

2011

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Recommended Citation

Oscaris, Carolina Rizzo. "DOMA's Attack on the Modern American Family." *The Modern American* 7, no. 2 (2011): 64-80.

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DOMA's Attack on the Modern American Family

DOMA'S ATTACK ON THE MODERN AMERICAN FAMILY

By Carolina Rizzo Oscaris¹

I. Introduction

Carlos and Amy fell in love during graduate school. Carlos, originally from Argentina, was on a student visa at the time. After living together for two years, the couple decided to get married. Surrounded by family and close friends, Carlos and Amy exchanged vows in an intimate wedding ceremony in New York, where Amy grew up. After the wedding, Amy filed an immediate-relative visa petition for Carlos, and Carlos applied to adjust his immigration status — from student to permanent resident. An immigration officer interviewed the couple and determined that Carlos and Amy's marriage was bona fide. Shortly thereafter, Carlos received his green card in the mail. The couple lived happily ever after in the United States.

But what if “Carlos” was actually Carla? Even in New York — a state that recognizes same-sex marriage — Amy would not be able to sponsor her wife for permanent residency.² Now Carla, upon finishing her doctorate, would face deportation if she stayed in the United States with her wife after her student visa expired — Carla would be “out of status.” By legally defining “marriage” and “spouse,” the Defense of Marriage Act (“DOMA”) denies federal benefits to same-sex married spouses, including the right for a U.S. citizen to petition for an immediate relative visa for their spouses.³ Because DOMA is still law, many legally married same-sex bi-national couples⁴ face the impossible injustice of having to flee the United States to remain together.

In this article, I argue that because DOMA unfairly discriminates against same-sex couples on the basis of their sexual orientation and the government cannot put forth any rational basis for the discrimination, the Act violates equal protection

and is unconstitutional. In the third section, I explore the inconsistencies that DOMA produces between state and federal law. I proceed to address the ways in which DOMA affects immigration law, and how DOMA's definition of marriage conflicts with other important public policy goals and considerations. Next, I articulate the specific hardship that DOMA imposes on same-sex bi-national couples and their families, and address various solutions to alleviate these hardships. Finally, I conclude that the recent shift⁵ in the Obama administration's stance on DOMA does not change the status quo. To truly provide equality and justice to all modern American families, Congress must repeal or amend DOMA, or the Supreme Court must invalidate it.

II. DOMA is Unconstitutional

Legal scholars have argued, and federal courts have agreed, that DOMA violates several Constitutional provisions, including — but not limited to — the First Amendment,⁶ the Equal Protection Clause of the Fifth and Fourteenth Amendments,⁷ the Tenth Amendment's Spending Clause,⁸ and the Full Faith and Credit Clause⁹ in Article IV.¹⁰ Additionally, commentators have suggested that the “lack of congressional definition of marriage” makes DOMA constitutionally suspect.¹¹

Several federal courts — trial and appellate levels, and even bankruptcy courts — have held that DOMA violates the United States Constitution. In *Golinski v. United States Office of Personnel Management*,¹² the United States District Court for the Northern District of California determined that DOMA is unconstitutional because — in failing to meet the heightened standard of scrutiny afforded to minority groups who have historically endured

discrimination — it violates the Equal Protection Clause.¹³ In *Gill v. Office of Personnel Management*, a Massachusetts federal district court also declared DOMA unconstitutional as applied to the plaintiffs — a same-sex couple lawfully married in Massachusetts — because it violated the Equal Protection Clause.¹⁴

In addition to holding that DOMA violates Equal Protection, the same court held in *Commonwealth of Massachusetts v. United States Health and Human Services* that DOMA violates the Spending Clause of the Constitution.¹⁵ The court held that, by forcing the Commonwealth to deny marriage-based benefits only to *same-sex* married couples, it places “an unconstitutional condition on the receipt of federal funding.”¹⁶ Similarly, the Ninth Circuit, in *In re Levenson*, recently granted a plaintiff’s request that his federal employer provide the plaintiff’s same-sex spouse with a monetary award to compensate for his inability to enroll as “family” for the purposes of the plaintiff beneficiary’s health benefits.¹⁷ The court determined that applying DOMA to deny a same-sex spouse of a federal employee benefits under the Federal Employee Benefits Act violated Equal Protection.¹⁸

Federal bankruptcy courts have also recognized DOMA’s constitutional infirmities. In *In re Balas*,¹⁹ the United States Trustee moved to intervene and dismiss a Chapter 11 bankruptcy petition filed by a same-sex married couple on the basis that the couple’s marriage was not cognizable under federal law. The California bankruptcy court rejected the government’s motion to intervene. In holding that DOMA violated debtors’ equal protection rights, the court relied on Attorney General Holder’s public letter to Congress (“Holder Letter”) and President Obama’s resolution that DOMA violates the Equal Protection Clause because it fails to survive even rational basis review.²⁰ In a similar case, the United States Bankruptcy Court for the Southern District of New York refused to grant the United States Trustee’s motion to dismiss a Chapter 7 bankruptcy petition filed by a same-sex couple married in Vermont.²¹ The Trustee introduced only the language of DOMA to buttress its claim that debtors’ petition had been improperly filed.²² Because the Trustee did not introduce any evidence to prove that dismissal would be in the best interest of all parties — as the law requires — the court declined to grant the Trustee’s motion to dismiss. In exercising its discretion,

the court considered the Obama Administration’s instructions to the DOJ to stop enforcing Section 3 of DOMA in that Circuit.²³

In addition to jurists, many legal scholars also argue that DOMA is unconstitutional. Specifically, some argue that Section 3 violates the First Amendment because it affords “associational protection” to heterosexual couples while denying it to same-sex couples.²⁴ Additionally, some maintain that DOMA violates the First Amendment’s Establishment Clause because laws limiting marriage to heterosexual couples are grounded in religious bias. Professor Julia McLaughlin argues that DOMA violates the Establishment clause by “creat[ing] a shadow establishment,” essentially engraining the accepted practices of sectarian groups into law and meanwhile “burden[ing] the enjoyment of fundamental rights and liberties . . . without the saving grace of a legitimate public secular purpose.”²⁵ Some contend that DOMA also violates the Full Faith and Credit Clause and principles of comity because it allows a state to refuse recognition of a marriage that occurred in another state.²⁶ The Full Faith and Credit clause prohibits states from “basing choice-of-law decisions on the desirability or obnoxiousness of other states’ policies.” Therefore, even the public policy exception to the Full Faith and Credit Clause does not save DOMA from constitutionality attacks.²⁷ Finally, scholars also argue that Congress overreached its Constitutional power in passing DOMA because, when regulating over matters that have historically been within states’ regulatory sphere — such as domestic relations — Congress bears the burden to show that such legislation is based on a very important national interest.²⁸ Because Congress has not proven a national interest behind its encroachment over states’ rights to legislate marriage laws and benefits, it has exceeded its constitutional powers.²⁹

Most scholars base their argument against DOMA’s constitutionality on the Equal Protection Clause.³⁰ Academics argue that statutes providing for disparate treatment of homosexuals should be subject to a heightened standard of scrutiny because homosexuals are a suspect class.³¹ Under heightened scrutiny, a discriminatory law must be substantially related to an important government interest.³² Scholars insist, however, that even under rational basis standard, DOMA would fail to survive.³³ Under rational basis, discriminatory laws must be rationally

related to a legitimate government interest.³⁴ Congress purports that DOMA achieves the following goals: (1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources.³⁵ Scholars argue, however, that Congress has failed to show a rational relationship between DOMA and any legitimate government interest.³⁶ Some of Congress' purported goals are not legitimate, and others are not rationally related to DOMA at all.

