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#LoveWins

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#Love Wins*

*But only if you marry one of us

Erin B. Corcoran[*]

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Introduction

On June 26, 2015, the U.S. Supreme Court in the 5-4 decision, *Obergefell v. Hodges*,[1] held that the U.S. Constitution—specifically the Fourteenth Amendment—requires a State to provide a marriage license between two people of the same sex and to also recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State.[2] Twitter registered more than 3.5 million tweets within an hour of the announcement, millions of Facebook

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[*] Professor of Law, University of New Hampshire School of Law and Faculty Fellow at the Warren B. Rudman Center for Justice, Leadership and Public Policy. The author would like to thank all the contributors to the ImmigrationProfBlog online symposium on Kerry v. Din for their unique and thoughtful perspectives on this Supreme Court decision. http://lawprofessors.typepad.com/immigration/2015/06/symposium-on-kerry-v-din-.html.

[1] 135 S. Ct. 2584 (2015).

[2] *Id*. at 2607–08.

profiles were backlit with rainbows,[3] and the Niagara Falls were lit with the colors of the rainbow. This historic civil rights struggle for gay rights and equality under the law that culminated in the *Obergefell v. Hodges* decision is worthy of such celebration.

In this landmark decision, Justice Kennedy, writing for the majority, discussed the reasons and traditions on why marriage is a fundamental right protected by the U.S. Constitution and then went on to explain how these premises apply to same sex marriage. First, he explained that choosing one's spouse is inherent to individual liberty, which is why the court in *Loving v. Virginia* struck down bans on interracial marriage. Second, the right to marry is fundamental because it supports a committed union between two individuals like no other. Third, protecting the right to marry safeguards children and families and "is a central part of the liberty protected by the Due Process Clause."[4] Fourth, "marriage is a keystone of our social order."[5] In sum, marriage provides individuals the institutional and legal capacity to affect "the highest ideals of love, fidelity, devotion, sacrifice and family."[6]

Yet, for Fauzia Din, a U.S. citizen and refugee who fled Afghanistan to avoid persecution, the promise of marriage remains illusory. On June 15, 2015, the U.S. Supreme Court in a plurality opinion[7] in *Kerry v. Din*,[8] upheld the U.S. State Department's decision to deny her husband, Kanishka Berashk, a visa to enter the U.S. and reunite with his wife for "terrorism related grounds."[9] The government provided no further explanation about

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[3] Caitlin Dewey, *More than 26 million people have changed their Facebook picture to a rainbow flag. Here's why that matters*, WASH. POST (June 29, 2015), http://www.washingtonpost.com/news/the-intersect/wp/2015/06/29/more-than-26-million-people-have-changed-their-facebook-picture-to-a-rainbow-flag-heres-why-that-matters/?tid=sm_fb.

[4] Obergefell, 135 S. Ct. at 2600 (citing Zablocki v. Redhail 434 U.S. 374, 384 (1974))).

[5] *Id.* at 2601.

[6] *Id.* at 2608.

[7] There is no majority opinion in *Kerry v. Din*. Justice Scalia delivered the opinion joined by Chief Justice Roberts and Justice Thomas. Justice Kennedy wrote a concurrence joined by Justice Alito.

[8] Kerry v. Din, 135 S. Ct. 2128 (2015).

[9] The U.S. State Department in a letter informed Berashak his visa had been denied pursuant to INA § 212(a) and that there "no possibility of waiver of this ineligibility." Brief for Respondent at 8, Kerry v. Din, 576135 S. Ct. 2128 (2015) (No. 13-1402) (2015 WL 179409 at *8).

why they viewed her husband as a national security threat. He was payroll clerk for the Afghan Ministry of Social Welfare, which was part of the national government that at one time, was controlled by the Taliban. However, his occupation was not stated as a reason the consular officer in Pakistan ultimately denied him a visa to enter the United States.[10] Ms. Din requested an explanation by the government on the reasons for why her husband was refused a visa. The government's decision was an individualized determination because it required "the application of a legal rule to particular facts."[11] Individualized agency determinations usually trigger procedural due process requirements, which include a notice of adverse action, an opportunity to present evidence and arguments before a neutral decision maker, and a written decision explaining the reasons for the outcome.[12]

The U.S. State Department refused to grant Ms. Din's request for review and the U.S. Supreme Court declined to recognize any protected liberty interest for the couple to live in matrimony in United States; and therefore procedural due process requirements were not triggered.[13] As of today, Ms. Din and her husband's marriage is in name only, as Ms. Din remains in this country with her mother and sister, while her husband remains in Afghanistan.

