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REFOCUS ON THE FAMILY: EXPLORING THE COMPLICATIONS IN GRANTING THE FAMILY IMMIGRATION BENEFIT TO GAY AND LESBIAN UNITED STATES CITIZENS

Blythe Wygonik*

I. INTRODUCTION

The immigration policy of the United States currently overlooks the fact that the narrow definition of family denies same-sex partners the immigration benefit extended to opposite-sex partners of allowing one spouse to sponsor his or her foreign partner for United States citizenship.¹ The United States judicially placed this immigration benefit out of reach for same-sex bi-national couples in the 1982 *Adams v. Howerton*² decision and legislatively through the Defense of Marriage Act ("DOMA").³ The latter defines the term marriage when used in the context of federal law, including immigration law, as a "union between one man and one woman."⁴ As

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1. See *infra* Parts II, III. This comment discusses the problem with same-sex partners and will refer to the individuals in these relationships as "gay or lesbian." However, the same dilemma can affect bi-sexual and transsexual individuals.

2. 673 F.2d 1036, 1040-43 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982).

3. Defense of Marriage Act of 1996 ("DOMA"), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000), 28 U.S.C. § 1738C (2000)). See also Sara A. Shubert, *Immigration Rights for Same-Sex Partners Under the Permanent Partners Immigration Act*, 74 TEMP. L. REV. 541, 544 (2001) ("The Supreme Court denied certiorari to a Ninth Circuit Court of Appeals . . . case [*Adams v. Howerton*] which excluded same-sex domestic partners from the definition of 'spouse' for immigration purposes. [However,] Congress solidified this limitation . . . when it passed the Defense of Marriage Act . . .").

4. 1 U.S.C. § 7; see *infra* Part II.C.1; Shubert, *supra* note 3, 74 TEMP. L. REV. at 565 (arguing for the adoption of the Permanent Partners Immigration

a result of the judicial decision and federal legislation, same-sex partners can be separated and may be forced to emigrate to foreign nations to ensure their liberties.⁵

Many same-sex bi-national couples who are unable to remain in the United States because they cannot sponsor a partner through immigration law move to Canada as an alternative to separating, a phenomenon coined as Canada's "gay gain."⁶ While the United States denies gay and lesbian citizens the immigration right to sponsor a foreign spouse for citizenship,⁷ Canada recognizes same-sex marriage under federal law and does not have a residency requirement for marriage.⁸ Canada's geographic proximity to the United

Act in order to extend immigration benefits to same-sex bi-national couples without disturbing the federal definition of marriage, which is limited to a union between one man and one woman).

5. See, e.g., Johnny Diaz, *Union Issue: Bordering on Rejection U.S. Hardly Welcomes Partners of Same Sex but Different Nations*, BOSTON GLOBE, June 16, 2002, City Weekly Section (noting that Joseph Pacatte, a United States citizen and software engineer involved in a three-year relationship with a Colombian man, considered moving to Canada in order to remain in a permanent relationship with his partner); Kathleen Harris, *'Gay Gain' Strikes Canada; Couples Take Off to Great White North After Court Ruling*, WINNIPEG SUN, Nov. 23, 2003, at A10 (coining the term "gay gain" for situations such as that of Susan Hodges, a United States citizen, who would choose to emigrate to Canada with her German partner, Kirsten Haake, in order to remain together permanently); Christina Headrick, *Immigration Law Another Hurdle for U.S. Gays*, RALEIGH NEWS & OBSERVER, July 29, 2003, available at http://www.shns.com/shns/g_index2.cfm?action=detail&pk=GAYIMMIGRATION-07-29-03 (last visited Jan. 27, 2005) (discussing a North Carolina man's decision to move to Canada, and commute every other week to the U.S. for work, so that he can live with his partner, a Thai national); Mary Beth Sheridan, *U.S. Immigration Restrictions Give Gay Couples Few Options*, WASH. POST, Dec. 28, 2003, at C1 (explaining how a United States citizen chose to move to Canada with his Canadian partner after the couple dodged immigration officials for nearly eleven years in order to see each other); Jose Antonio Vargas, *Gay Lives in Limbo; U.S. Immigration Laws Leave Binational Couples in the Lurch*, S.F. CHRON., Jan. 11, 2004, at A21 (noting how in 2001 a United States citizen and her Brazilian partner started the organization, Love Sees No Borders, to raise awareness of their situation and the plight of same-sex bi-national couples).

6. See Harris, *supra* note 5.

7. See *Adams*, 673 F.2d at 1042; see also 1 U.S.C. § 7; Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101-17775 (West 2000 & West Supp. 2003) (governing immigration, admission, entry, and exclusion of aliens under federal law and citizenship in the United States).

8. See Reference re Same-Sex Marriage, [2004] S.C.C. 79, available at 2004 Can. Sup. Ct. LEXIS 76, *52-*53; *Halpern v. Canada* (Att'y Gen.), [2003] 225 D.L.R. 4th 529, 572-73; Michael Battista, Esq., Memorandum for the Lavender Law Conference, *Oh Canada! LGBT Immigration/Emigration Issues in Canada*, Oct. 18, 2003, at 5-6 (on file with *Santa Clara Law Review*).

States serves as a refuge to same-sex bi-national couples facing separation in the United States and also as a progressive model for the United States to recognize the rights of same-sex couples. "Gay drain"⁹ describes the reverse effect of Canada's "gay gain": "the U.S. is losing more and more professional gays and lesbians due to conservative social policy [in the United States]."¹⁰

To illustrate how United States immigration law affects same-sex bi-national couples, consider the hypothetical situation of Angela, a female United States citizen, who falls in love and develops a long-standing relationship over three years with another woman, Paula, a female Polish national. In order for Paula to visit Angela in the United States, she must repeatedly evade immigration officials to maximize her six-month tourist visa.¹¹ Although Angela and Paula have a permanent commitment and a valid marriage license from Massachusetts,¹² they fail to fulfill the heterosexual marriage requirement for federal immigration law standards.¹³ As a result, Angela and Paula must find an alternative way to maintain their relationship, such as emigrating to Can-

9. "Gay drain" is a trend coined by Immigration Equality's program coordinator Adam Francoeur. Immigration Equality (formerly Lesbian and Gay Immigration Rights Task Force), at <http://www.lgirtf.org> (last visited Feb. 10, 2005). Immigration Equality (formerly Lesbian and Gay Immigration Rights Task Force) is a public interest organization based in New York City that focuses on the legal concerns under immigration law of gay, lesbian, bisexual, trans-gender, and HIV-positive individuals. *See id.*

10. *See Harris, supra* note 5.

11. *See Sheridan, supra* note 5 (describing a similar pattern between a United States citizen and a Canadian national).

12. *See Largess v. Supreme Judicial Court*, 373 F.3d 219, 224 (1st Cir. 2004), *cert. denied* 125 S. Ct. 618 (2004) ("On May 17, 2004 . . . Massachusetts implemented *Goodridge's* requirement that same-sex marriage be recognized. Since then, Massachusetts has issued marriage licenses to same-sex couples and has recorded same-sex marriages."). The *Largess* decision was a federal lawsuit to enjoin the implementation of the *Goodridge v. Department of Public Health* decision, legalizing same-sex marriage in Massachusetts, where the plaintiffs argued that implementation of *Goodridge* would violate the Guarantee Clause of the U.S. Constitution. *Id.* at 223-24. *See also Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969-70 (Mass. 2003); *infra* Part II.D.4. *Largess* affirmed the lower court decision to deny the injunctive and declaratory relief sought by the plaintiffs, thus reaffirming the validity of the *Goodridge* decision. *Largess*, 373 F.3d at 229.

