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Immigration After DOMA: How Equal is Marriage Equality?

*John Medeiros*¹

INTRODUCTION

Under current immigration law, there are four primary avenues to lawful permanent residence: family reunification, employment-based immigration, asylum/refugee admission, and diversity based on country of origin.² Of these four avenues, family reunification remains a top priority of our country's legal immigration system.³ This priority is evidenced by the disproportionate number of family-based visas over permanent residence visas offered through other means,⁴ and these numbers do not even account for spouses, parents, and minor children of United States citizens, all of whom are considered "immediate relatives" and, therefore, exempt from visa quotas.⁵ Since the early history of the United States, immigrants have arrived with their families to build better lives than those they left behind; this is, after all, the American Dream, the ideal to prosper and succeed not only for themselves but for future generations. For this reason, family-based immigration has historically been good public policy, but only for those who fall within the traditional definition of family. For others whose definition of family is not so traditional, such as married same-

¹ *Juris Doctor* expected at Hamline University School of Law, May 2014.

² RUTH ELLEN WASEM, CONG. RESEARCH SERV. RL 32235, U.S. IMMIGRATION POLICY ON PERMANENT ADMISSION 1 (Dec. 20, 2010).

³ See *Reform of Legal Immigration: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 104th Cong. 10 (1995) (statement of INS Commissioner Doris Meissner praising the Clinton Administration and the Jordan Commission for "strongly supporting the reunification of U.S. citizens with their spouses and minor children as the Nation's top priority for legal immigration.").

⁴ See Immigration & Nationality Act [hereinafter INA] § 201.

⁵ INA § 201(b)(2)(A)(i) (2013).

gendered couples, the picture has been very different.⁶

It is estimated that nearly 36,000 United States citizens are currently living in the United States with foreign-born, same-sex partners.⁷ Until recently, same-gendered binational spouses have been unable to avail themselves of the immigration advantages shared by their heterosexual counterparts, largely because of Section 3 of the Defense of Marriage Act (DOMA).⁸ That section defines the term “marriage” at the federal level as “a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”⁹ This means that for immigration purposes, married same-gendered binational couples could not seek those benefits otherwise available to married opposite-gendered binational couples. It also means that same-sex spouses of foreign nationals authorized to come to the United States temporarily, could not seek immigration benefits available to opposite-sex spouses of immigrants seeking the same benefit.

This dual treatment changed, however, in the summer of 2013, when the Supreme Court heard the case of *United States v. Windsor*,¹⁰ which challenged Section 3 of DOMA. In *Windsor*, the Court held that by restricting the terms “marriage” and “spouse” to heterosexual unions only, Section 3 of DOMA violated the Due Process Clause of the Constitution.¹¹ Following the Court’s ruling, on July 1, 2013, Secretary of Homeland Security Janet Napolitano released a statement that United States Citizenship and Immigration Services (USCIS) would review family-based immigrant petitions

⁶ See *infra* Section II.

⁷ Gary J. Gates, *Bi-National Same-Sex Unmarried Partners in Census 2000: A Demographic Portrait*, The Williams Project on Sexual Orientation Law and Public Policy, UCLA School of Law (2005), <http://escholarship.org/uc/item/6kk5x4pn> (last visited Sept. 2, 2013).

⁸ Defense of Marriage Act, Pub. L. No. 104-199, §§ 1-3, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738C (2006)) [hereinafter DOMA].

⁹ *Id.*

¹⁰ *United States v. Windsor*, 133 S. Ct. 2675 (2013).

¹¹ *Id.*

filed on behalf of same-sex spouses similar to how it reviews those same petitions filed on behalf of heterosexual spouses.¹²

While many applauded Secretary Napolitano's announcement, many married, same-gendered couples still fail to have complete redress. This article will explain why, despite this recent announcement, there is still reason for married same-gendered couples to navigate the immigration process with trepidation. Section I of this article will examine how the historical treatment of lesbian, gay, bisexual, and transgender (LGBT) immigrants to the United States helped shape the policy of failing to recognize same-sex marriages pre-DOMA and helped lead to the passage of DOMA. Section II will explore the immigration benefits of marriage and DOMA's impact on such benefits. Section III will look at the USCIS's traditional approach to recognizing marriage validity, while Section IV will examine why this approach can be worrisome for married same-gendered couples seeking immigration benefits even in a post-DOMA world.

I. HOW THE HISTORICAL TREATMENT OF LGBT IMMIGRANTS TO THE UNITED STATES HELPED SHAPE THE POLICY OF FAILING TO RECOGNIZE SAME-SEX MARRIAGES PRE-DOMA AND HELPED LEAD TO THE PASSAGE OF DOMA

Under its broad plenary powers, Congress has the authority to exclude immigrants from entering the United States.¹³ This

¹² Statement of Janet Napolitano, Department of Homeland Security (DHS) Secretary, reported in "DHS Advises on Implementation of the Supreme Court DOMA Ruling," *reprinted in* 90 INTERPRETER RELEASES at 1420 (July 8, 2013).

¹³ While the Constitution does not expressly authorize Congress to regulate immigration, its power to do so derives from several enumerated powers. The Commerce Clause states that Congress may "regulate commerce with foreign nations." U.S. CONST. art. I, § 8, cl. 3. The Migration Clause, also referred to as the Importation Clause, states that the "Migration or Importation of such Persons as any of the States now existing shall think proper to permit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and

plenary power is so broad it cannot be questioned by the courts.¹⁴ For example, in one of the most famous cases to illustrate Congress's plenary power in the context of immigration law, the Supreme Court held in *Chae Chan Ping v. United States* that the power to exclude is a proposition that is "not open to controversy."¹⁵ Congress's broad plenary power has had a direct impact on LGBT immigrants seeking entry into the United States. In order to understand Congress's historical treatment of LGBT immigrants, one must look at the general history of immigration-related exclusions, since such exclusions gave rise to public sentiment against undesirables, which has traditionally included LGBT immigrants.

A. How the Historical Treatment of LGBT Immigrants to the United States Helped Shape the Policy of Failing to Recognize Same-Sex Marriages pre-DOMA

Even before homosexuality was targeted as a ground of exclusion, the prohibition against LGBT immigrants before that time served as part of a larger scheme to exclude undesirables, which one historian refers to as ensuring "a 'proper' sexual and gender order."¹⁶ While the Alien Act of June 25, 1798 allowed the

eight," implying that Congress *may* permit migration after 1808. U.S. CONST. art. I, § 9, cl. 1. The Naturalization Clause authorizes Congress to "establish a uniform Rule of Naturalization." U.S. CONST. art. I, § 8, cl. 4. The War Clause grants Congress the power to declare war. U.S. CONST. art. I, § 8, cl. 11. As Justice Daniel concedes in his dissent in the *Passenger Cases*, the War Clause means that "Congress can place in the condition of alien enemies all who are under allegiance to a nation in open war with the United States." *Smith v. Turner*, 48 U.S. 283, 182 (1849).

¹⁴ *Miller v. Albright*, 523 U.S. 420, 456 (1998) (Scalia, J., concurring) ("Because only Congress has the power to set the requirements for acquisition of citizenship by persons not born within the territory of the United States, federal courts cannot exercise that power under the guise of their remedial authority.").

¹⁵ *Ping v. United States*, 130 U.S. 581, 603 (1889).

¹⁶ EITHNE LUIBHEID & LIONEL CANTU JR., *QUEER MIGRATIONS: SEXUALITY, U.S. CITIZENSHIP, AND BORDER CROSSINGS* xiv (2005).

President to deport any foreign-born national whom he considered “dangerous to the peace and safety of the United States,”¹⁷ the first truly restrictive federal immigration law was passed on March 3, 1875. Named after its sponsor, Horace Page, the Page Act excluded immigrants considered “undesirable.”¹⁸ Over a hundred years later, the government would admit that the Page Act established “the policy of direct federal regulation of immigration by prohibiting for the first time the entry of undesirable immigrants.”¹⁹ Out of growing concern of a booming prostitution industry that developed after male Chinese immigrants came to America during the California gold rush of 1848, Congress passed the Act, which specifically excluded contract laborers, criminal convicts (except those convicted of political offenses) and Asian women “imported for the purposes of prostitution.”²⁰

Seven years later, Congress passed the Immigration Law of 1882. Undesirables under that law included anyone deemed to be a “convict, lunatic, idiot, or any [other] person unable to take care of himself or herself without becoming a public charge.”²¹ This was followed less than ten years later by the Immigration Act of 1891, which excluded any immigrant who was “suffering from a loathsome or a contagious disease,” polygamists, paupers, and anyone convicted of a crime of moral turpitude.²² The significance of these provisions would later reappear when those living with AIDS started coming to the United States; such immigrants would

¹⁷ Alien and Sedition Acts, ch. 58, 1 Stat. 570, 571 (1798).

¹⁸ Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 708 (2005) (referring to the Page Act as the “Page Law.” The terms are used interchangeably).

¹⁹ Eithne Luibheid, *A Blueprint for Exclusion: The Page Law, Prostitution, and Discrimination against Chinese Women*, in ENTRY DENIED: CONTROLLING SEXUALITY AT THE BORDER 31 (2002) (citing U.S. Immigration and Naturalization Service, *Statistical Yearbook of the Immigration and Naturalization Service, 1991*, A1-2).

²⁰ Page Act of 1875, ch. 141, § 5, 18 Stat. 477.

²¹ Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214.

²² Immigration Act of 1891, ch. 551, 26 Stat. 1084.

be deemed excludable, primarily on health-related grounds and public charge grounds.²³

The 1891 Act is the first time the term “crime of moral turpitude” appears in immigration law; it is a term that remains in effect today. There is no statutory definition of “moral turpitude,” which leaves the decision as to whether an offense involves moral turpitude completely within the discretion of the immigration authorities and the courts.²⁴ Courts have held that the term “refers generally to conduct which is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed between persons or society in general.”²⁵

The next significant piece of immigration legislation was passed in 1903. Under that Act, among those who were excludable were epileptics, beggars, and political extremists (such as anarchists);²⁶ this Act later gave rise to the Immigration Act of 1917, which was legislation that was passed during World War I that contained a comprehensive list of immigration exclusions, many of which remain law today. This Act specifically excludes the following immigrants, inter alia:

All idiots, imbeciles, feeble-minded persons, epileptics, insane persons; persons who have had one or more attacks of insanity at any time previously; persons of constitutional psychopathic inferiority; persons with chronic alcoholism; paupers . . . persons afflicted with tuberculosis in any form or

²³ Bettina M. Fernandez, *HIV Exclusion of Immigrants Under the Immigration Reform & Control Act of 1986*, 5 LA RAZA L.J. 65, 85 (1992) (“The INS seemed to treat immigrants who are ‘likely to become a public charge,’ a category of immigrants who are not allowed waivers, and immigrants infected with HIV as being in the same category: persons who are not likely to be able to support themselves in the event of legalization.”).