This article contributes to the discourse[14] about how rights for non-citizens to be reunited with U.S. citizen family members, are devoid of any

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[10] Brief of Amici Curiae Former Consular Officers in Support of Respondent at 27, Kerry v. Din, 135 S. Ct. 2128 (2015) (No 13-1402) (2015 WL 294670 at *27).

[11] *Din*, 135 S. Ct. at 2144 (Breyer, J. dissenting).

[12] *Id.* at 2147 (Breyer, J. dissenting) (citing Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (plurality opinion)); *see also* Henry Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1278–81 (1975) (compiling a list of enumerating factors that have been considered to be elements of a fair hearing).

[13] *Din*, 135 S. Ct. at 2133–36.

[14] *See, e.g*., T. Alexander Aleinikoff, *Citizens*, *Aliens, Membership and the Constitution*, 7 CONST. COMMENTARY 9 (1990) (suggesting that current constitutional norms defining federal immigration power are shaped by citizenship and alienage); *see also* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (examining immigration law as it relates to the symbiotic relationship between statutory interpretation and constitutional law).

constitutional guarantees, either substantively or procedurally. By contrasting the Court's reasoning in the cases *Obergefell v. Hodges* and *Kerry v. Din*, this article demonstrates while the Court's treatment of same sex intimate relationships has evolved over time to expand constitutional guarantees for these individuals, the Court's thinking regarding the absolute, unreviewable power of the executive to decide who may enter the U.S., even to reunite with a U.S. citizen spouse, has remained harshly stagnant. In both *Obergefell* and *Din*, the individuals were arguing their right to marry and their right to choose where to reside in marriage were being obstructed by unlawful government actions that violated due process guarantees of the Constitution. Further, both parties sought similar remedies from the Court, which was governmental recognition of their martial union and the practical ability to effectuate such a union. The Court in *Obergefell* held that the right to marry someone of the same sex is not a question to be left to the political branches of our government, but a constitutionally justiciable one. Yet, the Court in *Din* deflected the constitutional due process claims by relying on its plenary power doctrine jurisprudence which "has long held that an alien seeking initial admission to the United States . . . has no constitutional rights . . . for the power to admit or exclude aliens is a sovereign prerogative."[15] First, this article explores some of the mechanical differences in these two cases by discussing the legal theories of the cases. Second, the article argues that while there are certainly technical distinctions, the more satisfying explanation for the outcomes in these cases is that immigrant rights, unlike race, personal reproductive choices and sexual orientation, has yet to find purchase with the Court. Ultimately, this article concludes that non-citizens rights still persist squarely outside the "rights-oriented jurisprudence" of the Court and remain ensconced in the political branches' unreviewable prerogative to decide whom to exclude from the United States.[16]

I. ALL MARRIAGES ARE NOT THE SAME

The Court had the power to wield the same result on both these cases—to affirm the right to live with the person of one's choosing in the State of one's choice—and yet, the Court decided that same sex marriage was constitutionally protected substantive right; whereas, the government's decision to deny a U.S. citizen and her immigrant spouse the opportunity to reunite and live together in marriage was unreviewable by a court. This

[15] Landon v. Plasencia, 459 U.S. 21, 32 (1982).
[16] Aleinikoff, *supra* note 14, at 11–12.

section discusses some legal distinctions and factual differences in these two cases.