13. *See DOMA*, 1 U.S.C. § 7 (2000). This section defines marriage to be a "legal union between one man and one woman" and spouse to be "a person of the opposite sex who is a husband or a wife." *Id.*

ada.¹⁴

This comment will explore the options for increasing rights to same-sex bi-national couples in order to eliminate the existing problem same-sex bi-national couples face: forced emigration or separation. Part II of this comment discusses the historical, legislative, and judicial treatment of immigration rights and chronicles the gradual increase in gay and lesbian immigration rights.¹⁵

Parts III and IV of this comment will identify and analyze the United States' current denial of sponsorship rights for same-sex partners through the use of a narrow definition of family that excludes same-sex couples for immigration purposes and overlooks the rights denied to United States citizens involved in bi-national same-sex relationships.¹⁶ This denial conflicts with the changing legal landscape in the United States, which is expanding rights of gay and lesbian citizens through new legislation and recent judicial decisions.¹⁷ The United States' current immigration policy towards same-sex bi-national couples also conflicts with Canada's more progressive policy, which serves as a refuge for couples who must leave the United States to remain together.¹⁸

Finally, Part V of this comment will propose that the solution to keeping same-sex bi-national couples together and residing in the United States is to focus attention on a different and evolving definition of family.¹⁹ Instead of interpreting family as the nuclear family construct, advocates should focus on expanding the definition of family to include evolving notions of family, including same-sex partners.²⁰ This comment will also propose emphasizing the rights denied to *United States citizens*, rather than immigrants, in order to

14. See, e.g., Diaz, *supra* note 5; Harris, *supra* note 5; Headrick, *supra* note 5; Sheridan, *supra* note 5; Vargas, *supra* note 5.

15. See *infra* Part II.

16. See *infra* Parts III, IV.

17. See *infra* Parts III, IV.

18. See *infra* Parts III, IV.

19. See *infra* Part V.

20. See *infra* Part V; Linda Kelly, *Family Planning, American Style*, 52 ALA. L. REV. 943, 945 (2001); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 452 (11th ed. 2003) (defining the term "family" as parents and their children or adopted children or any unit regarded as equal to the traditional family, such as a single-parent family; thus, in the English language, family is defined neither by sexual orientation nor by marriage).

strengthen the case for increasing immigration rights to same-sex bi-national couples.²¹

II. A BACKGROUND PRIMER ON IMMIGRATION RIGHTS FOR SAME-SEX BI-NATIONAL COUPLES

A. Family Unity: A Main Goal of the Immigration and Nationality Act

The Immigration and Nationality Act (“INA” or “the Act”)²² requires that an immigrant be excluded from admission to the United States unless he or she qualifies for a non-immigrant visa or falls under a proper immigrant visa provision—such as one for family-sponsored immigration.²³ The INA grants preferential treatment for “immediate relatives” of a United States citizen by placing no limitation on the number of immediate relatives admitted to the United States each year.²⁴ An “immediate relative” under the Act includes “children, spouses, and parents of a citizen of the United States”²⁵ Although the immediate relatives visa is pro-

21. See *infra* Part V.

22. Immigration and Nationality Act (“INA” or “the Act”), 8 U.S.C. §§ 1101-17775 (2000).

23. See *id.* § 1101, 1151(a)(1), 1151(b)(2)(A)(i); RICHARD A. BOSWELL, IMMIGRATION AND NATIONALITY LAWS: CASES AND MATERIALS 451 (3d ed. 2000). A “visa” is required in order to enter the United States at a port of entry and serves as an official certificate that an individual has been examined and is qualified to enter the United States. *Id.* at 44. An “immigrant visa” allows an individual to seek admission to the United States on a permanent basis; whereas, a “nonimmigrant visa” allows an individual to enter the United States for a temporary period where the individual has no intention of abandoning his or her residence abroad. See *id.* at 42-43. Under the INA, “[t]he term ‘immigrant visa’ means an immigrant visa required by this Act and properly issued by a consular officer at his office outside of the United States to an eligible immigrant under the provisions of this Act.” 8 U.S.C. § 1101(a)(16). Other types of nonimmigrant visas include student visas and visitor visas. An “F-1” student visa is for an applicant entering the United States temporarily solely to pursue a full course of study at an established elementary school, high school, college, university, seminary, conservatory, or language school recognized by the United States Citizen and Immigration Services (“USCIS”). See INA, 8 U.S.C. § 1101(a)(15)(F)(i). A “B-1” visitor visa is a visa granted to a visitor for business purposes. See INA, 8 U.S.C. § 1101(a)(15)(B). The individual is admitted to the United States “to conduct business, attend conferences, etc., so long as it is on behalf of a foreign employer.” See BOSWELL, *supra*, at 390.

24. INA, 8 U.S.C. § 1151(b)(2)(A)(i); BOSWELL, *supra* note 23, at 451. Although there is a yearly cap for overall family-sponsored immigration, the immediate relatives are not restricted by any such quota. *Id.*

25. INA, 8 U.S.C. § 1151(b)(2)(A)(i).

vided for the purpose of uniting families, the statute does not define family.²⁶ Rather, the immigration law allowing United States citizens to sponsor a family member for immigration provides that:

Exclusive of aliens described in subsection (b), aliens born in a foreign state or dependent area who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence are limited to—(1) family-sponsored immigrants described in section [1153(a)]²⁷

The statute lists in order of preference for family-sponsored immigration: unmarried sons and daughters of citizens, spouses and unmarried sons and daughters of permanent resident aliens,²⁸ married sons and daughters of citizens, and brothers and sisters of citizens.²⁹

Despite the reality of the changing dynamic of the family unit and the recognition of those units as equal to the traditional family,³⁰ immigration law continues to adhere to the concept of the nuclear family: a father, a mother, and their dependent children.³¹ Although immigration law allows citizen family members to sponsor another family member for United States citizenship, same-sex partners are not included in this category, even if the partnership is a legally recognized marriage in the Commonwealth of Massachusetts.³²

26. See *id.* § 1101 (failing to define the term, “family”); § 1151(a)(1) (referring to “family-sponsored immigrants”); § 1151(b)(2)(A)(i) (considering children, spouses, and parents of United States citizens to be “immediate relatives”). The INA does not define the term “spouse” either. See *id.* § 1101. DOMA, however, defines “spouse” for federal purposes as referring “only to a person of the opposite sex who is a husband or a wife.” See 1 U.S.C. § 7.

27. INA, 8 U.S.C. § 1151(a)(1).

28. The INA defines the term “alien” as “any person not a citizen or national of the United States.” *Id.* § 1101(a)(3). Further, the INA does not expressly define the term “permanent resident,” but the term “lawfully admitted permanent residence” generally means someone who is legally residing in the United States on a permanent basis. See *id.* § 1101(a)(20); BOSWELL, *supra* note 23, at 43. Such a person may work in the United States but may not vote. BOSWELL, *supra* note 23, at 43. Lawful permanent resident status is “gained by a person who is admitted to the U.S. with an immigrant visa or has had her status adjusted to permanent residence after first being admitted or paroled.” *Id.*

29. See INA, 8 U.S.C. § 1153(a).

30. Kelly, *supra* note 20, at 945; MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, *supra* note 20, at 452.

31. Kelly, *supra* note 20, at 945.

32. See 1 U.S.C. § 7 (excluding same-sex partners from marriage and from the term spouse for federal law); *Adams v. Howerton*, 673 F.2d 1036, 1042 (9th

The United States' definition of family excludes same-sex binational couples from the benefits of family-sponsored immigration.

However, the United States Citizen and Immigration Service ("USCIS")³³ currently allows non-citizen permanent partners to obtain derivative visas as spouses who are accompanying or following a non-immigrant into the United States.³⁴ The USCIS grants the B-2 status as a visitor for pleasure to the partner of a foreign-national temporarily coming to the United States, which allows the couple to stay together for the remainder of the non-immigrant's stay in the United States.³⁵ This allowance for non-citizen, non-immigrant, same-sex couples derives from the spousal benefit awarded to heterosexual couples.³⁶ Yet, ironically, the right the USCIS grants to non-citizen, non-immigrant, same-sex couples, it denies to U.S. citizens.³⁷

B. Courts Grant Deference to Congressional Immigration Decisions

Immigration laws are further shaped by the deference

Cir. 1982); *Largess v. Supreme Judicial Court*, 373 F.3d 219, 224, 229 (1st Cir. 2004) (affirming the lower court that found no violation of the Guarantee Clause of the U.S. Constitution in the plaintiffs' attempt to enjoin the implementation of the *Goodridge* decision granting marriage rights to same-sex couples within Massachusetts).