First, although Congress claims that protecting the institution of traditional marriage is necessary to preserve procreation, the *goal* of civil marriage is not to encourage procreation. Even if civil marriage was intended to encourage procreation, many people — including LGBT people — procreate regardless of their marital status.³⁷ Furthermore, the argument that LGBT people are bad parents is completely unsupported. In contrast, studies have shown that gay parents are no less fit than heterosexual parents to raise healthy children.³⁸ Moreover, courts have recognized gay parents' ability to effectively raise children and their right to continue to do so.³⁹ Second, Congress's attempt to reinforce a certain morality is impermissible. The values Congress attempts to uphold are rooted in religious tradition, and are therefore impermissible under the Establishment Clause and against Supreme Court precedent.⁴⁰ Third, contrary to Congress's assertion, DOMA does not protect state sovereignty. Rather, it does exactly the opposite by forcing states to deny federal benefits to same-sex married couples even if that state considers those marriages legal. In congressional debates over DOMA, Congress rejected Congressman Barney Frank's amendment that would allow states that recognize same-sex marriages to allocate federal benefits on that basis.⁴¹ Finally, DOMA is not rationally related to Congress's purported goal of preserving government resources.⁴² There is no evidence that DOMA saves the government money.⁴³ On the contrary, DOMA may be costing the federal government unnecessary expenditures in litigation just to defend the Act in federal courts. The congressional record shows that animus against gay people was the driving force behind DOMA.⁴⁴

Despite the various arguments against its constitutionality, DOMA remains valid and "virtually

immune from attack due to the heterosexual definition of marriage," a definition that strips the LGBT community from any opportunity to show it has suffered an actual injury as required to survive standing challenges.⁴⁵ In protecting only traditional, heterosexual marriage, Congress also "eviscerate[ed] more than 200 years of federal government deference to the states" in their ability to define marital status.⁴⁶ The American Bar Association, Former Representative Bob Barr — who originally introduced DOMA in the House of Representatives — and President Clinton — who signed DOMA into law — have all called for DOMA's repeal.⁴⁷ Although President Obama instructed Congress that homosexuals are a suspect class and that Section 3 of DOMA is unconstitutional, the DOJ continues to defend DOMA in litigation.⁴⁸

III. DOMA Propagates Inconsistencies Between State and Federal Power

Six states and the District of Columbia currently allow same-sex marriage.⁴⁹ Additionally, two other states recognize same-sex marriages contracted in other states.⁵⁰ As same-sex marriage gains momentum, the clash between state and federal law becomes more evident.⁵¹ Two cases, both fairly recent and arising in Massachusetts — the first state to allow same-sex marriage — illustrate this divide.

In *Gill*,⁵² the plaintiffs — legally married same-sex couples and survivors of same-sex spouses married in Massachusetts — raised an equal protection challenge to Section 3 of DOMA. The plaintiffs argued that because Section 3 denied them federal benefits despite their lawful marital status, the law unconstitutionally discriminated against homosexuals. Plaintiffs claimed that DOMA denied them key federal benefits related to health, social security and tax, on the basis of their sexual orientation. Specifically, the federal government denied plaintiffs access to three federal health care programs: the Federal Employees Health Benefits Program ("FEHB"), the Federal Employees Dental and Vision Insurance Program ("FEDVIP"), and the federal Flexible Spending Arrangement Program.⁵³ Plaintiffs further claimed that DOMA deprived them of social security benefits based on the lifetime earnings of their same-sex spouse, which are traditionally afforded to the widows and widowers of

opposite-sex spouses who were federal government employees.⁵⁴ Additionally, they argued that DOMA prevented these same-sex spouses from collecting federal survivor benefits following the death of their spouses.⁵⁵ Finally, some plaintiffs sought to file federal income taxes jointly with their spouses, as heterosexual married couples are allowed to do.⁵⁶

Plaintiffs articulated that DOMA is rooted in animus and has been used by the federal government to discriminate against a socially unpopular group.⁵⁷ The court found that DOMA based qualification for federal benefits only on whether a married couple is heterosexual.⁵⁸ Because the court did not find the distinction between same-sex and opposite-sex couples meaningful, it concluded that the distinction was based on the type of irrational prejudice that could never constitute a “legitimate government interest.”⁵⁹ In conclusion, the court agreed with plaintiffs that even under a rational basis standard of review, “DOMA fails to pass constitutional muster.”⁶⁰

In *Massachusetts v. U.S. Department of Health & Human Services*,⁶¹ the state of Massachusetts sued the federal government on the basis that that section 3 of DOMA (1) interferes with the Commonwealth’s regulation of marriage within the state in violation of the Tenth Amendment and (2) imposes improper conditions on the Commonwealth’s participation in certain federally-funded programs in violation of the Spending Clause.⁶² First, the court determined that DOMA violates the Tenth Amendment by intruding on a domestic relations issue historically within the realm of state sovereignty — defining and regulating marriage.⁶³ The additionally court held that DOMA exceeded the scope of federal spending clause power by basing federal funding on an “unconstitutional condition — that the beneficiaries be heterosexual couples.”⁶⁴ By only recognizing the opposite-sex spouses of federal employees, DOMA imposed “significant additional healthcare costs” on the Commonwealth, forcing the state to bear the financial burden of providing healthcare granted to same-sex spouses of state employees. Under *South Dakota v. Dole*,⁶⁵ legislation must satisfy a series of requirements to comply with the Spending Clause.⁶⁶ The court held that because DOMA violates Equal Protection Clause, it fails to meet the fourth requirement in *Dole* — that legislation not otherwise violate the Constitution — and therefore also violates the Spending Clause.⁶⁷

In both of these cases, the District Court of Massachusetts determined that DOMA is unconstitutional.⁶⁸ These cases evidence a state’s concern for its sovereignty under the doctrine of federalism. Because DOMA encroaches over state power to decide matters that have historically been local, it continues to create confusion in the courts.

IV. How DOMA Controls Immigration Benefits for Same-Sex Spouses

By enacting DOMA in 1996, Congress clarified the meaning of “spouse” under all federal statutes, including the Immigration and Nationality Act (“INA”).⁶⁹ The term “spouse” under DOMA refers only to a husband or wife of a person of the opposite sex.⁷⁰ Reliant on this definition are various federal benefits that accompany marriage — including immigration-related benefits.⁷¹ Specifically, a U.S. citizen can sponsor his or her foreign-born spouse for a green card.⁷² The rationale underlying this law is preserving family unity. As a result of DOMA, however, many families are torn apart, forced to live in separate countries or compelled to flee the United States to remain together. In some cases, couples resort to sham heterosexual marriages so that the foreign-born spouse may obtain a green card and stay in the United States.⁷³ Other options, including employment-based immigrant or nonimmigrant visas, the diversity lottery or asylum, are very limited.⁷⁴

The INA contains no explicit definition of “spouse.”⁷⁵ The INA does state, however, that a foreign partner qualifies for permanent residency (i.e. green card status) only if the federal government recognizes him or her as a spouse.⁷⁶ Therefore, the INA definition of “spouse” relies on DOMA, which limits marriage to heterosexual couples.⁷⁷ Accordingly, as long as DOMA exists, federal immigration agencies can — and will — refuse to acknowledge same-sex spouses as spouses, despite such recognition by the state or country where the couple legally married. By affecting immigration in this significant way, DOMA contravenes the “fundamental freedom of personal choice in matters of marriage and family life” recognized and upheld by Supreme Court precedent.⁷⁸

Additionally, because the federal government has exclusive jurisdiction over immigration, individual

states may not preempt federal law by conferring or modifying federally designed marriage-based immigration benefits.⁷⁹ Though a U.S. citizen may be in love with, committed and legally married to a foreign national of the same sex, the federal government refuses to acknowledge that the couple is legally married. Additionally, DOMA further injures the couple by categorically barring them from a vital federal benefit afforded to similarly-situated heterosexual couples: the opportunity to petition for a green card for the foreign-born spouse to reside permanently in the United States. In this way, DOMA effectively overrides and nullifies legal marriages that were celebrated in a state or foreign country that recognizes same-sex marriage.⁸⁰

V. DOMA's Damage and Going Against The Grain

A. *DOMA Leaves United States Citizens with Few Options to Unite With Their Families in the United States.*

Because U.S. immigration law does not recognize legal same-sex marriages (and thus an American same-sex spouse cannot petition for an immigrant visa for her wife), the only way a same-sex bi-national couple can live together in the United States is for the foreign partner to independently qualify for immigration status. Qualifying for an alternative immigration status requires one of many exceptional factors such as other U.S. citizen relatives, an employer willing and able to sponsor the foreign spouse for a green card, or a legitimate claim to persecution on the basis of the foreign spouse's sexuality.

One way that foreign spouses attempt to secure permanent residency is through family-based immigrant visa petitions through other U.S. citizen family members. Assuming that the foreign spouse is fortunate enough to have U.S. citizen family members, this route is still disadvantageous; because siblings are not considered "immediate relatives," siblings of U.S. citizens are subject to annual quotas and often wait years for an available visa. In contrast, spouses of U.S. citizens — along with unmarried minor children and parents of adult U.S. citizens — are considered "immediate relatives" and are not subject to quotas or waiting times.