Procedurally and substantively, these cases diverge. In *Obergefell*, the petitioners successfully argued that they had constitutionally protected substantive due process right—the right to marry someone of the same sex—that was being trampled. They petitioned the Court to intervene and affirmatively protect their fundamental right. Whereas, in *Kerry v. Din*, Ms. Din was attempting to assert a procedural due process right, access to information about the reasons the U.S government was denying her husband entry into the United States. Attempting to distinguish her case from a line of immigration cases, where the U.S. Supreme repeatedly affirmed the power of the sovereign to exclude non-citizens and affirmed its proclamation that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned,"[17] Ms. Din argued it was her, not her husband's, liberty interest that was implicated by the government unsupported decision to deny her husband a visa to reunite with her in the United States.

Ms. Din was in a "traditional" marriage.[18] She was not challenging the state or federal definition of marriage; she was not challenging the discretionary authority bestowed by Congress to the executive to decide who may enter the United States; she was simply challenging the opaque decision making process void of any opportunity to confront and cross examine witnesses, submit evidence on her husband's behalf and refute the government's allegations. Ms. Din's did not ask the Court to require the government to admit her husband; she only requested that the Court to require the government provide a basis for their denial. While the right asserted by Din is much more modest than Obergefell's, the Court refused to extend any constitutional protection to a U.S. citizen's claim to be reunited with a non-citizen spouse. In sum, "the liberty interest that Ms. Din [sought] to protect consists of her freedom to live together with her husband

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[17] United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

[18] A marriage as Justice Roberts notes in his Obergefell dissent was defined by Noah Webster in his first American dictionary as "'the legal union of a man and a woman for life,' which severed the purposes of 'preventing the promiscuous intercourse of the sexes, . . .promoting domestic felicity, and . . .securing the maintenance and education of children.'" *Obergefell*, 135 S. Ct. at 2613 (Roberts, C.J. dissenting) (citing 1 An American Dictionary of the English Language (1828)).

in the United States. She [sought] *procedural*, not *substantive*, protection for this freedom."[19]

Another distinction between these cases is the type of permission or legal recognition each individual sought from the government. In *Obergefell*, the petitioners argued that they had a constitutional right to (1) marry the partner of their choice and have that marriage legally recognized by the state; and (2) to have a valid same-sex marriage that was performed in one state to be recognized as a valid marriage in another state. The Court had to decide if it could review a state's decision to not issue licenses or recognize licenses issued in other states to same sex couples. In other words, do individuals have a constitutionally, judicially enforceable right to have their relationship recognized and sanctioned by the issuance of a license? In *Obergefell,* the Court held that marriage licenses for same sex marriage were constitutionally required as a matter of equal protection and due process; that states are compelled to recognize same-sex marriages licensed by other states, and to issue licenses as well; and states cannot through legislation define marriage to only include a union between a man and a woman.

In *Kerry v. Din*, Ms. Din was challenging the government's refusal to issue her husband an entry visa to join Ms. Din in the United States. In this case, the U.S. government did not challenge the validity or legality of Ms. Din's marriage. In fact, U.S. Citizenship and Immigration Service acknowledged her husband's prima facie eligible benefit when it approved the form I-130.[20] The government in its brief to the Court conceded that Ms. Din does have "a deeply rooted liberty interest, protected by the Due Process Clause, in 'rights to martial privacy and to marry and raise a family.'"[21] However, the government argued that these due process rights "are not implicated here"[22] because denying Ms. Din's husband a visa did not nullify the marriage or deprive Ms. Din of the legal benefits it created.[23] Rather the government decided as a matter of discretion,[24] not to allow an individual to enter its border.

[19] *Din*, 135 S. Ct. at 2142 (Breyer, J. dissenting) (emphasis in the original).
[20] Brief for Respondent at 7, Kerry v. Din, 135 S. Ct. 2128 (2015) (No. 13-1402) (2015 WL 179409 at *7).
[21] Brief for the Petitioners at 22, Kerry v. Din, 135 S. Ct. 2128 (2015) (No. 13-1402) (2015 WL 6706838 at *22).
[22] *Id*. at 22–23.
[23] *Id.*
[24] In this particular case there is even a question if true consular officer discretion was exercised. Evidence suggests that the consular officer who