33. Formerly known as the Immigration and Naturalization Service ("INS"), the USCIS "is the agency within the Department of Justice, which is responsible for enforcement of the immigration laws, as well as the conferral of immigration benefits." BOSWELL, *supra* note 23, at 9. See Lana Mobydeen, *Something Old, Something New, Something Borrowed, Something Mail-Ordered? The Mail-Order Bride Industry and Immigration Law*, 49 WAYNE L. REV. 939, 941 n.11 (2004) ("The Immigration and Naturalization Service (INS) changed into the Bureau of Citizenship and Immigration Services (BCIS) effective March 1, 2003, and later into the United States Citizen and Immigration Services (USCIS).").

34. See Brian McGloin, *Diverse Families with Parallel Needs: A Proposal for Same-Sex Immigration Benefits*, 30 CAL. W. INT'L L.J. 159, 167-69, 167 n.65 (1999) (acknowledging Immigration Equality's Lavi Soloway for pointing out that the USCIS makes this accommodation for a non-immigrant gay or lesbian individual).

35. *Id.* at 168. A visitor for pleasure must prove to the United States that he or she has not abandoned residence in his or her home country and has sufficient funds to support himself or herself while staying in the United States. See BOSWELL, *supra* note 23, at 390.

36. See 8 U.S.C. §§ 1101(a)(15)(E), (H), (L); McGloin, *supra* note 34, at 167-69.

37. See McGloin, *supra* note 34, at 167-69.

the Supreme Court gives to Congress when political judgments, such as the admission of aliens to the country, are at issue.³⁸ The deference given to Congress to decide immigration issues is supported by *Fiallo v. Bell*.³⁹

Fiallo consolidated three cases involving "unwed natural fathers and their illegitimate offspring who sought, either as an alien father or an alien child, a special immigration preference by virtue of a relationship to a citizen or resident alien child or parent."⁴⁰ The Court gave deference to Congress and determined that the parent-child relationship for immigration purposes did not extend to an illegitimate parent seeking this preferential treatment, despite the immigration law's preference to unite families of United States citizens.⁴¹

In his dissent in *Fiallo*, Justice Marshall noted the tension between giving proper deference to Congress and protecting citizens' fundamental interests.⁴² Justice Marshall recognized due deference to Congress in regard to immigration, but not when such deferential judicial review is "toothless."⁴³ Justice Marshall distinguished this case from other, less valid claims of aliens and declared that "[t]he simple fact that the discrimination is set in immigration legislation cannot insulate from scrutiny the invidious abridgment of citizens' fundamental interests."⁴⁴

C. Equitable Immigration Treatment for Gay and Lesbian Individuals Has Led to Greater Equity for Gay and Lesbian Individuals in the United States

One of the more controversial reasons Congress has his-

38. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 754, 766 (1972) (granting deference to Congress to decide the immigration issue of whether to allow an alien scholar admission to the United States for academic meetings).

39. 430 U.S. 787, 788-89 (1977) (resting on the fact that the INA has a special provision excluding illegitimate children of U.S. citizens from entering the country).

40. *Id.* at 790.

41. *Id.* at 799-800; see *infra* Part II.A (discussing how immigration laws give preference to an "immediate relative," which is defined as a child, spouse, or parent of a U.S. citizen).

42. See *id.* at 805-07 (Marshall, J., dissenting).

43. *Id.* at 805. Marshall used the term "toothless" to describe the overly-deferential review employed by the majority which effectively insulated "from scrutiny the invidious abridgment of citizens' fundamental interests" found in the underlying legislation. He called this insulation from review "abdication" to Congress rather than mere deference. *Id.* at 805, 807.

44. *Id.* at 807.

torically excluded individuals from this country is on social grounds.⁴⁵ In the 1950s, gay and lesbian acts were deemed to be abhorrent.⁴⁶ Congress addressed this concern by amending the immigration laws to restrict the ability of gay and lesbian people to remain in the United States.⁴⁷ Specifically, in December 1952, Congress added language to the INA that individuals afflicted with a "psychopathic personality" should be excluded from the country under the United States Public Health Service advisement that "the exclusion of aliens afflicted with psychopathic personality or a mental defect . . . is sufficiently broad to provide for the exclusion of homosexuals and sex perverts."⁴⁸ More specifically, the 1965 amendments to the INA expressly excluded gay and lesbian individuals from entering the country because they were "afflicted with psychopathic personality, or with sexual deviation."⁴⁹

This atmosphere of congressional exclusion of gay and lesbian people from immigration to the United States continued until 1990, when the 1965 INA gay and lesbian exclusionary provision was repealed.⁵⁰ Interestingly, the 1990 repeal came almost two decades after the 1973 decision by the American Psychiatric Association that homosexuality was not a psychiatric disorder.⁵¹ This report, nevertheless, influenced the 1990 repeal.⁵² Consequently, gay and lesbian people could no longer be denied admission into the United States based on their sexual orientation.⁵³

The USCIS has also expanded rights to individual same-sex couples through case-by-case discretionary judgment.⁵⁴ USCIS administrators may use their discretion to grant

45. BOSWELL, *supra* note 23, at 103.

46. See JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 90-91 (2001). The INS considered immigration law to classify homosexuals as "psychopaths." See *id.* at 90. Other branches of government, for example Congress, also considered homosexuality to be a mental deficiency. See *id.* at 91.

47. See *id.*; *Boutilier v. INS*, 387 U.S. 118, 122 (1967).

48. See MURDOCH & PRICE, *supra* note 46, at 91 (citing S. REP. NO. 1137, at 9 (1952)); *Boutilier*, 387 U.S. at 120-22 (citing S. REP. NO. 1137, at 9 (1952)).

49. 1965 Amendments, Pub. L. No. 89-236, 79 Stat. 911 (1965).

50. Immigration and Nationality Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990); Michael A. Scaperlanda, *Kulturkampf in the Backwaters: Homosexuality and Immigration Law*, 11 WIDENER J. PUB. L. 475, 486 (2002).

51. MURDOCH & PRICE, *supra* note 46, at 276.

52. *Id.*

53. See Scaperlanda, *supra* note 50, at 496-98.

54. See *id.* at 496-98.

spousal immigration rights to same-sex bi-national couples and may also extend the spousal immigration benefits to same-sex bi-national couples on "extreme hardship" grounds.⁵⁵ However, these discretionary allowances are not required by law, and only aid a few couples from the decision to separate or emigrate.⁵⁶

Another way in which the USCIS has expanded rights to gay and lesbian people is by granting asylum to individuals who demonstrate a well-founded fear of persecution in their country of origin based on their proclaimed sexual orientation.⁵⁷ Asylum is:

[a] discretionary benefit to certain persons inside the U.S. or at the border who are able to demonstrate that they are unable or unwilling to return to their country on account of persecution or a well-founded fear of persecution based on race, religion, nationality, *membership in a particular social group*, or political opinion.⁵⁸

After one year of asylum status, an individual may apply to be a lawful permanent resident of the United States.⁵⁹ A lawful permanent resident is "[a] person accorded the benefit of being able to reside in the U.S. on a permanent basis."⁶⁰ The Board of Immigration Appeals ("BIA")⁶¹ decided to grant political asylum status to non-citizen gay and lesbian individuals based on their membership in a particular social group, in which they share a common, immutable characteristic.⁶²

In the 1990 case of *Matter of Toboso-Alfonso*,⁶³ asylum was granted for the first time to gay and lesbian individuals.⁶⁴ In *Toboso-Alfonso*, the BIA granted asylum to a Cuban national facing persecution in his native country because he was

55. *See id.*

56. *See id.*

57. *See infra* notes 57-60 and accompanying text.

58. BOSWELL, *supra* note 23, at 41-42 (emphasis added).

59. *Id.* at 42.

60. *Id.* at 43.

61. The Board of Immigration Appeals ("BIA") reviews the decisions of immigration judges, who decide issues of admissibility and deportability, and "is the final administrative appellate body for certain cases under the immigration laws." *Id.* at 9.

62. Scaperlanda, *supra* note 50, at 486; MURDOCH & PRICE, *supra* note 46, at 276; *see* *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822 (BIA 1990).