Another way a foreign spouse could obtain permanent resident status is through the green-card lottery to obtain permanent residency. The Diversity Immigrant Visa Program was established by Congress to ensure adequate representation from countries that are not well represented in the United States.⁸¹ Due to the small number of visas granted every year, however, the chance of obtaining a visa through this program is extremely low.⁸² The green-card lottery randomly selects and grants only 55,000 visas for immigrants every year.⁸³

Alternatively, a foreign spouse may pursue an employment-based immigrant visa. However, such visas are financially and administratively burdensome both for the foreign spouse and his/her employer. Second, this visa petition process usually requires the foreign spouse to have worked for the employer for a significant period of time (most often while already in the United States in a non-immigrant status). Third, employers usually petition for a green card for an employee only if that employee is an integral part of the company. Consequently, this option may be extremely limited for foreign spouses who have not earned higher degrees or degrees in areas of high demand.

Finally, a foreign spouse who has suffered persecution on the basis of her sexuality may succeed in an asylum application. Claims for asylum are usually difficult and often unsuccessful. First, if the spouse does not claim persecution within one year of her entry into the United States, she will most likely be permanently barred from bringing an asylum claim altogether.⁸⁴ Unless persecution was due to another permissible grounds — such as political opinion, race, religion or nationality⁸⁵ — homosexuals seeking asylum must show that they suffered persecution because of their membership in a particular social group. Proving that persecution is based on an applicant's homosexuality is a notoriously difficult task — especially for homosexuals who are not easily identifiable as homosexuals.⁸⁶ If he/she can successfully establish a probability of future persecution, he/she may qualify for Convention Against Torture (CAT) relief. However, such relief does not include a route to legal permanent residency.⁸⁷

Because these alternative avenues to permanent residency are difficult, rare, and subject to limiting quotas, most same-sex bi-national married couples cannot remain together in the United States.

Thus, same-sex bi-national couples face an impossible choice that heterosexual bi-national couples almost never have to consider: break up the family, break the law or flee the United States.

*B. Family Separation Despite Federal Policy
Goals of Family Re-Unification*

Believed to promote the “health and welfare of the United States,” family reunification has long been the most important underlying goal of immigration sponsorship rights.⁸⁸ The current immigration quota system reflects this policy, which has been in place since 1990 when Congress amended the INA.⁸⁹ However, U.S. citizens and Legal Permanent Residents (“LPRs”) can only sponsor a foreign national if that person is his or her *spouse* or *other immediate family member*.⁹⁰ As mentioned before, spouses must be the *opposite gender* of the US citizen spouse to qualify for immigration benefits.⁹¹ These requirements completely exclude same-sex spouses as spouses for immigration benefits.

Marriage is a key concept in immigration law.⁹² Because DOMA controls the definition of marriage, it openly “undermines Congress’ intent to have a family-centric immigration policy by dividing the families created by same-sex bi-national couples.”⁹³ Thus a disturbing dissonance exists between U.S. immigration policy — which values family re-unification — and DOMA — which breaks up LGBT families.

*C. LGBT Couples and the Right to Form and
Sustain Loving Personal Relationships.*

Discrimination against LGBT people in the U.S. immigration system is not new.⁹⁴ As early as 1917, the U.S. government excluded gays and lesbians from entry for “medical reasons.” Despite this disgraceful history, the growing trend of the U.S. government has been to recognize the rights of LGBT people.⁹⁵ In 1963, the Supreme Court decision of *Rosenberg v. Fleuti* deemed unconstitutional the categorization of LGBT people as sexual deviants.⁹⁶ In 1979, the Supreme Court held that homosexuality could no longer be considered a mental disorder.⁹⁷ Congress repealed the homosexual exclusion provision in 1990.⁹⁸

Additionally, although LGBT people were still discriminated against in immigration law,⁹⁹

the landmark case of *Lawrence v. Texas* signaled a significant victory for LGBT people.¹⁰⁰ In *Lawrence*, the Supreme Court struck down a Texas statute that criminalized homosexual sodomy, holding that the government does not have the power to deem certain private sexual conduct between consenting adults a crime.¹⁰¹ The Court based its decision on the right of *all* persons to be free from government intrusion in their private interactions, especially those interactions occurring between two consenting adults.¹⁰² In upholding privacy rights for homosexuals, the Court also recognized that gay people are people, and as such, deserve the same dignity that heterosexual people enjoy.¹⁰³ In focusing on fundamental rights for all citizens, *Lawrence* made clear that that “marriage is a fundamental right and that homosexuals, like heterosexuals, are entitled to the liberty rights derived from the Due Process clause.”¹⁰⁴

Even though LGBT people have been historically discriminated against and continue to suffer discrimination in the United States, a growing trend across states favors recognizing same-sex marriages.¹⁰⁵ Additionally, U.S. Citizenship and Immigration Services (USCIS) has increasingly recognized the rights of LGBT foreign nationals.¹⁰⁶ For example, in 1993, both the Immigration and Naturalization Service (INS)¹⁰⁷ and the Department of State began to grant B-2 visitor visas to partners of gay foreign nationals who wanted to visit their partners in the United States.¹⁰⁸ The State Department now grants consular officers and foreign officials discretion to grant derivative status to the partners of U.S. diplomats, so long as the partnership is legal in the sending country.¹⁰⁹ In 1994, Attorney General Janet Reno announced that “INS and the Department of State should consider homosexuals to be members of a particular class for purposes of asylum.”¹¹⁰ However, by recognizing only the traditional nuclear family model — a model that no longer adequately represents modern American families — DOMA signals a departure from the growing trend to recognize LGBT relationships.¹¹¹ This model fails to acknowledge common phenomena that affect marriage, sexuality and family structure, such as divorce, single parenthood, non-marital relationships and same-sex marriage.

D. Immigration Equality in Western Democracies and Around the World

Worldwide, and especially in western democracies, governments are upholding immigration equality for LGBT couples.¹¹² At least eighteen countries have granted immigration equality to same-sex couples.¹¹³ Canada, Belgium, the Netherlands, Spain and South Africa provide immigration benefits to bi-national same-sex spouses.¹¹⁴ In Canada, the couple need not be legally married; simply residing together is sufficient to confer immigration benefits.¹¹⁵ Other countries, such as Denmark, Finland, Iceland, Sweden, Norway and the United Kingdom, have enacted laws recognizing same-sex couples and granting immigration benefits.¹¹⁶ France, Germany and Portugal have created parallel systems of immigration benefits for same-sex couples.¹¹⁷ These three countries have enacted laws that confer some rights to same-sex partners, such as the right to petition for benefits for the immigrant spouse.¹¹⁸ Australia and Israel have reformed their immigration systems to bring into parity the rights of LGBT and heterosexual couples, even though they do not grant same-sex couples the right to marry. Brazil and New Zealand also allow for immigration equality.¹¹⁹ The European Union declared that its immigration policy “must reflect and respect the diversity of family relationships that exist in today’s society” by including same-sex couples.¹²⁰ Because more countries are expected to legalize same-sex marriage in the coming years,¹²¹ the United States is behind the trend for failing to recognize same-sex unions in its immigration law and guarantee immigration equality for same-sex couples.¹²²

VI. Efforts to Rectify DOMA’s Injustices

Thus far, most legal challenges to DOMA have failed,¹²³ usually due to plaintiffs’ lack of standing.¹²⁴ *Adams v. Howerton* was the first case where a same-sex bi-national couple challenged the definition of “spouse” in U.S. immigration law.¹²⁵ Even though Sullivan and Adams were married in Colorado, the court denied Sullivan’s petition to classify his husband as an immediate relative for the purpose of obtaining an immigrant visa. The Ninth Circuit held that Sullivan failed to prove that his relationship with Adams was equivalent to that of

“spouses” within the definition in immigration law. Following this decision, Congress enacted DOMA. Subsequent cases were universally unsuccessful in challenging DOMA — especially Section 3 of the Act.¹²⁶

Currently, the only legislative hope for LGBT families is the Uniting American Families Act (“UAF”), formerly known as the Permanent Partners Immigration Act “PPIA”.¹²⁷ This Act would give LGBT couples access to the same immigration sponsorship rights that heterosexual couples enjoy. Although it does not propose a change to DOMA’s definition of marriage, it would create a parallel system of benefits by adding the term “permanent partner” alongside “spouse.”¹²⁸ These parallel benefits would be restricted to realm of immigration.