Still, the idea that the Court arrived at different outcomes for these married couples based on a formalistic distinction between the "right to marry" and "right to live together in matrimony" is unsatisfying for two reasons. First, the crux of James Obergefell's claim was that he wanted to live in a marriage with his husband John Oliver in Ohio, their permanent residence, not in Maryland where their marriage was performed and licensed. They could have chosen to move to Maryland and set up residence in Maryland where there marriage was recognized, but instead they insisted that Ohio was constitutionally required to recognize their marriage and permit them to live as a married couple with all the rights that flow from a legally recognized marriage including being listed as the surviving spouse on a death certificate. The Court agreed opining that allowing one state to refuse to recognize a marriage license issued by another state "would maintain and promote instability and uncertainty."[25] Second, the Supreme Court has recognized that there is a fundamental right to keep families together and that right includes an extended family.[26] For example, in *Moore v. East Cleveland*[27], the Supreme Court invalided a city ordinance that limited occupancy of a dwelling unit to members of a single family because the narrow definition of family violated due process. The ordinance defined family as an individual, a husband and wife and their unmarried children. Ms. Inez Moore was convicted of a criminal offense, served five days in jail and ordered to pay a fine because she was living her in East Cleveland home with her son and two grandsons, who were first cousins, not brothers.[28] The Court concluded that "[w]hether or not such a

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interviewed Ms. Din's husband was poised to grant the visa but the automated background check ultimately resulted in a denial. The background check is administered through the Consular Consolidated Database (CCD), which contains more than 143 million visa application records and data from the Consular Lookout and Support System (CLASS). CLASS contains more than 42.5 million records, including 27 million persons who are ineligible for visas. Much of the data comes from several federal agencies including the FBI, DHS, DEA and other intelligence agencies. Furthermore the FBI Inspector General raised concerns about the integrity of the information stored in the database. *See* Brief of Amici Curie Former Consular Officers in Support of Respondent at 11–13, Kerry v. Din, 135 S. Ct. 2128 (2015) (No 13-1402).

[25] *Obergefell*, 135 S. Ct. at 2607.

[26] Moore v. City of Cleveland, 431 U.S. 494, 504–06 (1977).

[27] 431 U.S. 494 (1977).

[28] *Id.* at 496–97.

household is established because of personal tragedy, the choice of relatives in this degree of kinship to live together may not lightly be denied by the State. . . .[T]he Constitution prevents East Cleveland from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns."[29] Thus *Moore* affirmed that the government is prevented from arbitrarily restricting the right of a family to live together, including the associational right of a husband and wife to live together.[30]

Juxtaposed with the Court's concern about comity between state marriage license policies, is the Court's apathy in *Kerry v. Din* the Court for how their holding would practically impede the ability for Fauzia Din and her husband to reside together in marriage. The U.S. government successfully argued that its decision to deny Berashk's visa did not prohibit Ms. Din and her husband from living together in marriage; they were just not allowing them to live together in the United States. The Court did not find it legally significant that Ms. Din fled Afghanistan for fear of persecution and was granted refugee status prior to becoming a U.S. citizen; or that for her to return and live in Afghanistan might pose threat to her life; or that she rebuilt her life in this country and swore allegiance to the United States when she became a naturalized citizen; or that neither she nor her husband had no legal right to reside in any other countries. For the Court, the theoretical possibility that this married couple could live in matrimony elsewhere did not threaten their fundamental right to marry. This proposition stands in stark contrast to the Court's position in *Obergefell* that held the married couple should not have to move from on state to in order to live together in marriage.

II. PROTECTING INDIVIDUAL RIGHTS: US VERSUS THEM

Why was the Court less concerned with protecting Din's marital relationship than Obergefell's, even though her marriage was a "traditional" one? Why did the Court insist Obergefell's marriage license should be portable and recognized by other jurisdictions, but fail to recognize any right for Din to choose where to live in marriage? I would argue the biggest difference in the Court's willingness to extend constitutional protections to Fauzia Din is that she is married to a non-citizen. Over time, with concerted efforts in raising public opinion and litigating through the courts, same sex couples are now one of us. The Court's decision in *Obergefell* was the culmination of series of Supreme Court decisions over the last three decades

