within federal jurisdiction led to the exclusion of both women and family law from federal courts). See generally Kristin A. Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761 (2005) (examining the historical and essentialist justifications of state sovereignty in domestic relations and particularly in the federal government's authority over matters relating to family).

manner that state antimiscegenation laws did, they collectively created obstacles to citizen-noncitizen unions, and especially to interracial couples who sought to enjoy the benefits, rights, and privileges of marriage. In so doing, the federal regulation of binational and interracial marriages in this particular context reinforced and perpetuated ideologies of White supremacy and White domination, even beyond the borders of the United States. Moreover, they caused unique equal protection and due process issues on citizen-noncitizen interracial couples and families that their domestic counterparts did not experience.

This neglected history also offers significant insight for the current struggles concerning the federal restriction of marriage. The federal government's active participation in policing marriage in the past reveals that states have not been alone in the business of marriage regulation. Yet, the sharp similarities between the struggles of binational and interracial couples in the 1940s and same-sex binational couples today should prompt limitations on the scope of the federal involvement in marriage.