²⁴ Shannon Minter, *Sodomy and Public Morality Offenses Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity*, 26 CORNELL INT’L L.J. 771, 785 (1993).

²⁵ See *Matter of Franklin*, 20 I. & N. Dec. 867, 868 (BIA 1994) (citing *Matter of Danesh*, 19 I. & N. Dec. 669, 670 (BIA 1988); *Matter of Flores*, 17 I. & N. Dec. 225, 227 (BIA 1980)).

²⁶ Immigration Act of 1893, 27 Stat. 569.

with a loathsome or dangerous contagious disease; persons not comprehended within any of the foregoing excluded class who are found to be and are certified by the examining surgeon as being mentally or physically defective, such as physical defect being of a nature which may affect the ability of such alien to earn a living; persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude; polygamists, or persons who practice polygamy or believe in or advocate the practice of polygamy; anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States. . . prostitutes, or persons coming into the United States for the purpose of prostitution or for any other immoral purpose . . . contract laborers . . . persons likely to become a public charge . . .”²⁷

By this time, immigration laws excluded both immoral women and men entering for immoral purposes. Immorality encompassed a host of sexual behaviors, including cohabitation sexual relations outside of marriage²⁸ and, arguably, sodomy.

But the legislation that would have the biggest impact on the admission – or, rather, the exclusion – of homosexuals to the United States is the McCarran-Walter Act of 1952. Enacted despite a presidential veto, the Immigration Act of 1952 (which would serve as the basis of what is known today as the Immigration and Nationality Act, or the “INA”) heightened anti-immigrant sentiment by “legislating the most dramatic expansion of the grounds for exclusion in the nation’s history.”²⁹ Among those excluded under the Act were those who violated narcotics laws, persons entering the country to engage in immoral sexual acts, addicts, Communists

²⁷ Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 875–76.

²⁸ LUIBHEID & CANTU, *supra* note 16, at xv.

²⁹ See Minter, *supra* note 24, at 776.

and homosexuals.³⁰ What made this Act so powerful was its scope. Although the initial draft of the Act specifically listed “homosexuals and sex perverts” as an excludable class, that language was removed by the recommendation of the Public Health Service, which advised Congress that the term “psychopathic personality” was broad enough to include both homosexuality and sexual perversion.³¹ As a result, the Act was amended to exclude “[a]liens afflicted with psychopathic personality, epilepsy, or a mental defect.”³² It was agreed that this language would supposedly make the diagnosis of covert homosexuals easier.³³ Not only did the Act bar the entry of homosexuals on “psychopathic personality” grounds, but it required that permanent residents applying for naturalization show they were persons of “good moral character.”³⁴ In practice, this meant that lawful permanent residents applying for naturalization who identified themselves as homosexual would be considered persons suffering from a “psychopathic personality,” and therefore ineligible for naturalization for failing to satisfy the “good moral character” requirement.³⁵

³⁰ INA § 212(a), Pub. L. No. 82-414, 66 Stat. 162, 18 (repealed 1990) (listing grounds of exclusion).

³¹ See S. REP. NO. 81-1515, at 345 (1950) (recommending that the category of “mental defectives” under the 1917 Act be amended to include “homosexuals and sex perverts.”). See also S. REP. NO. 82-1137, at 9 (1952) (“[t]he Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect which appears in the instant bill is sufficiently broad to provide for the exclusion of homosexuals and sex perverts.”).

³² INA § 212(a)(4) (repealed 1990).

³³ See Minter, *supra* note 24, at 777 (noting that the PHS reasoned that this general language included homosexuals, and that “in those instances in which the disturbance in sexuality may be difficult to uncover, a more obvious disturbance in personality may be encountered which would warrant a classification of psychopathic personality or mental defect” as reported in *Report of the Public Health Service on the Medical Aspect of H.R. 2379*, H.R. REP. NO. 82-1365, at 46-47 (1952)).

³⁴ INA § 316(a).

³⁵ Logan Bushell, *Give Me Your Tired, Your Poor, Your Huddled Masses* – *Just as Long as They Fit the Heteronormative Ideal: U.S. Immigration Law’s*

In 1962, Congress was struck a blow when the Ninth Circuit Court of Appeals ruled in the case of *Fleuti v. Rosenberg* that the term “psychopathic personality” was unconstitutionally vague when applied to homosexuals.³⁶ In response, Congress amended the INA to specifically include the words “sexual deviate.” Its reason for doing so was clear; it did so to “serve the purpose of resolving any doubt on this point.”³⁷ Two years later, the issue would come up again before the United States Supreme Court in the case of *Boutilier v. Immigration and Naturalization Service*, but instead of reaffirming the Ninth Circuit’s decision in *Fleuti*, the Court ruled that the term “psychopathic personality” was clearly intended to include immigrants who were homosexual.³⁸ The *Boutilier* case would become one of our country’s most devastating examples of the harsh realities of exclusion laws against homosexual immigrants.³⁹

Exclusionary & Inequitable Treatment of Lesbian, Gay, Bisexual, Transgendered, and Queer Migrants, 48 GONZ. L. REV. 673, 682 (2013) (citing WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 35 (1999) (quoting Immigration Service, Annual Report at 132 (1909))).

³⁶ See *Fleuti v. Rosenberg*, 302 F.2d 652, 654-56 (9th Cir. 1962), *vacated*, 374 U.S. 449 (1963). George Fleuti, a lawful permanent resident from Switzerland, was ordered deported on the grounds that he originally entered the United States as a homosexual and, therefore, was a person inflicted with a “psychopathic personality.” The 9th Circuit held that “psychopathic personality” was unconstitutionally vague, and invalidated Fleuti’s deportation order, stating, “[t]he conclusion is inescapable that the statutory term ‘psychopathic personality,’ when measured by common understanding and practices, does not convey sufficiently definite warning that homosexuality and sex perversion are embraced therein.” *Id.* at 658.

³⁷ *Hill v. Immigration and Naturalization Serv.*, 714 F.2d 1470, 1472 (9th Cir. 1983) (quoting S. REP. NO. 89-748, at 19 (1965); H.R. REP. NO. 89-745, at 16 (1965)).

³⁸ See *Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118, 120 (1967) (quoting, “[t]he legislative history of the Act indicates beyond a shadow of a doubt that the Congress intended the phrase ‘psychopathic personality’ to include homosexuals such as petitioner.”).

³⁹ After the Court’s decision to deport him back to Canada, Clive Boutilier attempted suicide, resulting in permanent brain damage, and his parents were forced to leave the United States to take care of their son for the next twenty

B. How the Historical Treatment of Homosexuals in the United States Helped Lead to the Passage of DOMA

With the language of the law firmly on its side, the government would continue to apply the term “psychopathic personality” for the purposes of excluding homosexuals from entering the United States for the next twenty-five years, until the Immigration Act of 1990 officially removed sexual orientation from the list of immigration exclusions.⁴⁰ Yet it was only eight years after the *Boutilier* decision that the first same-sex marriage case, *Adams v. Howerton*, was filed with Immigration and Naturalization Service (INS, the former name of the USCIS).⁴¹ Unlike all immigration cases before it involving homosexuality, the *Adams* case asked something very different of the INS and of the federal courts. It asked not only that homosexuality be validated, but also that homosexual relationships be recognized as equal to heterosexual relationships. This was a place the immigration authorities and the federal courts were not willing to go. Needless to say, the INS denied the case swiftly and harshly.⁴² Going even further, the Appellate Court stated the following in its decision:

“Congress has determined that preferential status is not warranted for the spouses of homosexual

years. See Bushell, *supra* note 35, at 685 (quoting Marc Stein, *Forgetting and Remembering a Deported Alien*, HISTORY NEWS NETWORK, <http://hnn.us/articles/1769.html>).

⁴⁰ Immigration Act of 1990, Pub. L. No. 101-649, § 601(a), 104 Stat. 4978 [hereinafter Immigration Act of 1990] (eliminating earlier laws that allowed the Immigration Service to exclude immigrants based on sexual orientation).

⁴¹ *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982).

⁴² In one of the most famous examples of the Immigration Service’s harsh treatment toward homosexual couples, the legal reason offered by the Immigration Service for the denial of the petition filed by a U.S. citizen on behalf of his foreign-born same sex spouse was that the petition had “failed to establish that a bona fide marital relationship can exist between two faggots.” See Letter from the Immigration & Naturalization Service to Richard Adams (Nov. 24, 1975), in JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 221 (New York, Basic Books, 2001).

marriages. Perhaps this is because homosexual marriages never produce offspring, because they are not recognized in most, if in any, of the states, or because they violate traditional and often prevailing societal mores. In any event, having found that Congress rationally intended to deny preferential status to the spouses of such marriages, we need not further ‘probe and test the justifications for the legislative decision.’”⁴³

In issuing its scathing decision, the *Adams* Court went far beyond making a decision based on the grounds of exclusion and instead attempted to provide a federal definition of marriage based on federal public policy long before DOMA became the law of the land.⁴⁴

The year 1990 saw the beginning of what appeared to be a much more favorable treatment of homosexual immigrants. It was then that Congress passed the Immigration Act of 1990.⁴⁵ Only by reading the congressional reports does one get to see the way that this policy change came about:

The term “sexual deviation” (INA 212(a)(4)) was included with the other mental health exclusion grounds expressly for the purpose of excluding homosexuals. Not only is this provision out of step with current notions of privacy and personal dignity, it is also inconsistent with contemporary psychiatric theories . . . To put an end to this unfairness,

⁴³ *Adams*, 673 F.2d. at 1042-43.