[29] *Id*. at 505–06.
[30] *Id.* at 510–11.

regarding the legal status of homosexuals. In *Bowers v. Hardwick*,[31] the Court upheld the constitutionality of a Georgia statute that criminalized sodomy. Ten years later, the Supreme Court in *Romer v. Evans*,[32] struck down an amendment to the Colorado Constitution that would have prohibited any city, town, or county from taking any action including judicial action to recognize homosexuals as a protected class, as an unconstitutional violation of the equal protection clause. In 2003, the Supreme Court in *Lawrence v. Texas*[33] overturned *Bowers v. Hardwick* holding that laws that make same sex intimacy a crime "demea[n] the lives of homosexual persons."[34] As recent as 2013 the Supreme Court in *United States v. Windsor*[35] invalidated the Defense of Marriage Act (DOMA) because barred the Federal Government from recognizing same sex marriages as valid even when they were lawful in the States they licensed.

Like the Court's evolving jurisprudence regarding racial equality,[36] the full recognition of all rights for homosexuals, materialized with incremental decisions by the Court regarding gay rights. Indeed, Justice Kennedy writing for the majority in *Obergefell* noted, "[t]he right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our

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[31] 478 U.S. 186 (1986).
[32] 517 U.S. 620 (1996).
[33] 539 U.S. 558 (2003).
[34] *Id*. at 575.
[35] 113 S. Ct. 2675 (2013).
[36] *See e.g.*, Dredd Scott v. Sandford, 60 U.S. 393 (1856) (holding that slaves are not citizens in the Constitution and therefore they cannot avail themselves of any rights and privileges found in the Constitution), *superseded by constitutional amendment,* U.S. CONST. amend. XIV; Strauder v. West Virginia, 100 U.S. 303 (1879) (holding a state statute that limited jury service to white males who are twenty-one or older and citizens of West Virginia was unconstitutional because it expressly "singled out" and disadvantaged blacks); Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding a Louisiana law that required railway passenger cars to have separate but equal accommodation for "the white and colored races"), *abrogated by* Brown v. Board of Education, 347 U.S. 483 (1954) (holding that separate education facilities are "inherently unequal" and as such are unconstitutional); Virginia v. Loving, 388 U.S. 1 (1967) (invalidating a state statute that made it a crime for persons of different races to marry because it was unconstitutional).

own era."[37] Justice Kennedy further illuminates the relationship between Court's evolving jurisprudence and public sentiment. "Indeed, in interpreting the Equal Protection Clause, the Court has recognized the new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[38]

Undeniably, the outcome, the plurality opinion, as well as the concurrence, in *Kerry v. Din* is in line with the Supreme Court's jurisprudence on the plenary power doctrine, which has refused to overturn or invalidate immigration statutes, holding that immigration is a matter "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of . . . government . . . exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."[39] The Court has further held that that immigration, and the right to regulate which individuals are allowed to enter the United States, is a power of the sovereign, thus signaling that the President has the authority to regulate entry into the United States.[40] Moreover the Court has stated, "over no other area is the legislative power more 'complete' than immigration."[41] It is Congress that enacts laws determining who can enter the United States, under what conditions, and for how long.[42] Congress also establishes who can be removed from the United States based on acts they commit after entry.[43] Ultimately the outcome of the *Din* decision is to confirm the status quo: "aliens seeking admission [can]not challenge immigration law on explicitly constitutional grounds."[44]

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[37] *Obergefell*, 135 S. Ct. at 2602.
[38] *Id*. at 2603.
[39] Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952).
[40] *Id.* at 586–88 (1952) (finding a noncitizen remaining in the United States is a "matter of permission and tolerance;" and not a right).
[41] *See* Adam Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L. J. 458, 461 (2009) (citing Kleindienst v. Mandel, 408 U.S. 753, 766 (1972)).
[42] *See* STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 12–24 (5th ed. 2009).
[43] *See* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 5–6 (2007) (discussing two basic types of deportation laws: "extended border control" and "post-entry social control").
[44] Motomura, *supra* note 14, at 571.