This bill, which was first introduced in the House of Representatives in 2001 by Representative Jerrold Nadler (D-NY), was re-introduced in both chambers of Congress in 2005.¹²⁹ It was re-introduced again on April 14, 2011 by Senator Patrick Leahy (D-VT) and Representative Jerrold Nadler (D-NY), read twice and then referred to the Senate Judiciary Committee, where it currently sits.¹³⁰ To date, it has only 22 co-sponsors in the Senate and very little chance of becoming law.¹³¹

VII. Competing Theories on How to Repair DOMA’s Constitutional Infirmities

A. Legislative Change and the UAF

For Congress to correct the constitutional violations inherent in DOMA, the Act must be repealed or amended.¹³² Envisioning the repeal of DOMA is difficult but not unfathomable; in fact, the Senate recently commenced efforts towards repeal.¹³³ However, repeal alone would not bring clarity to the quagmire of confusion the INA causes for same-sex bi-national spouses.¹³⁴

Even if DOMA is repealed — unless Congress provides for guidance in future legislation — immigration officials would need to review all applications on a case-by-case basis and refer to (and potentially interpret) diverse state laws to determine whether each marriage is lawful for immigration purposes. This case-specific inquiry would be similar to the approach employed by U.S. Attorneys General, the Board of Immigration Appeals, immigration officials and most federal courts.¹³⁵ In other words, if

DOMA is no longer law, the INA would recognize a same-sex marriage — and grant immigration equality to same-sex spouses — so as long as the marriage is *bona fide*, valid where celebrated, and the state of domicile does not have any strong public policy objections to the marriage.¹³⁶ Some of the negative effects to consider in an approach requiring case-by-case review would be undue delays, lack of uniformity and predictability, and financial investment in training immigration officers — or hiring attorneys — to perform the required significant legal analysis to adjudicate and interpret questions of law.

Creating a parallel system of benefits for LGBT couples through legislation is one approach to achieving equality for same-sex bi-national couples. Although piecemeal legislation like UAFA would bring pivotal change for American families, this strategy has one significant shortcoming in that it would not alter the federal definition of marriage — a definition that affects over a thousand federal laws. Therefore, it would not grant any other federal benefit to LGBT couples, like health or retirement benefits through their same-sex spouses or the ability to file jointly for taxes.¹³⁷ Because UAFA focuses only on preventing the separation of families, its effects remain within the realm of immigration.¹³⁸

B. Professor Feinberg's "Plus One Policy"

Another approach to bringing equality to same-sex bi-national is the "Plus One Policy" suggested by Professor Jessica Feinberg.¹³⁹ This policy seeks to alter the current model — based on the traditional family unit — by allowing any adult U.S. citizen to "sponsor one important individual in his or her life who does not fit within any of the pre-existing family reunification provisions."¹⁴⁰ One of the advantages of this proposal is that it does not seek to change the definition of marriage in immigration law and would therefore be more easily accepted by conservatives. Rather, it simply suggests a more flexible range of "domestic and global conceptions of family" while furthering the "humane and practical goals of family reunification law."¹⁴¹ A second advantage of this policy is that it benefits not only same-sex partnerships but also other important relationships — such as heterosexual non-marital romantic partners, extended family members, co-parents and even close

friendships — that immigration law does not currently acknowledge as deserving of reunification.¹⁴²

Launching the Plus One Policy could generate concerns — namely that it would increase fraud, immigration and government spending.¹⁴³ Additionally, this policy would treat "Plus One" relationships better than heterosexual marriages of less than two years, because foreign-born spouses in marriages less than two years old have only "conditional" residency until their second marriage anniversary. The government could impose a two-year conditional requirement on "Plus One" relationships, but it would require more time and financial expense to closely monitor these relationships in addition to young marriages. To further complicate matters, the "conditional" status of a foreign-born spouse is removed after their second anniversary if the couple shows that their relationship is still *bona fide*. To establish a *bona fide* relationship, most couples submit evidence that they have had children together, resided together, and intermingled their finances. These types of evidence of a *bona fide* relationship do not necessarily apply to "Plus One" relationships.¹⁴⁴ Alternatively, Feinberg proposes that the government could assess the importance of the relationship to the individuals involved.¹⁴⁵ The lack of universal standards to measure the importance of these relationships, and the profound discretion it would provide immigration officers to assess the value of these relationships would inevitably result in gross inconsistencies in practice.¹⁴⁶

Responding to the claim that her "Plus One" policy would result in excessive immigration, Feinberg explains that the Policy is inherently restrictive in that it allows each U.S. citizen to sponsor only one immigrant in his lifetime. Additionally further restrictions could be instituted. For example, the Plus One Policy could bar citizens who use the Policy from employing other family reunification provisions.¹⁴⁷ Another solution would be to place annual caps on the migration through this policy.¹⁴⁸

To reduce the potential of significant government spending, Feinberg proposes the government attach the same obligations imposed on petitioners who sponsor family members through the current family reunification provisions.¹⁴⁹ She also suggests that the policy could require a sponsored immigrant have financial obligations towards their sponsor — for example if the sponsor were to require governmental assistance, the immigrant would be

financially responsible for the sponsor.¹⁵⁰ However, this restriction assumes that the immigrant is financially solvent, or is physically or mentally able to work.

Like the UAFA, the Plus One Policy only addresses DOMA's injustices as to immigration and overlooks other ways that DOMA constitutionally injures LGBT people. Additionally, the policy places relationships such as close friendships on the same footing as marriage. In so doing, the policy does not address the disparity between same-sex marriage and heterosexual marriage. The Plus One Policy also allows U.S. citizens to sponsor only one immigrant. For an LGBT person who falls in love with a foreign-born person more than once, there would be no options that second time. In contrast, a heterosexual U.S. citizen could sponsor a foreign-born spouse and still petition for an additional person to emigrate to the United States through the Plus One Policy.

C. *Impact Litigation and a Judicial Declaration of Unconstitutionality*

Impact litigation could be another vehicle to remedy DOMA's constitutional violations.¹⁵¹ Though federal courts give nearly complete deference to Congress in immigration matters,¹⁵² Congress' plenary power is not without limits.¹⁵³ *Fiallo v. Bell* reinforced the plenary power of Congress over immigration issues, but also recognized that there is at least some judicial responsibility to oversee congress' legislation power, even over immigration matters.¹⁵⁴ Justice Marshall, dissenting in *Fiallo*, further elaborated that the Court has a duty to ensure that congressional acts 'comport with Fifth Amendment principles of due process and equal protection.'¹⁵⁵ Moreover, Justice Marshall added, "[t]he simple fact that discrimination is set in immigration legislation cannot insulate from scrutiny the invidious abridgement of citizens' fundamental interests."¹⁵⁶ The *Fiallo* Court makes clear that whenever immigration law offends the constitutional rights of U.S. citizens, the Court could defer less to Congress' plenary power and heighten scrutiny of immigration law.¹⁵⁷

Though some federal courts have held that certain sections of DOMA are unconstitutional, the Supreme Court has yet to finally decide these issues.¹⁵⁸ Furthermore, even though Attorney General Holder issued a letter to the House of Representatives regarding the unconstitutionality of DOMA,¹⁵⁹ the

Administration has been inconsistent on its view. Attorney General Holder's letter explained that two recent challenges to Section 3 of DOMA (*Windsor v. United States*, No. 1:10-cv-8435 (S.D.N.Y. 2011) and *Pedersen v. OPM*, No. 3:10-cv-1750 (D. Conn. 2011)) inspired the administration to examine the constitutionality of the Act.¹⁶⁰ The Holder Letter also declared that homosexuals are a suspect class and that, therefore, courts should employ heightened scrutiny to review the legality of classifications based on sexual orientation, at least in jurisdictions without precedent as what standard to use in those cases.¹⁶¹ For those reasons, the Holder Letter concludes, Section 3 of DOMA is unconstitutional.¹⁶² In spite of this finding, President Obama declared that the executive branch would continue to enforce DOMA until Congress expressly repeals it.¹⁶³

Smelt v. United States was the first case in which the DOJ under President Obama defended DOMA.¹⁶⁴ The DOJ shocked the LGBT community by defending DOMA.¹⁶⁵ Even though Obama previously argued DOMA should be repealed, the DOJ in *Smelt* followed the same position it would have held under President Bush. In its defense of DOMA, the DOJ introduced a new argument advocating for a neutral governmental position regarding same-sex couples.¹⁶⁶ To make matters more confusing, only three months after *Smelt*, the DOJ in *Gill* expressed that although the Obama administration was against DOMA, discrimination against LGBT people should be examined using only the rational basis standard.¹⁶⁷

Windsor v. United States further exemplifies the Obama Administration's inconsistency regarding DOMA. This case involved two lesbians — Windsor and Spyer — who after a 40-year relationship, legally married in New York.¹⁶⁸ When Spyer passed away, Windsor, who had become the executor of Spyer's estate, was forced to pay federal taxes she would not have owed if the federal government recognized their marriage. Windsor sued the federal government claiming that, because DOMA precluded the IRS from recognizing her lawful marriage to her wife, DOMA discriminated against her on the basis of her sexual orientation in violation of the Equal Protection Clause.¹⁶⁹ Initially, the DOJ appeared on behalf of the government, but soon thereafter, the DOJ informed the Court that in light of the Holder Letter, the DOJ would "cease to defend the constitutionality of Section 3 [of DOMA]."¹⁷⁰

Following its change in position, the DOJ notified the House of Representatives that it would allow Congress to participate in the litigation while still remaining as a party defendant.¹⁷¹ Even though the Obama administration has publicly advocated for the repeal of DOMA, the DOJ continues to defend it against constitutionality challenges in federal court.¹⁷² Consequently, and problematically, federal courts remain confused and inconsistent in how they treat and apply DOMA.