⁴⁴ Scott C. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World Without DOMA*, 16 WM. & MARY J. WOMEN & L. 537, 591-92 (2010) (“Unfortunately, the *Adams* court . . . ventured on into uncharted territory, relying on the INS’s examination of marital bona fides under the INA to demonstrate that Congress meant to create a new federal definition of “marriage” for immigration purposes in the INA beyond “the mere validity of a marriage under state law.”).

⁴⁵ Immigration Act of 1990.

Congress must repeal the “sexual deviation” ground [for immigration exclusion].⁴⁶

Despite the fact that the American Psychiatric Association declared in 1973 that homosexuality was no longer a psychiatric disorder,⁴⁷ Congress continued to maintain the homosexuality ban for nearly twenty years.⁴⁸ Nevertheless, while many homosexuals and immigrant rights advocates welcomed the tardy news, the “good moral character” ground of exclusion was not removed from the list immigration exclusions and still remains a requirement for legal permanent residence to this day.⁴⁹ As one historian notes, “[a]lthough homosexuals may no longer be explicitly excluded on sexuality grounds, their sexuality still makes them liable to be constructed as lacking good moral character or otherwise ineligible for permanent residence and citizenship.”⁵⁰ While the Immigration Act of 1990 was a step toward recognizing the legitimacy of homosexuality, it was a far cry from recognizing the validity of homosexual relationships, which is a different matter entirely. What the shift in law meant was that homosexuals could achieve the permanent residence previously denied them, as long as they appeared to be persons of good moral character (i.e., still hiding their homosexuality but for a different reason), and as long as their permanent residence was not based on marriage to a spouse of the same gender.

In an ironic twist of fate, the same year that Congress removed homosexuality from the list of immigration exclusions, three same-sex couples in Hawaii applied for marriage licenses and all were denied because of their sexual orientation.⁵¹ The couples sued, arguing that the Hawaii’s marriage statute violated their

⁴⁶ H.R. REP. NO. 101-723, at 56 (1990).

⁴⁷ John J. Conger, *Proceedings of the American Psychological Association, Incorporated, for the Year 1974: Minutes of the Annual Meeting of the Council of Representatives*, AMERICAN PSYCHOLOGIST, 30, 620-651 (1975), <http://www.apa.org/about/policy/discrimination.pdf> (last visited Sept. 19, 2013).

⁴⁸ See Immigration Act of 1990.

⁴⁹ INA § 101(f).

⁵⁰ LUIBHEID & CANTU, *supra* note 16, at xiv.

⁵¹ See *Baehr v. Lewin*, 852 P.2d 44, 48-52 (Haw. 1993).

constitutional right of equal protection under the law.⁵² The Hawaii Supreme Court ruled in favor of the couples.⁵³ The decision caught the public by storm, and many members of Congress grew concerned that gay marriage would sweep across the states, and that federal benefits would have to be extended to same-sex married couples.⁵⁴ Homosexuality was one thing, after all, but sanctioning homosexual relationships posed a very new threat, and Congress became afraid. This fear was compounded by the belief that the Full Faith and Credit Clause of the Constitution would force states that did not recognize same-sex marriages to do so if such marriages were legally performed elsewhere.⁵⁵ It was precisely this fear that led to the passage of DOMA.⁵⁶ With its surprising scarcity of words, DOMA had two important provisions. The first affirmed that no state shall be required to recognize same sex marriages lawfully performed in other states.⁵⁷ The second sealed the

⁵² *Id.*

⁵³ *Id.* at 48, ¶¶ 23, 24 (quoting, “Sex is a ‘suspect category’ for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution,” and “HRS § 572-1 [the statute defining marriage] is therefore subject to the ‘strict scrutiny’ test. HRS § 572-1 is presumed to be unconstitutional unless it can be shown that the statute’s sex-based classification is justified by compelling state interests and that it is narrowly drawn to avoid unnecessary abridgements of constitutional rights.”).

⁵⁴ H.R. REP. NO. 104-664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906.

⁵⁵ *Id.* at 7-10.

⁵⁶ *Id.* at 2 (quoting as the need for DOMA, “[I]f Hawaii (or some other State) recognizes same-sex ‘marriages,’ other States that do not permit homosexuals to marry would be confronted with the complicated issue of whether they are nonetheless obligated under the Full Faith and Credit Clause of the United States Constitution to give binding legal effect to such unions. With regard to federal law, a decision by one State to authorize same-sex ‘marriage’ would raise the issue of whether such couples are entitled to federal benefits that depend on marital status. H.R. 3396 anticipates these complicated questions by laying down clear rules to guide their resolution, and it does so in a manner that preserves each State’s ability to decide the underlying policy issue however it chooses.”).

⁵⁷ DOMA, Pub. L. No. 104-199, § 2(a), 110 Stat. 2419 (1996) (“[N]o State . . . shall be required to give effect to any public act, record, or judicial proceeding of

definition of marriage at the federal level as a union solely between one man and one woman.⁵⁸ In the context of immigration law, this legislation would prove detrimental.

II. THE IMMIGRATION BENEFITS OF MARRIAGE AND DOMA'S IMPACT ON SUCH BENEFITS

When posed with the question of why it is important for the government to recognize the validity of marriages, the first response that comes to the minds of most people is that recognition leads to permanent residence for foreign-born spouses of United States citizens and lawful permanent residents. While this conclusion is certainly true, immigration benefits extend even further, encompassing both those wishing to come to the United States permanently as well as those seeking to enter on a temporary basis.

A. DOMA's Impact on Immigrants

An "immigrant" is a person who seeks to enter the United States permanently.⁵⁹ Under current law, most foreign-born nationals immigrate to the United States on the basis of family reunification.⁶⁰ While United States immigration law is a quota-based system, the primary category of persons exempt from the quota is that of spouses of United States citizens (referred to by the law as "immediate relatives").⁶¹ Those who are subject to numerical limits include spouses of lawful permanent residents,

any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State.”).

⁵⁸ *Id.* § 3(a) (“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”).

⁵⁹ BLACK'S LAW DICTIONARY 817 (9th ed. 2009).

⁶⁰ Titshaw, *supra* note 44, at 546.

⁶¹ INA § 201(b)(2). The term “immediate relative” also encompasses children of U.S. citizens and parents of U.S. citizens if their U.S. citizen child is at least twenty-one years old.

spouses who are derivatives of primary beneficiaries of employment-based visa petitions, and spouses of applicants selected under the diversity visa program.⁶² For these individuals eligibility for lawful permanent residence in the United States is dependent upon the recognition of their marriage.

Section 3 of DOMA defines marriage as solely between one man and one woman for the purposes of federal benefits.⁶³ Unlike DOMA, the INA's definitions of "spouse" and "marriage" do not address same-sex relationships, despite the fact that Congress redrafted and amended the INA over a hundred times in the statute's history.⁶⁴ This would suggest that Congress intended to leave the terms undefined in the INA. Nevertheless, prior to the *Windsor* decision, the definition sealed by DOMA prevented same-sex spouses of United States citizens and lawful permanent residents to be recognized as beneficiaries of their spouses' petitions, even though they were lawfully married in a jurisdiction that recognized their marriage.

B. DOMA's Impact on Nonimmigrants

Marriage recognition also determines eligibility for a host of immigration benefits spanning well beyond the approval of spousal petitions for permanent residence.⁶⁵ For example, foreign-born nationals coming to the United States on a temporary basis are referred to as "nonimmigrants,"⁶⁶ and the law makes nonimmigrant

⁶² The annual quota for spouses and unmarried children of lawful permanent residents ranges from 226,000 to 480,000. INA § 201(c). This far exceeds the annual quota of 140,000 for those seeking to immigrate through the employment-based visa categories. INA § 201(d). It is also at least four times the annual quota of 55,000 for those seeking to immigrate through the diversity visa program. INA § 201(e).

⁶³ DOMA, Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996).

⁶⁴ Jessica Portmess, *Until the Plenary Power Do Us Part: Judicial Scrutiny of the Defense of Marriage Act in Immigration After Flores-Villar*, 61 AM. U. L. REV. 1825, 1845 (2012).

⁶⁵ See generally INA § 101(a)(15) (listing the various types of nonimmigrant, or temporary, visas).

⁶⁶ BLACK'S LAW DICTIONARY, *supra* note 59, at 48 (under *adjustment of status*).

visas available to their recognized spouses. There are a myriad of spousal nonimmigrant visa categories under the INA, all require marriage recognition. These categories include the following: spouse of an ambassador and other diplomat;⁶⁷ the spouse of a nonimmigrant treaty trader or investor;⁶⁸ the spouse of a foreign student pursuing a degree;⁶⁹ the spouse of a representative of a recognized foreign government to an international organization;⁷⁰ the spouse of a temporary professional worker;⁷¹ the spouse of a journalist or other representative of foreign informational media;⁷² the spouse of an exchange visitor or foreign medical graduate;⁷³ the fiancé(e) of a United States citizen;⁷⁴ the spouse of an intra-company transferee (manager, executive, or individual with specialized knowledge);⁷⁵ the spouse of a vocational or nonacademic student;⁷⁶ the spouse of a representative of a member state of NATO;⁷⁷ the spouse of an individual with extraordinary ability in the arts, sciences, business, or athletics;⁷⁸ the spouse of an internationally recognized artist or entertainer;⁷⁹ the spouse of a participant in an international cultural exchange program;⁸⁰ the spouse of a minister or religious worker;⁸¹ the spouse of an informant who supplies critical information related to a crime;⁸² the spouse of a person who is a victim of severe trafficking in

⁶⁷ INA § 101(a)(15)(A).

⁶⁸ INA § 101(a)(15)(E).

⁶⁹ INA § 101(a)(15)(F).

⁷⁰ INA § 101(a)(15)(G).

⁷¹ INA § 101(a)(15)(H).

⁷² INA § 101(a)(15)(I).

⁷³ INA § 101(a)(15)(J).

⁷⁴ INA § 101(a)(15)(K).

⁷⁵ INA § 101(a)(15)(L).

⁷⁶ INA § 101(a)(15)(M).

⁷⁷ INA § 101(a)(15)(N).

⁷⁸ INA § 101(a)(15)(O).

⁷⁹ INA § 101(a)(15)(P).

⁸⁰ INA § 101(a)(15)(Q).

⁸¹ INA § 101(a)(15)(R).