The plurality and concurrence in *Kerry v. Din*, refused to substantively review the executive branch's decision to exclude an individual from entry without notice or an opportunity for rebuttal. Unlike Obergefell whose legal claim was strategically grounded in the Court's evolving understanding as to the rights of individuals in same sex relationships, the Court's jurisprudence regarding the availability of due process for non-citizens or their spouses challenging the decision to bar admission remains painfully stationary. The plurality argued that Ms. Din had no constitutional right that merited judicial review. Din attempted distinguish her cases from prior cases regarding the government's power to exclude by asserting that she as a U.S. citizen had a constitutional right to know the specific reasons her husband was denied entry into the United States when the validity of the marriage itself was not at issue. Scalia is not persuaded and finds that there is no constitutional right to challenge a sovereign's decision on who to exclude even if that impacts a U.S. citizen. Whereas, Justice Kennedy's concurrence, did not go as far to say that Ms. Din had no liberty interest in her marriage, but rather the reason the government provided for denying her husband's visa was sufficient to satisfy due process.[45] In sum, the executive branch continues to possess absolute and unreviewable authority to exclude individuals at the border based on alleged national security grounds.[46]

The outcome and reasoning provided by the plurality and concurrence in *Din* is reminiscent of Court's decision over fifty years ago in *Knauff v. Shaughnessy*.[47] In *Knauff*, the Supreme Court held that the government's decision to exclude Ellen Knauff, for national security reasons without a hearing was constitutionally permissible.[48] Ellen Knauff was born in Germany in 1915, and then moved to Czechoslovakia.[49] In 1939 she fled to England as a refugee. During, World War II, Ms. Knauff served as a flight sergeant with the Royal Air Force in England and subsequently as a civilian employee of the U.S. Army in Germany. It was in Germany she met and married Kurt Knauff an Army veteran and fellow civilian Army employee.[50] After their marriage in Germany, she travelled to the United States to join her husband and apply for U.S. citizenship. When she arrived on August 14, 1948 she was immediately excluded from

[45] *Din*, 135 S. Ct. at 2139.
[46] *See Id.* at 2140.
[47] 338 U.S. 537 (1950).
[48] *Id.* at 544.
[49] *Id*. at 539.
[50] *Id*.

entry and detained at Ellis Island.[51] Two months later the Attorney General ruled without a hearing the Knauff would not be allowed to enter the United States because "her admission would be prejudicial to the interests of the United States."[52] She filed a habeas corpus petition challenging the Department of Justice's decision to deny her entry. Both the federal district court and the court of appeals denied her habeas petition. The Supreme Court affirmed the lower courts' decisions ruling that the Attorney General had the power to exclude Knauff without any hearing if the decision to exclude was for national security reasons.[53] "The rule of *Knauff* is that the government has absolute power to exclude. When an official claims that the exclusion concerns the country's national security, no court may examine the government's claim."[54]

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[51] *Id.*
[52] *Id.* at 539-40.
[53] *Id.* at 544.
[54] Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PENN. L. REV. 933, 957 (1995).

CONCLUSION

While there is much to celebrate in the U.S. Supreme evolving jurisprudence to recognize constitutional guarantee to marry the person of one's choosing, I would argue the Court still has failed to protect marriage where one party is a non-citizen. Ultimately, while family unity, is a central value that informs immigration laws and policies,[55] familial relationships do not alter the political nature of U.S. immigration control policies or the Court's continual unwillingness to scrutinize decisions made by the political branches of government. The decision in *Kerry v. Din* simply buttresses the unchecked power of the executive to arbitrarily exclude and reaffirms that this absolute, non-reviewable power to decide who is member of the community of the United States and who is excluded, is an inherent power of a sovereign nation.[56] Until love wins for all, including non-citizens, the promise of our democracy—equality and due process under the law—remain unrealized.

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[55] H. Rep. No. 82-1365, at 29 (1952).

[56] Aleinikoff, *supra* note 14, at 9–10. Aleinikoff argues that the "current constitutional norms defining federal immigration power are shaped by a membership model of citizenship and alienage. The Constitution is understood as recognizing or establishing a 'national community,' and one belongs to that community by being a citizen."