63. 20 I. & N. Dec. 819.

64. *See id.*

a gay man.⁶⁵ In 1994, the Attorney General ordered the decision of the Board of Immigration Appeals in the *Matter of Toboso-Alfonso* as precedent in all proceedings involving the same issue or issues.⁶⁶ As a result, gay and lesbian people who were once excluded from the United States altogether may now take refuge in the United States and eventually apply for lawful permanent residency if they experienced past persecution or a fear of persecution in their home country because of their sexual orientation.⁶⁷ Ironically, this grant of asylum led hundreds of gay and lesbian individuals to take refuge in the United States, while the United States still refuses to permit same-sex partners to immigrate.

1. Congressional Expansion of Gay and Lesbian Rights is Limited with the Passage of the Defense of Marriage Act

Although Congress began to increase gay and lesbian rights in the United States by granting asylum to qualifying non-citizens,⁶⁸ the expansion of rights was limited when Con-

65. *Id.* The applicant in this case was a forty-year-old native and citizen of Cuba, Fidel Toboso-Alfonso. *Id.* at 820. He applied for asylum because he was a gay man, was persecuted in Cuba based on his status as a gay man, and would have been persecuted for these reasons if he returned to Cuba. *Id.* at 820. He chronicled the treatment he received in Cuba on account of his status as a gay man. *Id.* at 820-22. First, the Cuban government registers and maintains files on all homosexuals, which subjects them to continual physical examinations, questioning on their sex lives, and criminal detentions for no apparent reason other than their homosexuality. *Id.* at 820-21. Second, the applicant was given an ultimatum at his place of work in Cuba to either leave the country or be placed in a penitentiary for four years. *Id.* at 821. Third, residents of Cuba threw eggs and tomatoes at him on account of his status as a gay man. *Id.* Fourth, Cuba has a consistent practice of sentencing homosexuals to incarceration in forced labor camps, repeated detentions, and physical beatings. *Id.* The BIA granted Mr. Toboso-Alfonso asylum status because "he [had] a well-founded fear of continued persecution . . . [based on his] membership in a particular social group, namely homosexuals." *Id.* at 822.

66. In re: Fidel Toboso-Alfonso, Att'y Gen. Order No. 1895-94 (June 19, 1994).

67. See MURDOCH & PRICE, *supra* note 46, at 91; BOSWELL, *supra* note 23, at 41-42; see, e.g., *Pitcherskaia v. INS*, 118 F.3d 641, 643-44 (9th Cir. 1997) (remand to determine whether to grant asylum to a lesbian Russian woman based on treatment she had experienced in Russia, including being beaten, arrested, and threatened with involuntary psychiatric confinement, constituted a reasonable fear of persecution because of her political opinions and support of gay and lesbian individuals in Russia).

68. See *infra* Part II.C.

gress passed the Defense of Marriage Act ("DOMA") in 1996.⁶⁹

DOMA provides that for all federal purposes, including immigration law, "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."⁷⁰ The DOMA also addresses marriage recognition between states:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.⁷¹

DOMA was passed in response to a 1993 Hawaii Supreme Court holding unconstitutional Hawaii's prohibition on same-sex marriage.⁷² Congress was also concerned that other states would follow Hawaii's lead.⁷³ Between 1993 and 2003, courts in Hawaii, Alaska, Vermont, and Massachusetts struck down the prohibitions of same-sex couples' right to marry.⁷⁴

69. Defense of Marriage Act of 1996 ("DOMA"), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as 1 U.S.C. § 7 (1997), 28 U.S.C. § 1738C (2004)); see *infra* Part III (discussing how DOMA withholds from same-sex couples the privileges federal law bestows upon opposite-sex couples).

70. 1 U.S.C. § 7.

71. 28 U.S.C. § 1738C.

72. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

73. See RALPH S. SMITH & RUSSEL R. WINDES, *PROGAY/ANTIGAY: THE RHETORICAL WAR OVER SEXUALITY* 158-59 (2000). The Supreme Court of Hawaii ruled that a same-sex couple had an arguable equal protection claim regarding Hawaii's marriage laws and remanded for a determination of whether the state could satisfy strict scrutiny. *Baehr*, 852 P.2d at 67. Before the ruling on remand, the voters of Hawaii passed a constitutional amendment allowing the legislature to restrict the definition of marriage to different-sex couples. SMITH & WINDES, *supra*, at 158.

74. *Baehr*, 852 P.2d 44; *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998) (finding that the marriage code prohibition implicated fundamental rights, and remanding to determine whether the government has a compelling interest in withholding marriage privileges from same-sex couples); *Baker v. State*, 744 A.2d 864 (Vt. 1999) (ruling that excluding same-sex couples from the state marriage benefits and protections violates the state constitution); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that Massachusetts' marriage licensing statutes violated the state's constitutional equal protection guarantees). In the *Brause* case, which increased rights to same-sex couples in Alaska by finding that marriage was a fundamental right but on remand denied same-sex couples the right to marry, Jay Brause and Gene Dugan appealed to the Supreme Court

Subsequently, the legislatures in Hawaii and Alaska amended their respective state constitutions to preclude same-sex marriage in response to the state court decisions.⁷⁵ Unlike Hawaii and Alaska, Vermont continues to recognize same-sex civil unions, which confer all the state benefits of marriage to same-sex couples under a different name (civil unions).⁷⁶ Most recently, on May 17, 2004, the Commonwealth of Massachusetts legalized same-sex marriage.⁷⁷

2. *The Proposed Permanent Partners Immigration Act Extends Spousal Benefits to Same-Sex Bi-National Couples*

To directly address the dilemma same-sex bi-national couples face in immigration of choosing between forced emigration or separation, New York State Representative Jerrold Nadler introduced the Permanent Partners Immigration Act ("PPIA").⁷⁸ The PPIA proposes amending the INA by defining the term "permanent partner" and including the term after "spouse" in relevant sections of the INA to extend spousal benefits to same-sex partners for immigration purposes.⁷⁹ The proposed PPIA defines "permanent partner" as:

an individual 18 years of age or older who

(A) is in a committed, intimate relationship with another individual 18 years of age or older in which both parties intend a lifelong commitment;

(B) is financially interdependent with that other individ-

of Alaska. See *Brause v. Dep't of Health & Soc. Servs.*, 21 P.3d 357 (Alaska 2001). However, the Alaskan Supreme Court found the issue of whether the failure to grant the couple a marriage license was a constitutional violation to be moot because the amendment to the Alaska Constitution that was effective in 1999 defined marriage as only between a man and a woman. *Id.* at 358.

75. See HAW. CONST. art. I, § 23 (adopted 1998) ("The legislature shall have the power to reserve marriage to opposite-sex couples."); ALASKA CONST. art. I, § 25 (adopted 1998) ("To be valid or recognized in this State, a marriage may exist only between one man and one woman.").

76. William C. Duncan, *The Many Questions of Civil Unions: An Introduction to a Symposium Addressing the Impact of Civil Unions*, 11 WIDENER J. PUB. L. 361, 369 (2002).

77. *Largess v. Supreme Judicial Court*, 373 F.3d 219, 224 (1st Cir. 2004) *cert. denied*, 125 S.Ct. 618 (2004).

78. Permanent Partners Immigration Act of 2000 (PPIA), H.R. 3650, 106th Cong. (2000) (introduced on February 14, 2000 (Valentine's Day)), available at <http://thomas.loc.gov>.

79. See *id.*

ual;

(C) is not married to or in a permanent partnership with anyone other than that other individual;

(D) is unable to contract with that other individual a marriage cognizable under this Act; and

(E) is not a first, second, or third degree blood relation of that individual.⁸⁰

The PPIA was reintroduced in the House of Representatives and once in the Senate.⁸¹

a. Support for the PPIA

Proponents argue that the PPIA will not negatively affect the institution of marriage because it separates the definitions of a “permanent partner[ship]” from “marriage,” while rectifying situations where gay and lesbian Americans must live apart from their partners or emigrate to another country if they want to remain together.⁸² The PPIA addresses this dilemma for same-sex bi-national couples and prevents fraud by creating strict requirement in order to qualify as a “permanent partner.”⁸³ The PPIA requires petitioners to prove they are at least eighteen years of age and are involved in a lifelong, committed, and financially interdependent relationship.⁸⁴ The penalties for marriage fraud would also apply to falsification of permanent partner status, which include up to five years in prison, or \$250,000 in fines, or both, or deportation.⁸⁵ In addition, the allowance in the PPIA for same-sex partners to remain together in the United States will decrease the need for couples in such situations to evade the existing immigration laws in order to remain together within the United States.