⁸² INA § 101(a)(15)(S).

persons;⁸³ the spouse of a victim of criminal activity;⁸⁴ and the spouse of a permanent resident awaiting availability of a permanent resident visa.⁸⁵ Qualifying foreign-born nationals whose marriages are recognized by the United States may have their spouses accompany them in any of the categories listed above for the duration of their length of admission. Furthermore, with many of the spousal nonimmigrant categories, the recognized spouse is authorized to work in the United States.⁸⁶ In the nonimmigrant context, marriage recognition is essential for a person to be eligible to accompany his or her spouse to the United States instead of being separated for years.

Prior to the *Windsor* decision that struck down Section 3 of DOMA, there were thirteen countries in the world that recognized same-sex marriage.⁸⁷ Additionally, Mexico had regional provisions that allowed same-sex couples to marry, and still does to this day.⁸⁸ One often unreported impact of DOMA on immigration benefits concerns foreign-born nationals lawfully married in one of these countries, yet whose same-sex spouses were ineligible for entry in the nonimmigrant visa categories mentioned above, despite the lawful recognition of their marriage abroad. As a matter of public policy, these categories are essential to the United States maintaining professional, international, and diplomatic relations by increasing global interaction and trade. Nevertheless, nonimmigrants married to same-sex spouses have had to choose between coming to the United States and leaving their spouses behind for what could amount to years, or abandoning the

⁸³ INA § 101(a)(15)(T).

⁸⁴ INA § 101(a)(15)(U).

⁸⁵ INA § 101(a)(15)(V).

⁸⁶ See generally 8 C.F.R. § 274a.12 (2011) (listing the classes of aliens authorized to work in the United States).

⁸⁷ These countries included Netherlands, Belgium, Spain, Canada, South Africa, Norway, Sweden, Portugal, Iceland, Argentina, Denmark, France, and Brazil. *The Freedom to Marry Internationally*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/landscape/entry/c/international> (last visited Sept. 2, 2013). Since the *Windsor* decision, Uruguay, New Zealand, and Great Britain have been added to that list. *Id.*

⁸⁸ *Id.*

opportunity to work or study in the United States altogether.

C. The Repeal of Section 3 of DOMA

On June 26, 2013, the Supreme Court held in *Windsor* that Section 3 of DOMA was unconstitutional.⁸⁹ Immediately following the Court's ruling the federal government responded. First Secretary of Homeland Security Janet Napolitano released a statement directing USCIS to review immigrant visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse.⁹⁰ That statement was followed up with the Secretary's answers to Frequently Asked Questions, among which confirmed that the ruling also meant that United States citizens could file nonimmigrant petitions on behalf of foreign-born fiancés/fiancées; permanent residents who are the same-sex spouse of a United States citizen would be eligible for expedited naturalization; and waivers formerly reserved only for opposite-sex spouses of United States citizens or lawful permanent residents would be eligible for same-sex spouses as well.⁹¹ Shortly thereafter the Board of Immigration Appeals held that, in light of the Supreme Court's decision, Section 3 of DOMA is no longer "an impediment to the recognition of lawful same-sex marriages and spouses if the marriage is valid under the laws of the State where it was celebrated."⁹² This was followed by United States Secretary of State John Kerry's cable providing guidance to embassies around the world on how to issue immigrant and nonimmigrant visas involving same-sex couples.⁹³

⁸⁹ *Windsor*, 133 S. Ct. 2675.

⁹⁰ Statement of Janet Napolitano, *supra* note 12.

⁹¹ Statement of Janet Napolitano, Department of Homeland Security (DHS) Secretary, reported in "Same-Sex Marriages," *reprinted in* 90 INTERPRETER RELEASES at 1611 (Aug. 5, 2013).

⁹² *Matter of Zeleniak*, 26 I. & N. Dec. 158, 159 (BIA 2013).

⁹³ Cable of John Kerry, "Next Step on DOMA: Guidance for Posts," D.O.S. Mem. 00112850 (Aug. 13, 2013), http://travel.state.gov/pdf/Next_Steps_On_DOMA_Guidance_For_Posts_August_2013.pdf (last visited Sept. 23, 2013).

Despite the administration's swift change in policy and the Court's ruling, two side effects of DOMA remain. The first is the creation of statutes that define marriage as solely between one man and one woman. The second is the related phenomenon of state constitutional amendments prohibiting same-sex marriages. Twenty-five states have both passed legislation and amended their constitutions to ban same-sex marriage.⁹⁴ An additional four states have passed legislation without amending their constitutions,⁹⁵ while four others have amended their constitutions without passing legislation.⁹⁶ This matters in the immigration context because, although the federal government has exclusive control over United States immigration law, policy, regulation, and enforcement,⁹⁷ states often play a role in the immigration process.⁹⁸

III. THE USCIS'S TRADITIONAL APPROACH TO RECOGNIZING MARRIAGE VALIDITY

In deciding *Adams v. Howerton*, the Ninth Circuit established a two-prong test to determine the validity of a marriage.⁹⁹ Under the *Adams* test, the Court reasoned that the marriage must first be valid under state law.¹⁰⁰ If it is, then an analysis must be done to determine that the marriage is also valid

⁹⁴ These states include Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin. *State Level Marriage Equality*, MARRIAGE EQUALITY USA, <http://www.marriageequality.org/sites/default/files/National%20Map%20%2318%20%2819-Dec-2013%29.pdf> (last visited Dec. 19, 2013).

⁹⁵ These states include Indiana, Pennsylvania, West Virginia, and Wyoming. *Id.*

⁹⁶ These states include Colorado, Nebraska, Nevada, and Oregon. *Id.*

⁹⁷ See *DeCanas v. Bica*, 424 U.S. 351 (1976); *Toll v. Moreno*, 458 U.S. 1 (1982) (*superseded by statute* as stated in *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968 (2011)).

⁹⁸ See *infra* Section III.

⁹⁹ *Adams*, 673 F.2d at 1038.

¹⁰⁰ *Id.*

under the INA.¹⁰¹ In practice, however, the Ninth Circuit's test is problematic for two reasons. First, the INA does not define the word "spouse."¹⁰² Second, the test is too general to be applicable in all situations. For example, the first prong of the test fails because it does not take into account marriages performed in other countries, nor does it acknowledge that a marriage recognized in one state may not be recognized in another.¹⁰³ The second prong is also flawed because it takes the position that federal law determines marital status, which is exactly what the Supreme Court found unconstitutional when it rendered its decision in *Windsor*.¹⁰⁴ In *Adams*, the Court looked to other sections of the immigration statute that had nothing to do with marriage – specifically, the homosexuality ground of exclusion – and reasoned that, because Congress excluded homosexuals from entering the United States, a marriage involving homosexuals could not possibly be valid under the INA.¹⁰⁵ Such a decision is not possible today, since homosexuality is no longer a ground for exclusion.

Although *Adams* has not been overruled, it should not control in determining marriage validity.¹⁰⁶ Twenty years after the *Adams* decision, the Ninth Circuit revisited the issue of marriage

¹⁰¹ *Id.*

¹⁰² *In re Lovo-Lara*, 23 I. & N. Dec. 746, 748 (BIA 2005).

¹⁰³ *Titshaw*, *supra* note 44, at 597.

¹⁰⁴ Ironically, prior to DOMA, a federal court found that the BIA did not act rationally by relying exclusively on state law to define marriage when it upheld the denial of an application for cancellation of deportation of a Canadian-born applicant who claimed to be a common law spouse even though California did not recognize common law marriages. *Kahn v. INS*, 20 F.3d 960, 962 (9th Cir. 1994). In his dissent, Judge Kozinski expressed outrage at the notion of a national definition for marriage (quoting "[b]y purporting to establish a federal law of domestic relations, the majority boldly goes where no federal court has gone before."). *Id.* at 967.

¹⁰⁵ *Adams*, 673 F.2d at 1040-41 ("We think it unlikely that Congress intended to give homosexual spouses preferential admission treatment under section 201(b) of the Act when, in the very same amendments adding that section, it mandated their exclusion.").

¹⁰⁶ *Titshaw*, *supra* note 44, at 595-96.

validity in *Agyeman v. INS*.¹⁰⁷ In a footnote the Court set forth a more reasonable three-prong approach.¹⁰⁸ It ruled that for a marriage to confer immigration benefits, it must be legally valid at the place of celebration; be bona fide; and not violate public policy.¹⁰⁹ This position is consistent with the approach followed by the USICS when adjudicating petitions.¹¹⁰

A. Marriage Must Be Valid at the Place of Celebration

The first prong of the test referenced in the *Agyeman* decision reinforces the general rule that a marriage will be recognized if it was “entered into in accordance with the laws of the place where the marriage took place.”¹¹¹ This statutory language is also supported by case law.¹¹²

¹⁰⁷ *Agyeman v. INS*, 296 F.3d 871 (9th Cir. 2002).

¹⁰⁸ *Id.* at 879 n.2. *See also* Titshaw, *supra* note 44, at 550.

¹⁰⁹ *Id.*

¹¹⁰ *See* Adjudicators’ Field Manual ch. 21.3(a)(2)(B) (“As a general rule, the validity of a marriage is judged by the law of the place of celebration. If the marriage is voidable but no court action to void the marriage has taken place, it will be considered valid for immigration purposes. However, if a marriage is valid in the country where celebrated but considered offensive to public policy of the United States, it will not be recognized as valid for immigration purposes. Plural marriages fall within this category.”).

¹¹¹ INA § 216(d)(1)(A)(i)(I).

¹¹² *See* *U.S. v. Sacco*, 428 F.2d 264, 268 (“The general rule is that the validity of a marriage is determined by the law of the state where it took place.”). *See also* *Loughran v. Loughran*, 292 U.S. 223 (1934); *Matter of Gamero*, 14 I. & N. Dec. 674 (BIA 1974); *Matter of Levine*, 13 I. & N. Dec. 244 (BIA 1969); *Matter of Luna*, 18 I. & N. Dec. 385 (BIA 1983); *Matter of Bautista*, 16 I. & N. Dec. 602 (BIA 1978); *Matter of Arenas*, 15 I. & N. Dec. 174 (BIA 1975); *Matter of P-*, 4 I. & N. Dec. 610 (BIA, Acting A.G. 1952); *Matter of Ma*, 15 I. & N. Dec. 70 (BIA 1974) (Where one of the parties to a marriage has a prior divorce, the court will look to the law of the state where the subsequent marriage was celebrated to determine whether or not that state would recognize the validity of the divorce).