VIII. Conclusion

DOMA — an act that directly affects the INA — has been declared unconstitutional by legal scholars, President Obama and various federal courts. Discriminating against legally married couples on the basis of sexual orientation, DOMA also frustrates long-standing U.S. immigration policy, diverges from Supreme Court precedent and a diverges from the growing trend — both domestically and internationally — to recognize same-sex partnerships. DOMA creates confusion, a clash between state and federal laws, and imposes undue hardship on U.S. citizens in same-sex legal unions. Although many of DOMA's original proponents now oppose the Act, including former Congressman Bob Barr and President Clinton, the current administration continues to defend it against challenges in federal courts. In light of the many viable solutions to rectify the injustice to same-sex bi-national couples that DOMA produces, there is little excuse for its continued existence in its current form. Although Democrats in the Senate recently voted to repeal DOMA,¹⁷³ it is unlikely that they will assemble enough votes to effectuate repeal.¹⁷⁴ Because formal Congressional repeal is likely futile, and President Obama relinquished his power to Congress, the future of DOMA — and the future of same-sex bi-national couples and their families — rests with the Supreme Court alone.

(Endnotes)

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Relations & Human Rights, and was a member of Migrants and Immigrant's Rights Awareness and Sigma Iota Rho. She is currently a third-year student at American University Washington College of Law, and serves as a Student Attorney in the International Human Rights Clinic.

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

³ See Julia Halloran McLaughlin, *DOMA and the Constitutional Coming Out of Same-Sex Marriage*, 24 WIS. J.L. GENDER & SOC'Y 145, 146 (2009) (providing a comprehensive background on DOMA and its relation to immigration law). See also *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 396 (D. Mass. 2010) ("In the wake of DOMA, it is *only* sexual orientation that differentiates a married couple entitled to federal marriage-based benefits from one not so entitled.") (emphasis added).

⁴ The term "same-sex bi-national couples" refers to couples of the same sex, one of whom is a U.S. citizen and the other of whom is a citizen of another country.

⁵ U.S. DEP'T OF JUSTICE, LETTER FROM THE ATTORNEY GENERAL TO CONGRESS ON LITIGATION INVOLVING THE DEFENSE OF MARRIAGE ACT, *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> ("Holder Letter") (In early 2011, Attorney General Eric Holder sent a letter to Congress concluding that, in jurisdictions without precedent on what standard of review should apply to sexual orientation classifications, the applicable standard should be heightened scrutiny. Additionally, that "consistent with that standard, Section 3 of DOMA may not be constitutionally applied to same-sex couples whose marriages are legally recognized under state law.").

⁶ McLaughlin, *supra* note 2, at 182. ("Section Three of DOMA interferes with intimate associational rights traditionally protected under the First Amendment.").

⁷ *Gill*, 699 F. Supp. 2d. at 396-97 (declaring section 3 of DOMA unconstitutional because it violates the Equal Protection Clause); McLaughlin, *supra* note 2, at 190 ("When characterized not as a general choice of law statute, but rather as an attempt to create a federal public policy rejecting same-sex marriage and imposing it upon the states, Section Two of DOMA becomes more suspect from a structural vantage point.").

⁸ *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 698 F. Supp. 2d 234, 253 (D. Mass. 2010) ("The federal government, by enacting and

enforcing DOMA, plainly encroaches upon the firmly entrenched province of the state, and, in doing so, offends the Tenth Amendment. For that reason, the statute is invalid.”).

⁹ See U.S. Const. amend. IV, § 1 (providing that “Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State”); McLaughlin, *supra* note 2, at 191 (noting that the Ninth and Tenth Amendments, read together, “create zones of state sovereignty and individual private autonomy into which the federal government may not stray, absent compelling reason. Traditionally...marriage...has been reserved to the several states....Rarely has Congress encroached into this zone of family law....”).

¹⁰ See Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255 (1998).

¹¹ See David J. Herzig, *DOMA and Diffusion Theory: Ending Animus Legislation Through a Rational Basis Approach*, 44 AKRON L. REV. 621, 653 (2011) (citing 142 Cong. Rec. H7446 (daily ed. July 11, 1996)).

¹² *Golinski v. U.S. Office of Pers. Mgmt.*, 781 F. Supp. 2d 967, 975 (N.D. Cal. 2011).

¹³ *Id.* at 971.

¹⁴ *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 397 (D. Mass. 2010).

¹⁵ *Massachusetts v. U.S. Health and Human Svcs.*, 698 F.Supp.2d 234, 248 (D. Mass. 2010).

¹⁶ *Id.*

¹⁷ *In re Levenson*, 587 F.3d 925, 938 (9th Cir. 2009).

¹⁸ See *id.* at 934 (“[T]o the extent that the application of DOMA serves to preclude the provision of health insurance coverage to a same-sex spouse of a legally married federal employee because of the employee’s and his or her spouse’s sex or sexual orientation, DOMA, as applied, contravenes the Fifth Amendment to the United States Constitution and is therefore unconstitutional.”).

¹⁹ *In re Balas*, 449 B.R. 567, 580 (Bankr. C.D. Cal. 2011).

²⁰ See *id.* at 579.

²¹ *In re Somers*, 448 B.R. 677, 684 (Bankr. S.D.N.Y. 2011).

²² *Id.* at 682 (“[T]he United States Trustee... has offered nothing more than a restatement of the language of DOMA.”).

²³ *Id.*

²⁴ McLaughlin, *supra* note 2, at 183.

²⁵ *Id.* at 179 (quoting Gordon Albert Babst, *Liberal Constitutionalism, Marriage, and Sexual Orientation* 78-79 (2002)). See James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamentalist Christianity*, 4 MICH. J. GENDER & L. 335, 373 (1997) (arguing that because DOMA’s legislative history shows religious purpose, it is an unconstitutional establishment of fundamentalist Christianity).

²⁶ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (2007) (States must honor a marriage that occurred in another state, unless doing so would violate the public policy of the state that the couple is most related to when they married). See generally Dennis A. Golden, *The Policy Considerations Surrounding the United States’ Immigration Law as Applied to Bi-National Same-Sex Couples: Making the Case for the Uniting American Families Act*, 18 KAN. J.L. & PUB. POL’Y 310, 318 (2009); Stanley E. Cox, *DOMA And Conflicts Law: Congressional Rules And Domestic Relations Conflicts Law*, 32 CREIGHTON L. REV. 1063, 1082 (1999) (DOMA constitutes an unconstitutional attempted exercise of full faith and credit power); Paige E. Chabora, *Congress’ Power under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996*, 76 NEB. L. REV. 604, 652 (1997).

²⁷ See Heather Hamilton, *The Defense of Marriage Act: A Critical Analysis of its Constitutionality under the Full Faith and Credit Clause*, 47 DEPAUL L. REV. 943, 977 (1998) (arguing that DOMA makes the public policy exception inapplicable because it “removes the requirement that a public policy exist.”); see Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1992 (1997) (explaining that, because DOMA removes the requirement that a public policy exist in order to justify non-recognition of a marriage that took place in another state, it renders the public policy exception inapplicable and is therefore unconstitutional).

²⁸ See Donovan, *supra* note 24, at 361.

²⁹ *Id.*

³⁰ See Matthew S. Pinix, *The Unconstitutionality of DOMA +INA*, 18 GEO. MASON U. C.R. L. J. 455, 493 (2008) (arguing that DOMA would fail to survive Equal Protection analysis under heightened scrutiny).

³¹ See U.S. DEP’T OF JUSTICE, *supra* note. (arguing that homosexuals should be a suspect class subject to a heightened standard of scrutiny); William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79

VA. L. REV. 1419, 1506-07 (1993) (explaining why homosexuals should be subject to a heightened standard of scrutiny).