Moreover, proponents of the PPIA note that sixteen other countries have already extended benefits to same-sex partners for immigration purposes: Australia, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Iceland, Is-

80. *Id.*

81. Permanent Partners Immigration Act of 2003 (PPIA of 2003), S. 1510, 108th Cong. (2003), available at <http://thomas.loc.gov>.

82. *See id.*

83. *See id.*

84. *See id.*

85. INA, 8 U.S.C. § 1325 (2000).

rael, the Netherlands, New Zealand, Norway, South Africa, Sweden, and the United Kingdom.⁸⁶ Canada recognized same-sex marriage in 2003, following the prior lead of Belgium and the Netherlands.⁸⁷ The recent decision of *Goodridge v. Department of Public Health* resulted in same-sex marriage being recognized within the Commonwealth of Massachusetts.⁸⁸

Advocates estimate that the PPIA would result in close to 20,000 people seeking residency status within the first year of such a change.⁸⁹ After the first year, the estimates drop to about 1,000 applications per year.⁹⁰

b. Opposition to the PPIA

Some opponents of the PPIA fear that the legislation would operate incorrectly by recognizing same-sex partnerships before legalizing same-sex marriage.⁹¹ Still others cite their moral opposition to homosexuality and consider legislation such as the PPIA as erroneously equating same-sex relationships with heterosexual ones.⁹² Robert Knight, the director of the Culture and Family Institute, asks, “[w]hy would we want to turn America into a magnet for homosexuals? . . .”⁹³ Glenn Stanton, a conservative advocate for Focus

86. Immigration Equality (Formerly the Lesbian and Gay Immigration Rights Task Force), *The Permanent Partners Immigration Act* (July 14, 2003), at <http://www.lgirtf.org/ppia.html>; Vargas, *supra* note 5.

87. Clifford Krauss, *Canadian Leaders Decide to Propose a Gay Marriage Law*, N.Y. TIMES, June 18, 2003, A1. The Netherlands has a long residency requirement to qualify for same-sex marriage privileges in the country, and Belgium only recognizes same-sex marriage of foreign couples from countries that already accept such marriages. *Id.*

88. *Goodridge*, 798 N.E.2d at 968; see *Largess v. Supreme Judicial Court*, 373 F.3d 219, 224 (1st Cir. 2004) (noting the legal effect of *Goodridge*); see *infra* pp. 513-15.

89. Sheridan, *supra* note 5.

90. *Id.*

91. Shubert, *supra* note 3, at 558.

92. See, e.g., David Crary, *Gay Rights Groups Target a Barrier to Immigration: U.S. Immigration Rules Don't Treat a Same-Sex Couple the Same as a Heterosexual Pair, and There's an Attempt in Congress to Change That*, MIAMI HERALD, Nov. 24, 2003, available at <http://www.miami.com/mld/miamiherald/2003/11/24/news/nation/7336152.htm> (last visited Feb. 11, 2005) (discussing some socially conservative groups who claim the PPIA undermines the traditional notion of marriage between a man and a woman).

93. Sheridan, *supra* note 5. The Culture and Family Institute, a conservative organization focused on targeting cutting-edge issues in the news such as

on the Family has argued that “[m]arriage is more than simply a close, committed relationship between two people”⁹⁴

In addition, opponents fear that increasing rights to same-sex partners will erode the institution of marriage and, therefore, wish to strengthen the DOMA.⁹⁵ Proponents, however, answer this concern by pointing out that the PPIA would expressly be separating the issues of same-sex marriage and same-sex immigration benefits, thus preserving the United States’ legal definition of marriage.⁹⁶ Opponents of the PPIA also fear that granting same-sex bi-national couples immigration benefits would extract limited resources away from the United States and drive the level of immigration too high.⁹⁷

D. Recent Judicial Decisions Expand Rights and Freedoms Historically Denied to Openly Gay and Lesbian Individuals in the United States

Recent United States judicial decisions have expanded the rights and freedoms of gay and lesbian individuals.⁹⁸ However, courts historically denied full rights to gay and lesbian individuals.⁹⁹ In particular, courts interpreted the language of the 1965 amendments to the INA that excluded gay

“homosexual activism,” was launched by Concerned Women for America, which is the largest women’s public policy organization in the country that seeks to unite biblical principles with the law. *See* Concerned Women for America at <http://www.cwfa.org/about.asp> (last visited Jan. 30, 2005).

94. Crary, *supra* note 92. Focus on the Family is a conservative organization with the objective of spreading the words of the Gospel to help preserve traditional Christian values and the institution of the family. *See* Focus on the Family, at <http://www.family.org/welcome/aboutfof/a0005554.cfm> (last visited Jan. 30, 2005) (discussing some socially conservative groups who claim the PPIA undermines the traditional notion of marriage).

95. *See* Crary, *supra* note 92.

96. *See* 1 U.S.C. § 7 (2000) (defining marriage for purposes of federal law to be a legal union between one man and one woman); Shubert, *supra* note 3, at 567-68.

97. *See* Sheridan, *supra* note 5.

98. *See* Lawrence v. Texas, 539 U.S. 558 (2003) (striking down Texas’s ban on homosexual sodomy and recognizing that adults are entitled to engage in private, consensual sexual intimacy, regardless of their sex or sexual orientation); Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (recognizing that the denial of same-sex marriage violates the constitution of the Commonwealth of Massachusetts).

99. *See* Rosenberg v. Fleuti, 374 U.S. 449 (1963); Boutilier v. INS, 387 U.S. 118 (1966); Adams v. Howerton, 673 F.2d 1036, 1036-43 (9th Cir. 1982).

and lesbian people from the United States as clear congressional intent to deny rights to gay and lesbian people.¹⁰⁰

I. Rosenberg v. Fleuti and Boutilier v. INS

The Supreme Court has decided two cases challenging the language of the 1965 INA amendments that expressly barred gay and lesbian people from the United States.¹⁰¹ In *Rosenberg v. Fleuti*, the Court considered whether a gay man could be admitted to the United States.¹⁰² Mr. George Fleuti, a gay Swiss national, came to the United States in 1952 with the intent to remain in the country and did not leave with the exception of a brief visit to Mexico in 1956.¹⁰³ In 1959, the Immigration and Naturalization Service ("INS")¹⁰⁴ sought to deport Mr. Fleuti on account of his 1956 entry into the United States following a trip to Mexico.¹⁰⁵ The INS contended that Mr. Fleuti's entry violated the laws of the United States because he was gay.¹⁰⁶ In particular, the INS argued that Mr. Fleuti was inadmissible under the INA because he was "afflicted with psychopathic personality," which included homosexuality.¹⁰⁷ The Ninth Circuit Court of Appeals held that the term "psychopathic personality" in the INA was unconstitutionally vague and could not be interpreted to include homosexuality.¹⁰⁸ On review by the Supreme Court, Justice Goldberg's opinion held that a return from a trip to Mexico did not constitute an "entry" into the United States under immigration law, and Mr. Fleuti was allowed to remain in the United States.¹⁰⁹ Although Mr. Fleuti remained in the United States freely, the decision circumvented the original issue raised in the case, whether the language "psychopathic personality" was unconstitutionally vague.¹¹⁰

In *Boutilier v. Immigration and Naturalization Service*,

100. *Boutilier*, 387 U.S. at 130.

101. See *Rosenberg*, 374 U.S. at 449; *Boutilier*, 387 U.S. at 118.

102. *Rosenberg*, 374 U.S. at 449.

103. *Id.* at 450.

104. At the time this case was decided, the United States Citizen and Immigration Services ("USCIS") was referred to as the Immigration and Naturalization Service ("INS").