B. Marriage Must Be Bona Fide

The second prong of the test requires that the marriage be bona fide. A marriage is not bona fide if the parties do not intend to live together as husband and wife and therefore are not recognized for immigration purposes.¹¹³ Evidence to establish the bona fides of a marriage can include proof that the beneficiary has been listed as the petitioner's spouse on insurance policies, property leases, income tax forms, or bank accounts; as well as testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences.¹¹⁴

¹¹³ *Adams*, 673 F.2d at 1040. See also *Bark v. INS*, 511 F.2d 1200, 1201 (9th Cir. 1979) (“A marriage is a sham if the bride and groom did not intend to establish a life together at the time they were married.”); *Lutwak v. United States*, 344 S. Ct. 604, 611 (1953) (“Congress did not intend to provide aliens with an easy means of circumventing the quota system by fake marriages in which neither of the parties ever intended to enter into the marital relationship; that petitioners so believed is evidenced by their care in concealing from the immigration authorities that the ostensible husbands and wives were to separate immediately after their entry into this country and were never to live together as husband and wife. The common understanding of a marriage, which Congress must have had in mind when it made provision for ‘alien spouses’ in the War Brides Act, is that the two parties have undertaken to establish a life together and assume certain duties and obligations.”); *Matter of Laureano*, 19 I. & N. Dec. 1, 1 (BIA 1983) (“A marriage entered into for the primary purpose of circumventing the immigration laws, commonly referred to as a fraudulent or sham marriage, is not recognized for the purpose of obtaining immigration benefits.”).

¹¹⁴ See *Matter of Phillis*, 15 I. & N. Dec. 385, 387 (BIA 1975). See also *Matter of Soriano*, 19 I. & N. Dec. 764, 766 (BIA 1988); *Matter of Laureano*, 19 I. & N. Dec. 1, 1 (BIA 1983) (“In determining whether a marriage is fraudulent for immigration purposes, the conduct of the parties after the marriage is relevant as to their intent at the time of marriage; evidence to establish intent may take many forms, including, but not limited to, proof that the beneficiary has been listed as the petitioner's spouse on insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences.”); *Agyeman*, 296 F.3d at 882-83 (“Evidence of the marriage's bona fides may include: jointly-filed tax returns; shared bank accounts or credit cards; insurance policies covering both spouses; property leases or mortgages in both names; documents reflecting joint ownership of a car or other property; medical records showing the other spouse as

C. Marriage Must Not Violate Public Policy

The final prong of the three part test requires that the marriage not violate public policy.¹¹⁵ There are two types of public policy considerations when it comes to marriage in the immigration context: federal public policy, and state public policy.

One accomplishment of the now-defunct Section 3 of DOMA allowed the USCIS to deny petitions filed by United States citizens and permanent residents on behalf of their lawful same-sex spouses on the grounds that the marriage violated federal public policy, since federal law defined marriage as solely between one man and one woman.¹¹⁶ But even before DOMA was around to accomplish this goal, the courts have long held that federal public policy is a consideration when determining marriage validity, and that a marriage in violation of federal public policy is not a valid marriage.¹¹⁷ One such example of marriage that is a violation of

the person to contact; telephone bills showing frequent communication between the spouses; and testimony or other evidence regarding the couple's courtship, wedding ceremony, honeymoon, correspondences, and shared experiences.”).

¹¹⁵ See *Hi v. Weedin*, 21 F.2d 801, 801-802 (9th Cir. 2002) (“An exception to the general rule, however, is ordinarily made in the case of marriages repugnant to the public policy of the domicile of the parties, in respect of polygamy, incest, or miscegenation, or otherwise contrary to its positive laws.”). See also *Matter of H*, 9 I. & N. Dec. 640, 641 (BIA 1962) (“An exception to the general rule, however, is ordinarily made in the case of marriages repugnant to the public policy of the domicile of the parties, in respect to polygamy, incest, or miscegenation, or otherwise contrary to its positive laws. Such cases involve marriages which are repugnant to the public policy of the domicile of the parties or to the laws of nature as generally recognized in Christian countries.”).

¹¹⁶ DOMA, Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996).

¹¹⁷ See *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (“[F]rom the earliest history of England polygamy has been treated as an offence against society.”). See also *In re Lovo-Lara*, 23 I. & N. Dec. 746, 753 (BIA 2005) (reversing the denial of a petition filed by a transgender U.S. citizen on behalf of her foreign-born spouse, ruling that the decision was based on an interpretation of INA 201(b) and not by finding a general federal public policy against the recognition of such marriages).

federal public policy is plural marriages.¹¹⁸ Another is fraudulent marriages.

Although the general rule is that a marriage that is valid where it was celebrated is valid everywhere, principles of conflict of laws allow for an exception if the marriage violates the “strong public policy” of another state.¹¹⁹ Many state courts have failed to recognize the validity of a marriage performed elsewhere on the grounds that the marriage violated that state’s public policy where couples are domiciled in that state.¹²⁰ On occasion, the federal courts and the Board of Immigration Appeals (BIA) have also recognized these exceptions for immigration purposes.¹²¹ Typically, these cases have fallen into three main categories: (1) marriages between biracial spouses; (2) marriages between those who are related by blood, and (3) marriages involving a spouse who has not yet reached that state’s age of consent.

There have been two BIA cases questioning the validity of marriages between biracial spouses in the context of immigration benefits.¹²² In the 1949 case of *Matter of D –*, the BIA failed to recognize the validity of a marriage between a Norwegian-born immigrant and his United States citizen wife of African descent because the two were married in Canada for the purpose of circumventing the anti-miscegenation laws of North Dakota, which made it a crime for African-Americans and whites to cohabit or to get married in that state.¹²³ In this case the Court found no violation of federal public policy, but a strong violation of state public policy.

¹¹⁸ See *Matter of Darwish*, 14 I. & N. Dec. 307, 308 (BIA 1973) (dismissing an appeal of a petition previously denied on the ground that plural marriages offend the public policy of the United States, even though the petitioner’s second marriage may be valid under Jordanian law).

¹¹⁹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971). See also *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1303-04 (M.D. Fla. 2005) (“Florida is not required to recognize or apply Massachusetts’ same-sex marriage law because it clearly conflicts with Florida’s legitimate public policy of opposing same-sex marriage.”); *Portmess*, *supra* note 64, at 1846.

¹²⁰ *Titshaw*, *supra* note 44, at 565.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Matter of D –*, 3 I. & N. Dec. 480, 481-82 (BIA 1949).

The second case concerning the validity of mixed racial marriage in the immigration context involved a Filipino man who was married in Washington, D.C.¹²⁴ In that case the BIA recognized the validity of the marriage to the detriment of the petitioner, who was later found to be of bad moral character because of an adulterous relationship with the woman he later married. The petitioner argued that his first marriage was not valid because, after marrying in Washington, D.C., the couple moved to Maryland, which had a criminal statute against marriage between a “white person . . . and a member of the Malay race.”¹²⁵ But because the state did not have a criminal cohabitation statute, the Court ruled that the marriage was not in violation of state public policy and was therefore valid.¹²⁶ As with *Matter of D* –, for immigration purposes, the violation of state public policy was not determined by the biracial marriage as much as it was determined by violation of a criminal statute of the state of domicile.

Marriages of consanguinity traditionally involve marriages between uncles and nieces, aunts and nephews, and cousins. In the immigration context, such marriages are considered valid if they do not violate the strong public policy expressed in the criminal statute of the couple’s state of domicile.¹²⁷ The BIA has held that where a state has a criminal statute against consanguinity or against cohabitation of spouses who evade the state’s laws by marrying in another state that recognizes marriages of consanguinity, the marriage will not be valid for immigration purposes.¹²⁸

¹²⁴ *Matter of C* –, 7 I. & N. Dec. 768 (BIA 1956).

¹²⁵ *Id.* at 110.

¹²⁶ *Id.* at 113.

¹²⁷ *Matter of T* –, 8 I. & N. Dec. 529, 531 (BIA 1960) (“It is to be noted that Congress has not expressed any public policy excluding a spouse on the ground of consanguinity and that immigration laws are silent on this point; recourse must be had to state law for expressions of such public policy.”). *See also* Titshaw, *supra* note 44, at 569.

¹²⁸ *Matter of Zappia*, 12 I. & N. Dec. 439 (BIA 1967) (refusing to recognize a marriage between first cousins in South Carolina because the couple was domiciled in Wisconsin, where such marriages were void and subject to criminal sanctions). *See also* Angelo Bartolomeo, *Department of Justice Not Defending*

Concerning marriages involving a spouse that has not yet reached the age of consent, the BIA takes a similar position as it does with marriages of consanguinity: if the marriage is recognized in both the state of celebration and the state of domicile, it will be recognized by the BIA.¹²⁹ For example, in *Matter of Agoudemos*, the BIA held that the marriage of a sixteen year old girl was valid for immigration purposes because she was of the age of consent for both the state where the marriage was celebrated and the state where the couple was domiciled.¹³⁰

The state public policy cases, referenced above, all have a common thread: the test used to determine if the marriage violated state public policy was whether or not the state of domicile had a criminal statute forbidding the marriage, and if the parties to the marriage violated that statute. Given the logic of the *Agoudemos* Court, if same-sex marriages violated a criminal statute, such marriages would arguably violate the state public policy.

IV. WHY THE TRADITIONAL APPROACH TO MARRIAGE VALIDITY CAN BE WORRISOME FOR MARRIED SAME-GENDERED COUPLES SEEKING IMMIGRATION BENEFITS IN A POST-DOMA WORLD

On July 8, 2013, Secretary of Homeland Security, Janet Napolitano, stated that family-based immigrant petitions filed on behalf of same-sex spouses would be reviewed in the same manner as those petitions filed on behalf of heterosexual spouses.¹³¹ Since issuing that statement, the USCIS has provided guidance to same-gendered binational couples on how to apply for immigration benefits through marriage.¹³² In adjudicating such petitions, the

the Defense of Marriage Act: Politically Significant, Legally Irrelevant?, 62 DEPAUL L. REV. 857, 861 (2013).