³² See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (holding that classifications based on gender must be analyzed under intermediate scrutiny); *Clark v. Jeter*, 486 U.S. 456 (1988) (analyzing distinctions based on legitimacy under heightened scrutiny).

³³ See Melissa A. Provost, *Disregarding the Constitution in the Name of Defending Marriage: The Unconstitutionality of the Defense of Marriage Act*, 8 SETON HALL CONST. L. J. 157, 202 (1997) (arguing that in light of the Court's decision in *Romer v. Evans*, "it becomes a possibility that DOMA will be invalidated under a rational basis review.").

³⁴ See, e.g., *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (applying rational basis review, upholding the statute because it was rationally related to a legitimate government purpose, because no "suspect class" was implicated).

³⁵ H.R. REP. NO. 104-664, at 12 (1996), available at <http://www.scribd.com/doc/22636325/Defense-of-Marriage-Act-DOMA-H-R-Report-104-664-1996>.

³⁶ Barbara A. Robb, *The Constitutionality of the Defense of Marriage Act in the Wake of Romer v. Evans*, 32 NEW ENG. L. REV. 263, 337 (1997).

³⁷ *Id.* at 315-19.

³⁸ *Id.* at 320-21.

³⁹ See *Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235 (C.C. Haw. Dec. 3, 1996) (noting that same-sex marriages would not negatively affect the optimal development of children); *Adoption of Tammy*, 619 N.E.2d 315, 321 (Mass. 1993) (agreeing with the plaintiffs that recognizing the legal relationship between two lesbian mothers was in the best interest of their child).

⁴⁰ See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (refusing to uphold antimiscegenation laws rooted in religious tradition). See also *Romer v. Evans*, 517 U.S. 620, 631-36 (1996) (finding that "religious objections to homosexuality" were part of the reasoning behind Amendment 2 to the Colorado Constitution prohibiting the protection of LGBT people as a class).

⁴¹ See 142 CONG. REC. H7480, 7498 (daily ed. July 12, 1996); 142 CONG. REC. H7480, 7501 (daily ed. July 12, 1996) (the amendment was defeated by vote 311 to 103).

⁴² Robb, *supra* note 35, at 337.

⁴³ *Id.* at 336-38.

⁴⁴ *Id.* at 339-41.

⁴⁵ McLaughlin, *supra* note 2, at 166.

⁴⁶ *Id.*

⁴⁷ AMERICAN BAR ASSOCIATION, SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES, RECOMMENDATION (2009), available at <http://www.glad.org/uploads/docs/news/aba-doma-sec3-resolution-08-2009.pdf>; BOB BARR PLEDGES TO REPEAL DOMA, YOUTUBE, <http://www.youtube.com/watch?v=pz-VZgVTJdQ>; Patrick B. Craine, *Former President Clinton Calls for Repeal of the Defense of Marriage Act*, LIFESITENEWS, (Aug. 17, 2009), available at <http://www.lifesitenews.com/news/archive/ldn/2009/aug/09081709>.

⁴⁸ U.S. DEP'T OF JUSTICE, *supra* note 4.

⁴⁹ Connecticut, Iowa, Massachusetts, New Hampshire, New York and Vermont.

⁵⁰ Maryland and Rhode Island.

⁵¹ American Bar Association Family Advocate, *Why Can't My Wife Get a Green Card*, 32 FAM. ADV. 37, 39 (2010).

⁵² *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 397 (D. Mass. 2010).

⁵³ *Id.* at 379-81.

⁵⁴ *Id.* at 382.

⁵⁵ *Id.*

⁵⁶ *Id.* at 383.

⁵⁷ *Id.* at 389 ("What remains, therefore, is the possibility that Congress sought to deny recognition to same-sex marriages in order to make heterosexual marriage appear more valuable or desirable. . . . [T]he Constitution will not abide such 'a bare congressional desire to harm a politically unpopular group.'").

⁵⁸ *Id.* at 395-98.

⁵⁹ See *id.* at 396 ("[I]t is only sexual orientation that differentiates a married couple entitled to federal marriage-based benefits from one not so entitled. And this court can conceive of no way in which such a difference might be relevant to the provision of the benefits at issue.").

⁶⁰ *Id.* at 388.

⁶¹ *Massachusetts v. U.S. Health and Human Svcs.*, 698 F. Supp.2d 234, 253 (D. Mass. 2010).

⁶² *Id.* at 235-36. The federal benefits involved in this case were Masshealth (the Commonwealth's Medicare program), Medicare Tax and the State Cemetery Grants Program (which provided funding for (1) construction of two cemeteries for veterans in Massachusetts and (2) reimbursement of \$300 to

defray the burial costs of each veteran to be buried either of those cemeteries). *See id.* at 239-40.

⁶³ *Id.* at 250 (“[S]tate control over marital status determinations is a convention rooted in the early history of the United States, predating even the American Revolution.”).

⁶⁴ *Id.* at 248 (referencing and applying the constitutionality analysis in the companion case of *Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010)).

⁶⁵ *South Dakota v. Dole*, 483 U.S. 203 (1987).

⁶⁶ *See id.* at 207-08 (noting that legislation imposing conditions for federal funding meet these five requirements pursuant to the Spending Clause: (1) pursue the “general welfare,” (2) contain clear conditions for funding, (3) those conditions must bear relation to ‘the federal interest in particular national projects or programs,’ (4) the legislation must not violate the Constitution and (5) financial pressure created by the conditions must not be coercive as to constitute compulsion.)

⁶⁷ *Id.* at 248.

⁶⁸ *Massachusetts v. U.S. Dep’t of Health and Human Servs.*, 698 F. Supp. 2d 234, 253 (D. Mass. 2010); *Gill v. Office of Pers. Mgmt.*, 699 F.Supp.2d 374, 397 (D. Mass. 2010).

⁶⁹ *Gill*, 699 F.Supp. 2d at 395 (“The federal definitions of ‘marriage’ and ‘spouse,’ as set forth by DOMA, are incorporated into at least 1,138 different federal laws, many of which implicate rights and privileges far beyond the realm of pecuniary benefits.”); *see* Defense of Marriage Act, Pub. L. No. 104-199, 3(a), 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. 7 (2000), *id.* 2 (a) (codified at 28 U.S.C. 1738C (2000)) (in addition to defining “marriage,” also contracting the applicability of the Full Faith and Credit Clause by allowing states to choose whether to recognize same-sex marriages performed in other states)); *see generally* Herzig, *supra* note 10, at 652.

⁷⁰ Defense of Marriage Act § 3, 1 U.S.C. § 7 (2010) (“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the 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.”).

⁷¹ *See* Lena Ayoub & Shin-Ming Wong, *Foreign and International Law in Gay Rights Litigation: Separated and Unequal*, 32 WM. MITCHELL L. REV. 559, 570 (2006) (“Under DOMA, marriages, civil unions, and domestic partnerships recognized by states confer no immigration benefits to bi-national same-sex couples.”).

⁷² *See* 8 U.S.C. § 1154 (a) (1) (A) (i) (2009) (“[A]ny citizen of the United States claiming that an alien is entitled to classification by reason of . . . an immediate relative status . . . may file a petition with the Attorney General for such classification.”); *see also* 8 U.S.C. § 1151 (b) (2) (A) (i) (2009) (defining spouses of U.S. citizens as immediate relatives).

⁷³ Sara E. Farber, *Presidential Promises and the Uniting American Families Act: Bringing Same-Sex Immigration Rights to the United States*, 30 B.C. THIRD WORLD L.J. 329, 336-37 (2010).

⁷⁴ 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, 102-04 (2010); Farber, *supra* note 72, at 337-40.

⁷⁵ *See* Immigration and Nationality Act, ch. 477, 201 (b) (2) (A) (i), 66 Stat. 163 (1952) (codified at 8 U.S.C. 1151 (b) (2) (A) (i) (2000); *id.* 203 (a) (2) (codified at 8 U.S.C. 1553(a) (2) (2000))).

⁷⁶ *See* Immigration and Nationality Act, Pub. L. No. 82-414 § 205, 66 Stat. 163, 180 (1952) (codified as amended at 8 U.S.C. § 1154 (a)-(b) (2006)); 8 U.S.C. § 1186a (d) (1) (A) (i) (i) (requiring that a marriage be valid where it was celebrated). *See also* Scott C. Titshaw, *The Meaning of Marriage: Immigration Rules and the Implications for Same-Sex Spouses in a World Without DOMA*, 16 WM. & MARY J. WOMEN & L. 537, 558 (2010) (noting that the provision supports congressional intent to defer to the states and for the “congressional approval of the traditional presumption of universal validity of marriages valid where celebrated”).