105. *Rosenberg*, 374 U.S. at 450.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 463.

110. *Id.*

the Supreme Court first addressed the issue of whether gay and lesbian people may be excluded from entry into the United States through the use of the term "psychopathic personality."¹¹¹ Mr. Boutilier, a Canadian national, entered the United States in 1959 to join his mother, stepfather, and three siblings.¹¹² He applied for United States citizenship in 1963.¹¹³ Along with his application, Mr. Boutilier supplied an affidavit of his arrest in New York in 1959 for committing homosexual sodomy.¹¹⁴ The case chronicled Mr. Boutilier's same-sex encounters from the age of fourteen, highlighted the fact that he had three or four same-sex encounters each year, and reported that he had lived with a man with whom he maintained a sexual relationship since 1959.¹¹⁵ Justice Clark, writing for the Supreme Court majority, denounced such behavior by ruling that homosexuality was a "psychopathic personality" within the meaning of the INA.¹¹⁶ Justice Clark wrote that, "when petitioner first presented himself at our border for entrance, he was already afflicted with homosexuality. . . . and under it he was not admissible."¹¹⁷ This landmark case deemed gay and lesbian individuals to be "afflicted with 'psychopathic personalit[ies]'" for purposes of United States immigration law.¹¹⁸

2. *Adams v. Howerton*

In *Adams v. Howerton*, a 1982 challenge to the INA regarding its treatment of same-sex bi-national couples, involving an alleged same-sex marriage between two men in Colorado, failed.¹¹⁹ Adams, a United States citizen, alleged that his "marriage" to Sullivan, who was not a United States citizen, was valid for purposes of classifying Sullivan as an "immediate relative" under the INA.¹²⁰ Basing its decision on the

111. *Boutilier*, 387 U.S. 118.

112. *Id.* at 119.

113. *Id.*

114. *Id.*

115. *Id.* at 119-20.

116. *Id.* at 123.

117. *Boutilier*, 387 U.S. at 123.

118. *Id.*

119. *Adams*, 673 F.2d at 1038. The case places the term "married" in quotation marks because the two men obtained a marriage license in Colorado and were married by a minister, despite the fact that Colorado law is silent as to whether same-sex marriage is permitted. *Id.* at 1038-39.

120. *Id.* at 1038; 8 U.S.C. § 1151(b)(2)(A)(i) (2000) ("[T]he term "immediate

construction of the INA, the Ninth Circuit Court of Appeals found that Congress intended only partners of heterosexual marriages to be considered “spouses” under the INA.¹²¹ The court held that, “so long as Congress acts within constitutional constraints, it may determine the conditions under which immigration visas are issued.”¹²²

Adams used a two-step analysis to decide whether a marriage will be recognized for immigration purposes.¹²³ The court should first determine whether the marriage is valid under state law and then decide whether the state-approved marriage qualifies under the INA.¹²⁴ The Ninth Circuit, however, did not address the validity of the state marriage because it could decide the case solely based on the statutory construction of section 201(b), the second and most critical step in the analysis.¹²⁵

The court determined the meaning of the word “spouse” by looking to the congressional intent behind the INA and by following the canon of statutory construction to give words their “ordinary and fundamental” meaning.¹²⁶ Because Congress did not manifest an intent to broaden the definition of “spouse,” the court interpreted the term to mean “a relationship between a man and a woman.”¹²⁷

The court based its decision partly upon a review of the 1965 amendments to the INA, which excluded gay and lesbian people from immigration to the United States.¹²⁸ The Supreme Court’s interpretation of the word “spouse” in *Boutilier*, which expressed a clear intent to exclude gay and

relatives” means the children, spouses, and parents of a citizen of the United States . . .”).

121. *Adams*, 673 F.2d at 1040.

122. *Id.* at 1039.

123. *Id.* at 1038. For further discussion of the two-prong test see *infra* Part IV.B.

124. *Adams*, 673 F.2d at 1038.

125. *Id.* at 1039. The court did not directly address the first prong of the two-step analysis: whether a marriage between same-sex persons is valid under Colorado statutory law. The court noted that “Colorado’s statutory law, however, neither expressly permits nor prohibits homosexual marriage.” See *id.* Additionally, the court highlighted that Colorado’s Attorney General released an informal and unpublished opinion, just three days after the purported marriage, stating that marriages between same-sex persons are of no legal effect in Colorado. See *id.*

126. *Id.* at 1040.

127. *Adams*, 673 F.2d at 1040.

128. *Id.*

lesbian people from the country, further strengthened the argument that "spouse" did not apply to same-sex partners.¹²⁹

The emphasis in the *Adams* decision focused on the plenary power given to Congress to admit or exclude aliens,¹³⁰ subject to rational basis review.¹³¹ In particular, the court cited many reasons why Congress has such broad power.¹³²

First, Congress holds the power to admit or exclude aliens under its inherent authority to maintain international relations and defend the country against foreign encroachment.¹³³ Second, the court also cited *Fiallo* in its rationale that in this broad power over immigration, "Congress regularly makes rules that would be unacceptable if applied to citizens."¹³⁴ In conclusion, the court reaffirmed Congress's plenary power by holding that *Adams*' challenge did not survive rational basis review.¹³⁵ The court noted that the rational bases for allowing Congress's law to stand included same-sex couples do not produce offspring; same-sex marriages are not recognized in any states; and, homosexuality violates traditional mores.¹³⁶ The Court denied certiorari in *Adams*, and, therefore, it remains the primary decision interpreting the INA provision as applied to same-sex couples.¹³⁷

3. Lawrence v. Texas

The Supreme Court recently extended rights to gay and lesbian people in *Lawrence v. Texas*.¹³⁸ In *Lawrence*, the Court struck down Texas's ban on homosexual sodomy, recognizing that adults are entitled to engage in private, consensual sexual intimacy, regardless of their sex or sexual orientation.¹³⁹ The Court overruled *Bowers v. Hardwick*¹⁴⁰ by

129. *Id.*

130. *See Fiallo v. Bell*, 430 U.S. 787, 792 (1977). *See also* discussion *supra* Part II.B.

131. *Adams*, 673 F.2d at 1041. "Where there is a rational basis for Congress's exercise of its power, whether articulated or not, the Court will uphold the immigration laws that Congress enacts." *Id.* at 1042.

132. *Id.* at 1041.

133. *Id.* (citing *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)).

134. *Adams*, 673 F.2d at 1042 (quoting *Fiallo*, 430 U.S. at 792).

135. *Id.*

136. *Id.*

137. *Id.*, *cert. denied*, 458 U.S. 1111 (1982).

138. 539 U.S. 558 (2003).

139. *Id.* at 578.

holding that in *Bowers*, the issue of whether there was a fundamental right to engage in sodomy was incorrectly stated and, thus, was incorrectly decided.¹⁴¹ In *Lawrence*, the Court noted that two adults engaging in consensual sexual practices are entitled to respect for their private lives, without regard to their sexual orientation.¹⁴² The Court went so far as to state that the profound, legitimate relationships that develop between two people are protected by the Constitution: "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."¹⁴³

4. Goodridge v. Department of Public Health

Most recently, the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*¹⁴⁴ declared the state's practice of prohibiting same-sex marriage to be a violation of the Massachusetts Constitution.¹⁴⁵ The court held that it is unconstitutional to deny same-sex couples the benefits afforded to heterosexual married couples solely on the basis of sexual orientation.¹⁴⁶ The court then analogized the dis-

140. 478 U.S. 186 (1986) (upholding a Georgia sodomy law by ruling that there is no fundamental right to engage in homosexual sodomy).

141. *Lawrence*, 539 U.S. at 566-67.

142. *Id.* at 567.

143. *Id.*

144. 798 N.E.2d 941 (Mass. 2003).

145. *Id.* at 968.