¹²⁹ See *Matter of Agoudemos*, 10 I. & N. Dec. 444, 445-46 (BIA 1964).

¹³⁰ *Id.*

¹³¹ Statement by Janet Napolitano, *supra* note 12.

¹³² USCIS, *Same Sex Marriages*, <http://www.uscis.gov/portal/site/uscis/>

USCIS should follow the three-prong approach to marriage validity described in Part III, in lieu of the two-prong approach referenced in *Adams*. Yet even with the more favorable three-prong test, those seeking immigration benefits under this analysis would be best advised to proceed with caution. To understand why such caution is warranted, it is worth considering how each prong of the test could be applied to married same-gendered couples seeking immigration benefits.

A. Same-Sex Marriages Must Be Valid at the Place of Celebration

The first requirement is that the marriage must be valid in the place of celebration. This is true with marriage in all immigration cases, and same-sex marriages should not be treated any differently. If same-sex marriage is recognized in the foreign country, or state, where it took place, then this should satisfy the first prong of the test. However, many states and countries recognize civil unions, but not same-sex marriage. The USCIS does not recognize civil unions for immigration purposes.

B. Same Sex Marriage Must Be Bona Fide

For a marriage to be bona fide, it means it must be made in good faith, and without fraud or deceit.¹³³ For married, same-gendered couples, this may be challenging. It is not uncommon for same-sex couples to include a person who was previously married to someone of the opposite gender, and there are many valid reasons why this might be. Perhaps that person is bisexual, or was married before becoming aware of his/her own sexual orientation, or did not fully accept their orientation, or perhaps that person was

menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=2543215c310af310VgnVCM10000082ca60aRCRD&vgnextchannel=2543215c310af310VgnVCM10000082ca60aRCRD (last visited Sept. 29, 2013).

¹³³ BLACK'S LAW DICTIONARY, *supra* note 59, at 199.

drawn to marriage by strong religious beliefs. In many countries, including some where homosexuality is illegal, arranged marriages are common and carry social status for the individuals. In such countries, it would go against cultural and societal norms for individuals to not marry. Given this reality, married same-gendered couples should be cautious of an immigration officer who could conclude that either the prior marriage was fraudulent, or the current marriage is fraudulent. In either case, the situation is likely to raise the bar in proving the bona fides of the marriage.

On a related note, homosexuals from countries that criminalize homosexual activity should be cautious when answering questions related to criminal grounds of exclusion. For example, one question asks, “[ha]ve you EVER, in or outside the United States . . . knowingly committed any crime of moral turpitude . . . for which you have not been arrested?”¹³⁴ Although sexual orientation has been taken off the list of immigration exclusions, criminal activity has not.

C. Same Sex Marriage Must Not Violate Public Policy

In determining if same sex marriage violates public policy, we first look to federal public policy arguments and then to state public policy arguments.

Federal public policy objections to heterosexual marriage have traditionally been rare.¹³⁵ The same is not true, however, for same-sex marriages.¹³⁶ For seventeen years, from 1996 until the June 2013, Section 3 of DOMA provided a federal public policy objection to same-sex marriage. But even with the repeal of Section 3, there are still federal public policy concerns that must be taken into consideration when determining the validity of same-sex

¹³⁴ USCIS Form I-485, Application to Register Permanent Residence or Adjust Status, 3, <http://www.uscis.gov/files/form/i-485.pdf> (last visited Sept. 29, 2013).

¹³⁵ Titshaw, *supra* note 44, at 602.

¹³⁶ See DOMA, Pub. L. No. 104-199, §§ 1-3, 110 Stat. 2419 (1996). See also *Windsor*, 133 S. Ct. 2675; *Adams*, 673 F.2d 1036; Joyce Murdoch & Deb Price, *supra* note 42; *Matter of Zeleniak*, 26 I. & N. Dec. 158, 159 (BIA 2013).

marriage for immigration purposes. To fully understand these concerns, it helps to look at what the Supreme Court decided in *Windsor*.

In *Windsor* the Court did not rule that the federal government must recognize all same-sex marriages; it ruled only that Section 3 of DOMA, which provides a federal definition for marriage, is unconstitutional because it violated the Due Process Clause of the Constitution.¹³⁷ Despite its ruling, the Court upheld Congress's power to enact federal laws that bear on marital rights to further federal public policy. Consider the following statement from the opinion:

By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States. Yet it is further established that Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges. Just this Term the Court upheld the authority of the Congress to pre-empt state laws, allowing a former spouse to retain life insurance proceeds under a federal program that gave her priority, because of formal beneficiary designation rules, over the wife by a second marriage who survived the husband . . . This is one example of the general principle that when the Federal Government acts in the exercise of its own proper authority, it has a wide choice of the mechanisms and means to adopt . . . Congress has the power both to ensure efficiency in the administration of its programs and to choose what larger goals and policies to pursue. Other precedents involving congressional statutes which affect marriages and family status further illustrate this point. In addressing the interaction of state domestic relations and federal immigration law Congress determined that marriages “entered into for

¹³⁷ See *Windsor*, 133 S. Ct. at 2696.

the purpose of procuring an alien's admission [to the United States] as an immigrant" will not qualify the noncitizen for that status, even if the noncitizen's marriage is valid and proper for state-law purposes. . . . And in establishing income-based criteria for Social Security benefits, Congress decided that although state law would determine in general who qualifies as an applicant's spouse, common-law marriages also should be recognized, regardless of any particular State's view on these relationships.¹³⁸

Even though the Court recognized the "dignity" of marriage equality,¹³⁹ it did not prohibit a federal regulation of marriage in certain circumstances. Instead, it ruled there are examples that "establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy."¹⁴⁰ The problem with DOMA was that it had simply gone beyond its reach of what was acceptable.¹⁴¹ Furthermore, although the Court did not address Congress's specific authority to regulate immigration benefits for same-sex spouses, it did use the INA as an example of permissible congressional statutes that affect marriages to illustrate the notion that Congress has the power to "ensure efficiency in the administration of its programs and to choose what larger goals and policies to pursue."¹⁴² This wording suggests that a future Congressional attempt to define marriage in certain contexts, including immigration, would not necessarily be deemed unconstitutional.

Even more curious is the language at the very end of the *Windsor* decision. Justice Kennedy writes that DOMA injures, "those whom the State, by its marriage laws, sought to protect in personhood and dignity."¹⁴³ When read in the context of immigration law, this language takes on special meaning because

¹³⁸ *Id.* at 2689-90.

¹³⁹ *Id.* at 2696.

¹⁴⁰ *Id.* at 2690.

¹⁴¹ *Id.*

¹⁴² *Id.* at 2696.

¹⁴³ *Windsor*, 133 S. Ct. at 2696.

states that recognize same sex marriage cannot possibly “protect” same-gendered binational spouses who wish to seek immigration benefits, as immigration is a federal question and one under the exclusive control of Congress. Such a reading lends support to a Congressional definition of marriage for immigration purposes.

As for state public policy objections, there is much more need to exercise caution. The *Windsor* decision left intact Section 2 of DOMA, which says no state shall be required to give effect to same-sex marriages recognized in other states.¹⁴⁴ In other words, Section 2 of DOMA still allows states to “formulate their own public policy regarding the legal recognition of same sex unions, free from any federal constitutional implications.”¹⁴⁵ But in many ways Section 2 of DOMA is redundant, since states have always had the ability to choose their own laws over competing laws of another state – provided the choice is neither arbitrary nor unfair – because full faith and credit was never intended to compel states to recognize marriages performed in other states.¹⁴⁶ When a state chooses to recognize the marriage laws of another state, it does so under the principle of comity – respect for actions of other states. But comity is a common law principle, and not a constitutional mandate, and despite this principle, states maintain the ability to object to those marriages they strongly oppose.¹⁴⁷ Common exceptions to the principle of comity are “natural law exceptions,” which include marriages that are considered universally offensive, such as polygamous and incestuous marriages; and “positive law exceptions,” which include marriages that are prohibited by the legislature, including those marriages by that state’s own residents who were married in another jurisdiction for the sole purpose of

¹⁴⁴ DOMA, Pub. L. No. 104-199, § 2, 110 Stat. 2419 (1996).

¹⁴⁵ Matthew J. Hrutkay, “Give Me Your Tired, Your Poor, Your Huddled Masses,” *But Not Your Homosexual Partners: International Solutions to America’s Same Sex Immigration Dilemma*, 18 CARDOZO J. INT’L & COMP. L. 89, 101 (2010) (citing H.R. REP. NO. 104-664, *supra* note 54).

¹⁴⁶ Joanna L. Grossman, *Defense of Marriage Act, Will You Please Go Now!*, 2012 CARDOZO L. REV. DE NOVO 155, 161 (2012).

¹⁴⁷ *Id.*

evading their state's marriage restriction laws.¹⁴⁸ Same-sex marriage, which is not recognized by all fifty states, proves that these exceptions to the common law principle of comity are still alive today.

Even though these exceptions to comity would still exist despite Section 2 of DOMA, this does not mean that Section 2 does not serve a purpose. Section 2 adds a new section to the Full Faith and Credit Act that specifically provides that states need not grant full faith and credit to same-sex marriages performed in other states that may choose to celebrate them.¹⁴⁹ Since the enactment of DOMA, nearly sixty percent (60%) of states have passed "mini-DOMAs" – statutes and constitutional amendments banning the celebration and/or the recognition of same-sex marriages.¹⁵⁰ It is these "mini-DOMAs" that could be problematic for same-gendered binational spouses seeking immigration benefits.

i. State Statutes Banning Same-Sex Marriage

At the risk of oversimplifying the legislative process, citizens of a state elect their legislators, and those legislators make and pass the laws in the interest of those citizens. This is how thirty-one states have successfully passed statutes banning same-sex marriage.¹⁵¹ But what is unclear is what those statutes have to say in order to express a sufficiently strong public policy. We know that when the BIA has refused to recognize marriage on state public policy grounds, those marriages violated criminal laws of the state of domicile.¹⁵² This would suggest, as one scholar has noted, that since the Supreme Court has held that sexual intimacy and cohabitation cannot be constitutionally criminalized, no state could enforce a same-sex criminal statute that rises to the "standard traditionally required to express a sufficiently strong state public

¹⁴⁸ *Id.* at 161-62.