⁷⁷ *See* Defense Of Marriage Act of 1996 § 7, 1 U.S.C. § 7 (2006) (“marriage means only a legal union between one man and one woman as husband and wife.”).

⁷⁸ *Fiallo v. Bell*, 430 U.S. 787, 810 (1977).

⁷⁹ *See* *United States v. Valenzuela-Bernal*, 458 U.S. 858, 864 (1978) (“The power to regulate immigration . . . has been entrusted by the Constitution to the political branches of the Federal Government.”);

DeCanas v. Bica, 424 U.S. 351, 354 (1976) (“[I]n the area of immigration and naturalization, congressional power is exclusive.”) ; Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (“The Court without exception has sustained Congress’ ‘plenary power to ‘make rules for the admission of aliens’....”). *But see* INS v. Chadha, 462 U.S. 919, 941-42 (1983) (finding that Congress must exercise its power to regulate aliens in constitutionally-permissive ways).

⁸⁰ *Id.* (“[E]ven though marriages between same-sex couples are being legally performed in other countries. . . such recognition does not impact the current federal immigration law and policy precluding lesbian and gay U.S. citizens or lawful permanent residents from sponsoring their foreign national partners for immigration benefits.”)

⁸¹ 8 U.S.C. § 1153 (c) (2006).

⁸² *See* Desiree Alonso, *Immigration Sponsorship Rights for Gay and Lesbian Couples: Defining Partnerships*, 8 CARDOZO WOMEN’S L.J. 207, 215 (2002) (characterizing the chances of obtaining a visa through this program as “very low”); Timothy R. Carraher, *Some Suggestions for the UFAA: A Bill for Same-Sex Binational Couples*, 4 NW. J. L. SOC. POL’Y 150, 157 (2009) (describing the Lottery Program as “the mechanism by which a very small number of visas are distributed at random”).

⁸³ *See* § 1151 (e) (limiting the number of diversity visa immigrants to 55,000 per fiscal year).

⁸⁴ *See* 8 U.S.C. § 1158 (a) (2) (B) (2009) (requiring that the applicant demonstrate by clear and convincing evidence that the [asylum] application has been filed within one year after the date of the applicant’s arrival in the United States).

⁸⁵ *See* § 1158 (b) (1) (B) (i) (outlining the permissible grounds for asylum as: race, religion, nationality, political opinion or membership in a particular social group).

⁸⁶ *See, e.g., Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990) (the first case to recognize homosexuality — within “particular social group” — as a permissible grounds for applying for asylum). *See also* Dan Bilefsky, *Gays Seeking Asylum in U.S. Encounter a New Hurdle*, N.Y. TIMES, available at <http://www.nytimes.com/2011/01/29/nyregion/29asylum.html?pagewanted=all> (discussing the difficulties of showing membership to a “particular social group” when that group is homosexuals).

⁸⁷ 8 U.S.C.A. § 1231 (b) (3) (2006) (establishing that to qualify for relief from removal based on the

CAT, an applicant must prove that they will more likely than not be subject to torture — infliction of extreme physical or mental pain — by a government official if forced to return).

⁸⁸ *See* Alonso, *supra* note 81, at 213-15 (defining family reunification as “the policy that drives the preferential treatment for immigrants sponsored by spouses or immediate family members who claim U.S. citizenship.”); *see also* U.S. SELECT COMM’N ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGR. POL’Y AND THE NAT’L INTEREST 112-13 (1981) (“[R]eunification of families serves the national interest not only through the humanness of the policy itself, but also through the promotion of the public order and well-being of the nation.”). Mara Schulzetenberg, *U.S. Immigration Benefits for Same Sex Couples: Green Cards for Gay Partners*, 9 WM. & MARY J. WOMEN & L. 99, 100 (2002) (“Congress has repeatedly indicated that family unification is one of the most important goals of United States immigration law, and approximately 75 percent of green cards are issued on family unity grounds.”); Hrutkay, *supra* note 73 (“Since 1948, family unification has played a central role in the development of U.S. immigration law and policy.”).

⁸⁹ § 1151(b) (2) (A) (i) (exempting immediate relatives from numerical quotas).

⁹⁰ Immediate family members generally include spouses, children, parents, and siblings. Family members are afforded higher priority status depending on the degree of closeness the beneficiary and the petitioning U.S. citizen/LPR relative. *See* U.S. DEP’T OF STATE, TRAVEL.STATE.GOV, http://travel.state.gov/visa/immigrants/types/types_1306.html#1.

⁹¹ 1 U.S.C. § 7 (1996); 28 U.S.C. § 1738 (1996).

⁹² *See* Titshaw, *supra* note 75, at 549 (“the recognition of a marriage frequently determines whether a foreign national may obtain a visa, enter the United States, legalize unlawful status, remain in the United States temporarily or permanently, become a U.S. citizen, or even be deported.”).

⁹³ Cori K. Garland, *Say “I Do”: The Judicial Duty to Heighten Constitutional Scrutiny of Immigration Policies Affecting Same-Sex Binational Couples*, 84 IND. L. J. 689, 702 (2009).

⁹⁴ *See* Alonso, *supra* note 81, at 211; *see also* Immigration Act of 1917.

⁹⁵ *See e.g.* Golden, *supra* note 25, at 302-04; Victor C. Romero, *The Selective Deportation of Same-Gender*

Partners: In Search of the "Rara Avis", 56 U. MIAMI L. REV. 537, 538 (2002).

⁹⁶ *Rosenberg v. Fleuti*, 374 U.S. 449, 451 (1963).

⁹⁷ *Hill v. INS*, 714 F.2d 1472, 1481 (9th Cir. 1983).

⁹⁸ See Immigration Act of 1990, Pub. L. No. 101-649, 601, 104 Stat. 4978, 5067-78 (1990) (codified at 8 U.S.C. 1182 (1990)).

⁹⁹ See Ayoub & Wong, *supra* note 70, at 566 (noting that homosexuals were subject to deportation, exclusion or denial of citizenship based on convictions for sodomy or public morality offenses under the category of "crimes involving moral turpitude" or exclusions based on lack of good moral character).

¹⁰⁰ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁰¹ *Id.*

¹⁰² See *id.* at 558 ("an emerging recognition that liberty gave substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex ought to have been apparent.").

¹⁰³ See *id.* ("the Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their own private lives and still retain their dignity as free persons.").

¹⁰⁴ See Garland, *supra* note 92, at 695. See also *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (decades before *Lawrence*, holding that any person in the United States has the right to marry whomever they choose).

¹⁰⁵ See Jessica Feinberg, *The Plus One Policy: An Autonomous Model of Family Reunification*, 11 NEV. L. J. 629, 636 (2011) ("[L]egal recognition of same-sex marriage has increased significantly in recent years.").

¹⁰⁶ Schulzetenberg, *supra* note 87, at 113.

¹⁰⁷ Currently, United States Citizenship and Immigration Services (USCIS).

¹⁰⁸ *Id.*

¹⁰⁹ See Titshaw, *supra* note 75, at 594. However, this consular discretion only helps LGBT *foreign* nationals, not U.S. citizens or Legal Permanent Residents.

¹¹⁰ Schulzetenberg, *supra* note 87, at 113.

¹¹¹ See Feinberg, *supra* note 104, at 630; Alonso, *supra* note 81, at 224.

¹¹² See, e.g., James D. Wilets, *To Admit or Deny?: A Comparative Perspective on Immigration Law for Same-Sex Couples: How the United States Compares to Other Industrialized Democracies*, 32 NOVA L. REV. 327, 356 (2008).

¹¹³ These countries are: Australia, Belgium, Brazil, Canada, Denmark, Czech Republic, Finland, France,

Germany, Iceland, Israel, Netherlands, New Zealand, Norway, South Africa, Spain, Sweden and the United Kingdom.

¹¹⁴ Ayoub & Wong, *supra* note 70, at 575.

¹¹⁵ *Id.* at 562-63.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 576-78.

¹¹⁸ *Id.* at 580.

¹¹⁹ *Id.* at 578-80.

¹²⁰ Ayoub & Wong, *supra* note 70, at 580.

¹²¹ Albania, Slovenia, Uruguay, Venezuela and Nepal. See Feinberg, *supra* note 104, at 645.

¹²² See Titshaw, *supra* note 75, at 553 ("For well over a century, courts and immigration authorities have recognized the general rule that marriages, valid in the country or state where celebrated, are valid everywhere.").