146. *Id.* The Massachusetts Supreme Judicial Court noted that marriage brings many social benefits including mutuality, companionship, intimacy, fidelity, and family. *Id.* at 954-55. Marriage also bestows many legal benefits that cannot be enjoyed without a valid marriage license. *Id.* at 954. Some legal benefits from marriage include joint income tax filing, tenancy by the entirety property ownership, extension of benefits of the homestead protection to one's spouse and children, automatic rights to inherit property of a deceased spouse who does not leave a will, rights of elective share and of dower, entitlement to wages owed to a deceased employee, eligibility to continue certain businesses of a deceased spouse, the right to share the medical policy of one's spouse, preferential options under Massachusetts' pension system and medical program, access to veterans' spousal benefits and preferences, financial protection for spouses of certain Massachusetts' employees killed in the line of duty, equitable division of marital property upon divorce, temporary and permanent alimony rights, the right to bring claims for wrongful death and loss of consortium, presumptions of legitimacy and parentage of children born to a married couple, prohibition of one spouse testifying against the other concerning private conver-

criminatory treatment of same-sex couples to that of bi-racial couples in the case of *Loving v. Virginia*¹⁴⁷ and declared that a law cannot bar access to the fundamental right to marry “because of a single trait: skin color in . . . *Loving*, sexual orientation here.”¹⁴⁸ The court noted that laws must conform to reality: “As it did in . . . *Loving*, history must yield to a more fully developed understanding of the invidious quality of the discrimination.”¹⁴⁹

In its rationale, the court confronted the traditional reasons for denying same-sex partners the right to marry.¹⁵⁰ First, the court stated that any interest in procreation was not rationally furthered by excluding same-sex couples from the right to marry.¹⁵¹ *Goodridge* noted that “[f]ertility is not a condition of marriage, nor is it grounds for divorce.”¹⁵²

Second, the court noted that same-sex partners are able to raise children in an “optimal setting,” thereby rejecting the state’s argument that heterosexual marriage is the only environment where children can be raised in an “optimal setting.”¹⁵³ The court stated that “[t]he demographic changes in the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household.”¹⁵⁴ In particular, Massachusetts and many other states recognize the right of individuals to maintain custody of children and even to adopt, regardless of their sexual orientation or marital status.¹⁵⁵

sations, an automatic “family member” preference to make decisions for a disabled spouse, rights to child custody, visitation, support, and removal out-of-state upon divorce, and priority rights to allocate the assets of a deceased spouse who dies intestate. *Id.* at 955-56.

147. *Loving v. Virginia*, 388 U.S. 1 (1967) (declaring an anti-miscegenation statute in Virginia unconstitutional on equal protection grounds).

148. *Goodridge*, 798 N.E.2d at 958.

149. *Id.*

150. *See id.* at 961-65 (analyzing the state interests in procreation, raising children, preserving state resources, and safe-guarding the institution of marriage).

151. *Id.* at 961-62.

152. *Id.* at 961.

153. *Id.* at 962-64.

154. *Goodridge*, 798 N.E.2d at 962-63 (citing *Troxel v. Granville*, 530 U.S. 57, 63 (2000)).

155. *See, e.g., Doe v. Doe*, 452 N.E.2d 293 (Mass. 1983) (holding that rejecting a parent’s wish to retain custody of a child pursuant to a divorce action solely because of the parent’s sexual orientation is insufficient grounds for denial). Many other states allow second-parent adoption by same-sex partners, and some states, such as New Jersey, allow same-sex couples to petition for

Third, the court also refuted the state's argument that marriage should be limited so as to conserve scarce state and private financial resources. The court noted that the "ban on same-sex marriage bears no rational relationship to the goal of economy."¹⁵⁶

Finally, the court held that the decision to redefine marriage would not trivialize or destroy the institution of marriage.¹⁵⁷ For instance, the court referenced the expansion of married women's rights and the demise of anti-miscegenation laws, which were considered rather progressive at the time, to undermine the institution of marriage.¹⁵⁸

E. Canada: Serving as a Progressive Model for the United States and a Refuge for Same-Sex Bi-National Couples

The positive legal treatment of gay and lesbian people in Canada is important to the discussion of United States immigration law. Canadian courts have recognized same-sex marriage under its federal Constitution.¹⁵⁹ Therefore, Canada has become a place of residence for gay and lesbian individuals who cannot remain together permanently in the United States.¹⁶⁰ Canada's legalization of same-sex marriage occurred after that of the Netherlands and Belgium yet, it has a greater impact on United States citizen.¹⁶¹ Unlike Belgium and the Netherlands, Canada does not have a residency requirement for marriage.¹⁶² Canada is anecdotally experienc-

joint adoption in the same manner as heterosexual couples. McGloin, *supra* note 34, at 160-61, 165.

156. *Goodridge*, 798 N.E.2d at 964.

157. *Id.* at 965.

158. *Id.* at 967.

159. *See Reference re Same-Sex Marriage*, [2004] S.C.C. 79, available at 2004 Can. Sup. Ct. LEXIS 76, *52-*53 (noting that the proposed bill, the *Civil Marriage Act*, submitted by the Canadian Government to extend marital rights in Canada to same-sex couples was constitutional); *Halpern v. Canada* (Att'y Gen.), [2003] 225 D.L.R. 4th 529, 572-73. For a detailed description of the effect of the Canadian Supreme Court decision *Reference re Same-Sex Marriage*, see the Government of Canada, *Civil Marriage and the Legal Recognition of Same-Sex Unions*, at <http://www.news.gc.ca/cfm/CCP/view/en/index.cfm?articleid=114989&keyword=%same%2Dsex> (published Dec. 9, 2004) (last visited Apr. 27, 2005).

160. *See, e.g., Diaz*, *supra* note 5.

161. *Krauss*, *supra* note 87.

162. *Id.* (noting that the Netherlands has a long-term residency requirement and Belgium only recognizes same-sex marriages from countries that grant same-sex marriage).

ing “gay gain,” where many same-sex bi-national couples are choosing to live in Canada to stay together and take advantage of the country’s progressive policies.¹⁶³

Prior to 1952, Canadian immigration policy was silent on the issue of same-sex partners.¹⁶⁴ In 1952, Canadian policy explicitly discriminated against same-sex partners as members of an “inadmissible” class for immigration purposes.¹⁶⁵ However, a new Immigration Act in 1976 removed homosexuality from Canada’s “inadmissible” class of immigrants.¹⁶⁶ By 1982, the *Canadian Charter of Rights and Freedoms*, which amended the Canadian Constitution, declared: “[e]very individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination”¹⁶⁷

By 1994, Canadian immigration policy moved toward recognizing bi-national same-sex couples by admitting gay foreign individuals for “humanitarian and compassionate”¹⁶⁸ reasons rather than by virtue of their same-sex relationship to a Canadian citizen.¹⁶⁹ The policy remained in effect until 2002, when the Canadian Immigration and Refugee Protection Act¹⁷⁰ granted common law partners the same rights in immigration law as married partners.¹⁷¹

Additionally, the Ontario Court of Appeal responded to Canada’s prohibition on same-sex marriage by holding in *Halpern v. Canada (Attorney General)*¹⁷² that denying same-sex partners full and equal access to the rights, responsibilities, and benefits of marriage is unconstitutional under the *Canadian Charter of Rights and Freedoms*.¹⁷³ The British Co-

163. See Harris, *supra* note 5.

164. Battista, *supra* note 8, at 1.

165. *Id.*

166. *Id.*; see Immigration Act [Repealed], ch. 52, 1976-1977 S.C. 1193 (Can.), R.S.C., ch. I-2, § 2(2); Battista, *supra* note 8, at 1.

167. Canadian Charter of Rights and Freedoms § 15(1).

168. Immigration Act [Repealed], R.S.C. 1985, c. I-2, § 6(5) (Can.).

169. Battista, *supra* note 8, at 3.

170. Immigration and Refugee Protection Act, ch. 27, § 42, 2001 S.C. (Can.).

171. See Battista, *supra* note 8, at 4. A common law partner is defined as “a person who is cohabiting with a person in a conjugal relationship, having so cohabited for a period of at least one year.” *Thomas v. Canada (Att’y Gen.)* [2004] F.C.J. No. 812 (Nova Scotia) (quoting the Employment Insurance Act, S.C. 1996, c. 23, s. 29(c)).

172. *Halpern v. Canada (Att’y Gen.)*, [2003] 225 D.L.R. 4th 529.