¹⁴⁹ DOMA, Pub. L. No. 104-199, § 2, 110 Stat. 2419 (1996) (amending 28 U.S.C. § 1738).

¹⁵⁰ MARRIAGE EQUALITY USA, *supra* note 94.

¹⁵¹ *Id.*

¹⁵² *See supra* section III(c).

policy.”¹⁵³ But such an argument presumes that only criminal statutes determine public policy, and this is not true. Perhaps the best example to illustrate this is that of common-law marriage, since common-law marriage, like same-sex marriage, is recognized in some states, but not in others, and those states that prohibit it have no criminal statutes against it.

A common-law marriage is defined as “one that takes legal effect without license or ceremony.”¹⁵⁴ Common-law marriages have four main elements: capacity to enter into the contract of marriage, agreement to that contract, cohabitation, and holding out.¹⁵⁵ Of these, the most important element is holding out.¹⁵⁶ Common-law marriage can only be established if the couple hold themselves out to themselves and to others as a married couple.¹⁵⁷ The number of states where common law marriages can be contracted has substantially reduced over the years, and currently only nine states and the District of Columbia allow common law marriages to be contracted within its borders.¹⁵⁸

In the case of common-law marriage, the public policy concern is not whether the act violates a criminal statute, but if the marriage is declared void by that state. Void marriages do not comport with legal requirements; they are invalid at inception, and, unlike voidable marriages, cannot be made valid.¹⁵⁹ State courts have held that void marriages violate public policy, and some have used common-law marriages to illustrate that point. In the case of *Laikola v. Engineered Concrete*, the Minnesota Supreme Court held

¹⁵³ Titshaw, *supra* note 44, at 604.

¹⁵⁴ BLACK'S LAW DICTIONARY, *supra* note 59, at 1060.

¹⁵⁵ Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 712 (1996).

¹⁵⁶ *Id.* at 713.

¹⁵⁷ *Id.*

¹⁵⁸ These states include Alabama, Colorado, Kansas, Rhode Island, South Carolina, Iowa, Montana, Utah, and Texas. Common-Law Marriage in the United States, WIKIPEDIA, http://en.wikipedia.org/wiki/Common-law_marriage_in_the_United_States (last visited Sept. 30, 2013).

¹⁵⁹ Angela M. Bean, “Validity of Marriages for Immigration Eligibility,” *Immigration & Nationality Law Handbook*, 171, 175-76 (AILA 2000-01 ed.).

that common-law marriages, which are not subject to criminal statutes but are void in Minnesota, cannot be consummated by Minnesota residents who visit another state that allows common-law marriages.¹⁶⁰ The Court held that the obvious implication is that marriages declared void by a state legislature “demonstrate a strong public policy.”¹⁶¹ The Court emphasized that its opinion was based on the fact that common-law marriages in Minnesota are “void, not merely prohibited.”¹⁶²

The principle that a common-law marriage considered by a state to be void violates that state’s public policy has also been affirmed by the United States Supreme Court. In the case of *Meister v. Moore*, the Court held that “in the absence of any provision declaring marriages not celebrated in a prescribed manner . . . absolutely void, it is held that all marriages regularly made according to the common law are valid and binding.”¹⁶³ Because the Supreme Court has recognized that void provisions under state law are permissible, same-sex marriages would arguably violate the public policy of those states with such provisions in their statutes. *Meister* is still good law, and federal courts have since had a long history of deferring to state law for marital status determinations, even when there is inconsistency among states as to what constitutes a marriage.¹⁶⁴

When it comes to determining eligibility for immigration benefits, the same principle applies. Common-law marriages recognized in the state where celebrated will be accepted for

¹⁶⁰ *Laikola v. Engineered Concrete*, 277 N.W.2d 653 (Minn. 1979).

¹⁶¹ *Id.* at 656.

¹⁶² *Id.*

¹⁶³ *Meister v. Moore*, 96 U.S. 76, 80 (1877).

¹⁶⁴ *See Commonwealth v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234, 237-38 (D. Mass 2010) (“Several issues relevant to the formation and dissolution of marriages have served historically as the subject of controversy, including common law marriage, divorces, and restrictions regarding race, ‘hygiene,’ and age at marriage. Despite contentious debate on all of these subjects, however, the federal government consistently deferred to state marital status determinations.”).

immigration purposes.¹⁶⁵ However, whereas voidable marriages are recognized only if there is not a court order declaring the marriage void,¹⁶⁶ void marriages are not marriages, and, therefore, not valid for immigration purposes.¹⁶⁷ In adjudicating immigration petitions, examiners refer to the Adjudicator's Field Manual, which describes itself as a "comprehensive 'how to' manual detailing policies and procedures for all aspects of the Adjudications Program."¹⁶⁸ The manual reinforces the notion that if a marriage is voidable, but not void, it will be considered valid for immigration purposes.¹⁶⁹ Similarly, the Foreign Affairs Manual, which sets forth the basic organizational directives of the United States Department of State, including procedures to follow when issuing visas abroad, offers the same guidance to consulate officers.¹⁷⁰ Following this line of reasoning, the BIA has refused to recognize a marriage that is void in the state of domicile even if it was recognized in the state where it was celebrated.¹⁷¹

The conclusion that can be drawn here is that the state public policy concern for marriage recognition for immigration benefits is not solely based on whether the marriage in question

¹⁶⁵ See *Matter of Megalogenis*, 10 I. & N. Dec. 609 (BIA 1964). See also *Matter of A—E—*, 4 I. & N. Dec. 405 (BIA 1951).

¹⁶⁶ Olsi Vrapic, *Family-Sponsored Immigration*, FORMS & FUNDAMENTALS, 379, 388 (AILA 2011-12 ed.).

¹⁶⁷ Bean, *supra* note 159, at 175.

¹⁶⁸ *Adjudicator's Field Manual* [hereinafter AFM] ch. 1.1.

¹⁶⁹ *Id.* at 21.3(a)(2)(B).

¹⁷⁰ 9 *Foreign Affairs Manual* [hereinafter FAM] 40.1 n.1.1 ("[m]arriages considered to be void under State law as contrary to public policy . . . or which Federal law . . . determines does not meet the Federal definition of a marriage, cannot be recognized . . .").

¹⁷¹ See *Matter of Zappia*, 12 I. & N. Dec. 439 (BIA 1967) (refusing to recognize a marriage between first cousins in South Carolina because the couple was domiciled in Wisconsin, where such marriages were void and subject to criminal sanctions). *But see* *Matter of Hirabayashi*, 10 I. & N. Dec. 722 (BIA 1964) (recognizing a marriage between first cousins in Colorado, although the state of domicile, Illinois, considered such marriages void for reasons of incest. The court relied on an Illinois statute in effect before the marriage took place that removed cohabitation as a crime of incest, in fact nullifying the purpose for considering the marriage void).

violates a criminal statute, but also takes into consideration whether the marriage is declared void – and not merely prohibited – by the domicile state. Applying that principle to same-sex marriage, there is a state public policy argument that needs to be considered. Of the thirty-one states that have passed legislation banning same-sex marriage, nearly half of them specifically state in their statutes that same-sex marriages are “void.”¹⁷² In addition, twelve states have language in their statutes that specifically say that same-sex marriage violates that state’s public policy.¹⁷³ With such language, there is the possibility that the USCIS or the BIA could reverse from its current position to hold that same-sex marriages that are recognized in the location where they are celebrated, but void by law in the state of domicile, are not valid for immigration purposes because such marriages violate the public policy of the domicile state.

ii. State Constitutions Banning Same-Sex Marriage

Even more problematic for same-gendered spouses seeking immigration benefits are those states that have amended their constitutions to prohibit recognition of same-sex marriages, since amending the constitution is arguably the strongest way for states to formulate their own public policy. One of the main functions of a state’s constitution, after all, is to “create the state’s ‘organic law’; that is, specifying the general, fundamental law to which the state’s statutes must conform.”¹⁷⁴ If citizens are unhappy with the content

¹⁷² These states include Alaska, Arizona, Arkansas, Georgia, Indiana, Kansas, Kentucky, Mississippi, Ohio, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, and Wisconsin. Same Sex Marriage Laws in the United States by State, WIKIPEDIA, http://en.wikipedia.org/wiki/Same-sex_marriage_law_in_the_United_States_by_state (last visited Sept. 23, 2013).

¹⁷³ These states include Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Missouri, Ohio, Pennsylvania, South Carolina, Tennessee, and Utah. *Id.*

¹⁷⁴ Jack Stark, *A Practical Guide to Drafting State Constitutional Provisions*, 72 TEMP. L. REV. 1061, 1063 (2000).

of their state's constitution, they can change it, and if they do not change it, one can only assume they accept it as it stands.¹⁷⁵

While the process of amending a state's constitution varies by state,¹⁷⁶ the people of the state speak through the political or electoral process of their state to address constitutional amendments they desire.¹⁷⁷ State constitutional amendments demonstrate a very strong public policy, as they prevent a state supreme court from imposing its policy preferences on the people of that state.¹⁷⁸ There are currently twenty-nine states that have amended their constitutions to prohibit same-sex marriage.¹⁷⁹ States with constitutional amendments prohibiting same-sex marriage have a strong public policy argument for two reasons: passionate debates and public referenda were a part of the process to pass the amendments, and states have no other permissible options to express their opposition to same-sex relationships.¹⁸⁰ Such constitutional amendments are the "most extreme public policy objection constitutionally possible."¹⁸¹

Constitutional amendments pose a unique problem when it comes to a state's public policy for refusing to recognize same-sex marriage because the right of people to govern themselves is a

¹⁷⁵ Todd E. Pettys, *Popular Constitutionalism and Relaxing the Dead Hand: Can the People Be Trusted?*, 86 WASH. U. L. REV. 313, 331 (2008).

¹⁷⁶ Adam H. Morse, *Second-Class Citizenship; The Tension Between the Supremacy of the People and Minority Rights*, 43 J. MARSHALL L. REV. 963, 969 (2010) ("State constitutions vary significantly in their amendment processes. Some states allow future amendments by a simple majority vote on an initiative, while others require supermajority votes in the legislature followed by a ballot measure or repeated actions over the course of several election cycles.").

¹⁷⁷ Reva B. Siegel, *Social Movements and Law Reform: Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 324 (2001).