¹²³ See, e.g., *Dragovich v. U.S. Dep't of the Treasury*, 764 F. Supp. 2d 1178, 1192 (N.D. Cal. 2011); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 397 (D. Mass. 2010); *In re Levenson*, 587 F.3d 925, 931 (9th Cir. 2009); *Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009); *Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2006) (finding that a gay couple lacked standing to challenge Section 2 of DOMA); *Wilson v. Ake*, 354 F.Supp.2d 1298, 1308 (M.D.Fla. 2005); *Smelt v. County of Orange*, 374 F. Supp. 2d 86, 880 (C.D. Cal., 2005); *In re Kandau*, 315 B.R. 123, 145 (Bankr. W.D. Wash. 2004) (upholding constitutionality of DOMA and ruling that parties were not entitled to heightened equal protection scrutiny); *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982) (affirming lower court finding that a foreign man married to an American man was not a spouse for immigration purposes and that DOMA did not violate the 14th Amendment Equal Protection clause). But see *Matter of Lovo-Lara*, 23 I. & N. Dec. 746, 753 (BIA 2005) (deferring to North Carolina state courts to determine whether to recognize a marriage in which one spouse was a post-operative transsexual).

¹²⁴ See, e.g., *Smelt*, 374 F. Supp. 2d at 684; *Bishop v. Oklahoma*, 447 F.Supp. 2d 1239, 1247 (N.D. Okla. 2006); *Mueller v. Comm. of IRS*, 39 Fed. Appx. 437, 438 (7th Cir. 2002).

¹²⁵ *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982).

¹²⁶ Defense of Marriage Act § 3, 1 U.S.C. § 7 (2010) (providing that "[i]n determining the meaning of

any Act of Congress, or any ruling, regulation or interpretation of the 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.).

¹²⁷ See, e.g., Carraher, *supra* note 81, at 150.

¹²⁸ See S. 1278, 109th Cong. § 2 (2005) (defining “permanent partner” as “any person eighteen years of age or older who is: (i) in a committed, intimate relationship with an adult U.S. citizen or legal permanent resident eighteen years of age or older in which both parties intend a lifelong commitment; (ii) financially interdependent with that other person; (iii) not married to, or in a permanent partnership with, anyone other than that other person; (iv) unable to contract with that person a marriage cognizable under the Immigration and Nationality Act; and (v) is not a first, second, or third degree blood relation of that other individual.”).

¹²⁹ *Id.*; Ayoub & Wong, *supra* note 70, at 572.

¹³⁰ Farber, *supra* note 72, at 342-46 (2010).

¹³¹ Co-sponsors of UAFSA (S.821) in the Senate are Senators Akaka (D-HI), Blumenthal (D-CT), Boxer (D-CA), Brown (D-OH), Cantwell (D-WA), Cardin (D-MD), Casey (D-PA), Coons (D-DE), Durbin (D-IL), Franken (D-MN), Gillibrand (D-NY), Harkin (D-IA), Inouye (D-HI), Kerry (D-MA), Lautenberg (D-NJ), Merkley (D-OR), Murray (D-WA), Sanders (D-VT), Schumer (D-NY), Udall (D-CO), Whitehouse (D-RJ), Wyden (D-OR). See THE LIBRARY OF CONGRESS, THOMAS, *available at* <http://thomas.loc.gov/cgi-bin/bdquery/D?d112,d112:2::/temp/-bd7uXP:@P|/home/LegislativeData.php?n=BSS;c=112>.

¹³² See Respect for Marriage Act, S. 598, H.R. 1116 (2011) (requiring federal recognition of any marriage valid in the state or country where it was celebrated with the only requirement that the marriage was one that “could have been entered into in a State.”).

¹³³ See Seung Min Kim, *Senate Dems Move to Repeal DOMA*, POLITICO, Nov. 10, 2011, *available at* <http://www.politico.com/news/stories/1111/68075.html>.

¹³⁴ See Titshaw, *supra* note 75, at 541 n.15 (noting that repeal of DOMA “will not necessarily result in a clear, uniform rule recognizing all same-sex marriages”).

¹³⁵ *Id.* at 610. (“These standards have been used in dozens of cases, including those involving biracial marriage, marriage between close relatives, marriage involving minors, marriage involving transgender spouses, proxy marriage, polygamy, and even same-sex marriage before DOMA.”).

¹³⁶ *Id.*

¹³⁷ And because of this, it may violate Equal Protection in some other way.

¹³⁸ Ayoub & Wong, *supra* note 70, at 572.

¹³⁹ Feinberg, *supra* note 104, at 629.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 630.

¹⁴³ *Id.* at 659-65.

¹⁴⁴ *Id.* at 661.

¹⁴⁵ *Id.* at 662.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 663.

¹⁴⁸ *Id.* at 663-64.

¹⁴⁹ *Id.* at 664.

¹⁵⁰ *Id.* at 665.

¹⁵¹ See *Commonwealth v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234, 253 (D. Mass. 2010) (striking down DOMA); *Perry v. San Francisco*, 704 F. Supp. 2d 291, 293 (N.D. Cal. 2010) (same).

¹⁵² See *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (recognizing that the power of Congress over immigration is largely immune from judicial control).

¹⁵³ See *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (ruling that Congress’ plenary power relating to immigration is subject to “important constitutional limitations”); *Chae Chang Ping v. U.S.*, 130 U.S. 581, 604 (1889) (holding that that Congress’ power to legislate over immigration is restricted, not only by the Constitution itself but also by “considerations of public policy and justice which control . . . the conduct of civilized nations.”).

¹⁵⁴ *Fiallo v. Bell*, 430 U.S. 787, 805 (1977).

¹⁵⁵ *Id.* at 800.

¹⁵⁶ *Id.* at 807; *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (Marshall, J., dissenting) (“When Congress’ exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our ‘delicate and difficult task’ to determine whether the resulting restriction on freedom can be tolerated.”).

¹⁵⁷ *Fiallo*, 430 U.S. at 807.

¹⁵⁸ See *McLaughlin*, *supra* note 2, at 161.

¹⁵⁹ U.S. DEP'T OF JUSTICE, *supra* note 4.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* (“[T]he President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.”).

¹⁶³ President Obama makes it seem like his hands are tied because he owes deference to Congress. However, the Executive has “substantial power with respect to immigration in the United States, especially regarding the exclusion of immigrants.” See Farber, *supra* note 72 at 351 (citing Immigration and Nationality Act, 8 U.S.C. § 1182(f) (2006)). The President has “some role in commenting on legislative proposals and also has the power to veto legislative agendas.” See Farber, *supra* note 72, at 353.

¹⁶⁴ *Smelt v. U.S.*, SACV-09-00286 (C.D. Cal. Sept. 24, 2009); see Herzig, *supra* note 10, at 667 (“The first brief filed by the DOJ under the Obama administration was in the case of *Smelt v. United States*.”).

¹⁶⁵ See Laura Meckler, *Gay Group Slams Policies of President*, WALL ST. J., June 16, 2009, available at <http://online.wsj.com/article/SB124511150294217147.html>; LGBT Legal and Advocacy Groups Decry Obama Administration’s Defense of DOMA, HUMAN RIGHTS CAMPAIGN (June 12, 2009), available at <http://www.hrc.org/press-releases/entry/lgbt-legal-and-advocacy-groups-decry-obama-administrations-defense-of-doma>

¹⁶⁶ *Id.*

¹⁶⁷ U.S. DEP'T OF JUSTICE, *supra* note 4. See DOJ Memorandum in *Support of the Defendants’ Motion to Dismiss* at 1, *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2009) (No. 1:09-cv-10309), 2009 WL 5803678. Obama had advocated for heightened standard of review.

¹⁶⁸ *Windsor v. U.S.*, No. 10 Civ. 8435, 2011 WL 2207572, at *14 (S.D.N.Y. June 2, 2011).

¹⁶⁹ *Id.* at 3.

¹⁷⁰ *Id.* at 3-4.

¹⁷¹ *Id.* at 4.

¹⁷² Press Release, Office of the Press Secretary, Statement by the President on the Presidential Memorandum on Federal Benefits and Non-Discrimination, and Support of the Lieberman-

Baldwin Benefits Legislation (June 17, 2009) (on file with author).

¹⁷³ See Seung Min Kim, *Senate Dems Move to Repeal DOMA*, POLITICO, Nov. 10, 2011, available at <http://www.politico.com/news/stories/1111/68075.html>.

¹⁷⁴ See *id.* (“Feinstein acknowledged after the hearing that she didn’t have the 60 votes needed to override a filibuster on the Senate floor” and even with the requisite votes in the Senate “the bill ...will almost certainly go nowhere in the Republican-controlled House.”).