¹⁷⁸ Morse, *supra* note 176, at 965.

¹⁷⁹ See *supra* notes 93 and 95. See also List of U.S. State Constitutional Amendments Banning Same-sex Unions by Type, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_U.S._state_constitutional_amendments_banning_same-sex_unions_by_type (last visited Oct. 2, 2013).

¹⁸⁰ Titshaw, *supra* note 44, at 604.

¹⁸¹ *Id.*

principal element of freedom, and this includes the right of the states' citizens to define marriage as they see fit, even if those citizens are wrong. As Justice Black stated, "[t]he people, through their elected representatives, may of course be wrong in making those determinations, but the right of self-government that our Constitution preserves is just as important as any of the specific individual freedoms preserved in the Bill of Rights."¹⁸²

Obviously, constitutional amendments banning same-sex marriage create tension between the sovereignty of the people and the rights of a given minority, and it is precisely this tension on which the USCIS or the BIA could rely to deny immigration benefits, on public policy grounds, to same-gendered spouses who reside in a state whose constitution prevents the state from recognizing their marriage.

It is worth emphasizing that the current position of the USCIS is to recognize such marriages despite the public policy of the domicile state. But the USCIS's position itself is one that is problematic. When posed with the question of whether or not the Service will recognize a same-sex marriage lawfully performed in the state of celebration, but prohibited by the domicile state, the Service currently offers the following response:

Yes. As a general matter, the law of the place where the marriage was celebrated determines whether the marriage is legally valid for immigration purposes. Just as USCIS applies all relevant laws to determine the validity of an opposite-sex marriage, we will apply all relevant laws to determine the validity of a same-sex marriage. **The domicile state's laws and policies on same-sex marriages will not bear on whether USCIS will recognize a marriage as valid.** [emphasis added]¹⁸³

But this response is markedly different from the response that initially appeared on the Service's website. The initial

¹⁸² In re Winship, 397 U.S. 358, 385 (1970) (Black, J., dissenting).

¹⁸³ USCIS, *Same Sex Marriages*, *supra* note 132.

response posted immediately following the *Windsor* decision read as follows:

Yes, you can file the petition. In evaluating the petition, as a general matter, USCIS looks to the law of the place where the marriage took place when determining whether it is valid for immigration law purposes. That general rule is subject to some limited exceptions under which federal immigration agencies historically have considered the law of the state of residence in addition to the law of the state of celebration of the marriage. Whether those exceptions apply may depend on individual, fact-specific circumstances. If necessary, we may need to provide further guidance on this question going forward.¹⁸⁴

From the USCIS's most recent statement, it appears as though the agency has determined that state public policy objections no longer apply in determining marriage validity, regardless of whether or not the marriage is a same-sex marriage or an opposite-sex marriage. But such a position is inconsistent with case law and with the agency's own internal procedures, as stated in government policy manuals such as the Adjudicator's Field Manual¹⁸⁵ and the United States Department of State Foreign Affairs Manual.¹⁸⁶ If anything, the Service's shift in stance illustrates the fragility of the state public policy prong. The agency changed its response through a Question & Answer comment posted on its web page, and not by using solid foundational administrative law principles. In adapting this policy the USCIS has arguably dismissed prior case law and administrative law principles of rulemaking, making itself susceptible to litigation that could bring state public policy arguments back in the foreground.

¹⁸⁴ This language no longer appears on the USCIS website, but is available in print. Statement of Janet Napolitano, *supra* note 12.

¹⁸⁵ AFM, *supra* note 168.

¹⁸⁶ FAM, *supra* note 170.

iii. Solutions to State Statutes and State Constitutions Banning Same-Sex Marriage

As “mini-DOMAs” pose the most solid arguments in favor of a state public policy strong enough to allow the refusal of recognition of same-sex marriages for immigration purposes, it is imperative for supporters of same-sex marriage to find a lasting solution to prevent the USCIS or the BIA from taking this position.

One solution would be a court challenge in which the Supreme Court determines that sexual orientation is a suspect class that warrants heightened scrutiny under constitutional analysis. As it stands, despite the *Windsor* decision, sexual orientation, unlike racial discrimination, has not been made a suspect class and, consequently, does not undergo the same level of scrutiny when used as a basis for discrimination.¹⁸⁷ Defining marriage to exclude same-sex spouses is, arguably, a form of gender discrimination, and gender discrimination warrants heightened scrutiny.¹⁸⁸ The Court could even go so far as to declare sexual orientation an immutable characteristic, in turn ruling that discrimination based on sexual orientation renders even higher scrutiny. Either ruling would invalidate statutes that prohibit same-sex marriage, and would declare unconstitutional those amendments that define marriage as only between one man and one woman because they violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. While the United States Supreme Court has ruled that state constitutional amendments that discriminate against LGBT members of society are unconstitutional violations of equal protection, it has not ruled that sexual orientation is a protected class that calls for a heightened level of review. For example, in *Romer v. Evans*, the Court held that an amendment to

¹⁸⁷ Angelo DiBartolomeo, *supra* note 128, at 875 (citing Letter from Eric H. Holder, Jr., U.S. Attorney Gen. Dep’t. of Justice, to John A. Boehner, Speaker of the House, U.S. Cong. (Feb. 23, 2011), at 1-2).

¹⁸⁸ See *Glenn v. Brumby*, 724 F. Supp. 2d 1284 (N.D. Ga. 2010), *aff’d*, 663 F. 3d 1312 (11th Cir. 2011) (holding that firing a transgender employee was a form of sex discrimination, and therefore subject to intermediate scrutiny).

Colorado's constitution that prohibited the state or local government from adopting measures that would protect homosexuals was a classification undertaken for its own sake and, therefore, a violation of equal protection.¹⁸⁹ But the *Romer* Court made its decision using a rational basis review, and a similar ruling in cases concerning statutes or amendments that define marriage – something traditionally left to the states – remains uncertain.

Another solution would be a fundamental right challenge. A fundamental right is a “right derived from natural or fundamental law.”¹⁹⁰ It is a “significant component of liberty, encroachments of which are rigorously tested by courts to ascertain the soundness of purported governmental justifications.”¹⁹¹ Fundamental right challenges warrant strict scrutiny to determine whether the law violates the Due Process Clause or the Equal Protection Clause of the 14th Amendment of the United States Constitution. Strict scrutiny is the most stringent standard applied by the courts under judicial review, and favors an individual's fundamental right over the governmental regulation suppressing that right. To pass strict scrutiny, the government must have a compelling interest, establish law that is narrowly tailored to that interest, and use the least restrictive means to achieve that goal. Since 1888, the United States Supreme Court has held fourteen times that marriage is a fundamental right of all people, and the deprivation of that right warrants strict scrutiny,¹⁹² but it has yet to apply that rule to

¹⁸⁹ *Romer v. Evans*, 517 S. Ct. 620, 621 (1996) (“This disqualification of a class of persons from the right to obtain specific protection from the law is unprecedented and is itself a denial of equal protection in the most literal sense.”).

¹⁹⁰ BLACK'S LAW DICTIONARY, *supra* note 59, at 744.

¹⁹¹ *Id.*

¹⁹² *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888) (marriage is “the most important relation in life.”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (the right “to marry, establish a home and bring up children” is a central part of liberty protected by the Due Process Clause); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (“Marriage and procreation are fundamental to the very existence and survival of the race.”); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (“Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.”); *Loving v. Virginia*, 388

marriage among same sex couples. It came close to doing so in rendering its decision in *Lawrence v. Texas*, when the Court issued the following statement, “our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, and education [. . .]. Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”¹⁹³ But *Lawrence* was not a case questioning the constitutionality of same-sex marriage; it was a case questioning anti-sodomy laws. Nevertheless, it could lend support to a constitutional challenge to state statutes and state constitutions that ban same sex marriage.

Regrettably, when given the chance to make either of these determinations, the *Windsor* Court fell short, missing its

U.S. 1, 12 (1967) (ruling that marriage is fundamental to existence and survival); *Boddie v. Connecticut*, 401 U.S. 371, 376, 383 (1971) (“[M]arriage involves interests of basic importance to our society” and is “a fundamental human relationship.”); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) (“This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”); *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (“[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.”); *Carey v. Population Servs. Int’l*, 431 U.S. 678, 684-85 (1977) (“[I]t is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage”); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (“[T]he right to marry is of fundamental importance for all individuals.”); *Turner v. Safley*, 482 U.S. 78, 95 (1987) (“[T]he decision to marry is a fundamental right.”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (“Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as ‘of basic importance in our society,’ rights sheltered by the Fourteenth Amendment.”); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (“our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, and education.”).

¹⁹³ *Lawrence*, 539 U.S. at 774.

opportunity to strike down the many state laws and constitutions that continue to impose the traditional limits of marriage.¹⁹⁴

CONCLUSION

Under the United States Constitution, Congress's plenary power grants almost total control over immigration. While many applaud the decision of the USCIS to recognize the validity of same-sex marriages in granting immigration benefits, there is nothing to prevent Congress from imposing limits on same-sex marriage for immigration purposes, and nothing to prevent the USCIS from shifting its position in the future. Furthermore, despite the repeal of Section 3 of DOMA, there is no uniform rule recognizing all same sex marriages under the INA. Same-sex marriage should continue to be recognized for immigration purposes provided they pass the three prong test; first, they must be recognized in the place of celebration; second, they must be bona fide; and third, they must not violate federal or public policy. Under the current fragile system, same-sex marriages run the risk of a heightened bar in proving they are bona fide. They also run the risk of being considered a violation of public policy where domicile states have passed legislation making such marriages void and invalid, or have amended their constitutions to prohibit the recognition of such marriages. For these reasons one of three things must happen: (1) Congress must amend the INA to specifically recognize the validity of same-sex marriages despite state public policy objections; (2) the federal courts must recognize same-sex marriages despite these similar objections; or (3) the Supreme Court must rule either that sexual orientation is a protected status deserving of heightened scrutiny, or that the fundamental right to marriage applies to same-sex couples, and deserves a strict scrutiny level of review. With either of these two rulings, the Supreme Court would invalidate state constitutional amendments banning same-sex marriages and, in turn, weaken state public policy

¹⁹⁴ See generally *Windsor*, 133 S. Ct. 2675.

arguments against the recognition of same-sex marriages for immigration purposes.