173. *Id.* at 572-73.

lumbia Court of Appeal and the Quebec Superior Court have declared that the prohibition of same-sex marriage is unconstitutional.¹⁷⁴ Since *Halpern*, many other provinces have started to issue marriage licenses, including Yukon, Manitoba, Nova Scotia, Saskatchewan, and Newfoundland/Labrador.¹⁷⁵ Most recently, the Canadian Supreme Court solidified the *Halpern* decision by noting that the *Civil Marriage Act*, a bill proposed by the Canadian Government to extend civil marriage rights to same-sex couples throughout Canada pursuant to the *Canadian Charter of Rights and Freedoms*, was constitutional.¹⁷⁶ Although the *Civil Marriage Act* is still pending approval in Canada, the decisions and the issuance of marriage licenses in numerous Canadian provinces illustrate how Canada is on the brink of extending civil marriage to same-sex couples.¹⁷⁷

In the immigration context, *Halpern* interpreted the *Canadian Charter of Rights and Freedoms* from the Canadian Constitution and amended the definition of marriage to include "the voluntary union for life of two persons to the exclusion of all others,"¹⁷⁸ and the case triggered the associated immigration rights allowing one partner in a same-sex binational couple to sponsor the other partner.¹⁷⁹ Within four

174. *EGALE Canada Inc. v. Canada (Att'y Gen.)*, [2003] 225 D.L.R. 4th 472; *Hendricks v. Quebec (Att'y Gen.)*, [2002] R.J.Q. 2506 (S.C.). See also *Canadians for Equal Marriage/Egale Canada, Quebec Becomes Third Province to Allow Same-Sex Couples to Marry: Over 70% of Canada Now Has Equal Marriage* (Mar. 19, 2004), at <http://www.egale.ca/index.asp?lang=E&menu=52&item=952> (last visited Apr. 27, 2005) (describing the result of the *Hendricks* decision to permit same-sex couples to marry in Quebec).

175. See *Equal Marriage for Same-Sex Couples, A Timeline of Canadian Milestones in Marriage*, at <http://www.samesexmarriage.ca/evolution/timeline.htm> (last visited Mar. 25, 2005).

176. See Reference re Same-Sex Marriage, [2004] S.C.C. 79, available at 2004 Can. Sup. Ct. LEXIS 76, *52-*53. See also Government of Canada, *Civil Marriage and the Legal Recognition of Same-Sex Unions*, *supra* note 159, at <http://www.news.gc.ca/cfmx/CCP/view/en/index.cfm?articleid=114989&keyword=same%2Dsex>.

177. *Halpern*, [2003] 225 D.L.R. 4th at 572-73; *EGALE Canada Inc.*, [2003] 225 D.L.R. 4th 472; *Hendricks*, [2004] R.J.Q. 2506 (S.C.). See also Government of Canada, *Civil Marriage and the Legal Recognition of Same-Sex Unions*, *supra* note 159, at <http://www.news.gc.ca/cfmx/CCP/view/en/index.cfm?articleid=114989&keyword=same%2Dsex>.

178. See *Halpern* [2003] 225 D.L.R. 4th at 572-73; Canadian Charter of Rights and Freedoms § 15(1); Battista, *supra* note 8, at 5-6.

179. Battista, *supra* note 8, at 5-6.

months of the *Halpern* decision, the City of Toronto issued 900 same-sex marriage licenses, including 311 to American citizens and 34 to other international couples.¹⁸⁰

III. THE UNITED STATES IMMIGRATION LAW'S FAILURE TO RECOGNIZE SAME-SEX RELATIONSHIPS FORCES SAME-SEX BI-NATIONAL COUPLES TO SEPARATE OR EMIGRATE¹⁸¹

Although *Adams* expressly denied immigration benefits to same-sex couples in 1982¹⁸² and DOMA reinforced this decision by restricting the definition of marriage for federal purposes to include only unions between one man and one woman,¹⁸³ *Lawrence* and *Goodridge* serve as auspicious signs that benefits for same-sex couples may be extended because these decisions broaden same-sex privacy and marital rights, respectively.¹⁸⁴ In addition, Canada's extension of rights to same-sex couples may serve as a model for the United States.

Despite the indicia of progress, the United States still denies immigration benefits to same-sex bi-national couples, uses a narrow definition of family that excludes same-sex couples for immigration purposes, and overlooks the rights denied to United States citizens involved in bi-national same-sex relationships.¹⁸⁵ By defining "marriage" as a union between one man and one woman, DOMA withholds from gay and lesbian people the privileges federal law bestows upon heterosexual couples.¹⁸⁶ This adherence to antiquated, restrictive definitions of what constitutes family creates a disparity between current United States immigration practices that impose harsh consequences on same-sex bi-national couples and the changing atmosphere in other United States legal contexts, where rights to gay and lesbian people are being

180. Harris, *supra* note 5.

181. The author recognizes that the issue of whether marriage is a fundamental right granted to all couples, including same-sex couples, is currently debated within the legal community. However, this comment does not seek to explore this language nor to decide the issue of whether the fundamental right to marry extends to same-sex couples.

182. See *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982); discussion *supra* Part II.D.2.

183. See DOMA, 1 U.S.C. § 7 (2000).

184. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003).

185. See *infra* Parts II.D.3, II.D.4.

186. See 1 U.S.C. § 7.

extended.¹⁸⁷

The recent expansion of rights afforded same-sex couples over the past year places pressure on Congress to pass the PPIA, to extend spousal-like benefits to same-sex bi-national couples, or, alternatively, to defend DOMA and its effect on immigration—an area growing steadily stronger for an extension of rights to same-sex couples in other countries.¹⁸⁸ The disparity between the current restrictive immigration law and the changing social attitude and expansion of other gay and lesbian rights is also demonstrated by a “gay drain.”¹⁸⁹ Although Congress has denied spousal benefits in immigration to same-sex couples, the federal legislature and the courts must eventually respond to the changing definition of family and the implications this denial has on United States citizens, who can be forced to emigrate.¹⁹⁰

IV. CURRENT U.S. IMMIGRATION POLICIES FOR SAME-SEX BI-NATIONAL COUPLES CONFLICTS WITH RECENT CASE LAW

A. Judicial Expansion of Same-Sex Privacy and Marriage Rights Minimizes the Obstacles to Same-Sex Bi-National Couples' Immigration Benefits

Recent federal and state judicial decisions have greatly increased rights to gay and lesbian people. *Lawrence v. Texas* struck down laws prohibiting homosexual sodomy, resulting in same-sex couples being able to enjoy the right to make their own choices concerning sexual expression in the privacy of their own homes.¹⁹¹ This case overturned laws denying legitimacy to gay and lesbian relationships by prohibiting individuals from engaging in private consensual acts,¹⁹²

187. See *infra* Part II.

188. See PPIA, H.R. 3650, 106th Cong., 2nd Sess. (2000) available at <http://thomas.loc.gov>; 1 U.S.C. § 7; Scaperlanda, *supra* note 50, at 489-91.

189. See, e.g., Diaz, *supra* note 5; Harris, *supra* note 5; Headrick, *supra* note 5; Sheridan, *supra* note 5; Vargas, *supra* note 5.

190. See Kelly, *supra* note 20.

191. See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

192. See TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2004). This Texas statute criminalizing same-sex sodomy was struck down in *Lawrence*. See *id.*; *Lawrence*, 539 U.S. at 567. Other such statutes were also struck down in *Lawrence*, including the Georgia sodomy statute that was upheld as constitutional in *Bowers*. See GA. CODE ANN. § 16-6-2 (2004); *Lawrence*, 539 U.S. at 567; *Bowers*, 478 U.S. at 196.

thereby advancing the rights of same-sex couples in the United States.¹⁹³

Goodridge v. Department of Public Health in Massachusetts is a testimony to a state's power to prohibit discrimination of gay and lesbian individuals in that state.¹⁹⁴ The Massachusetts Supreme Judicial Court construed the denial of the rights and responsibilities to civil marriage to gay and lesbian people to be a violation of the state's constitution.¹⁹⁵ In particular, the court opined about the ability of same-sex couples to raise children in an "optimal environment," thus legitimizing same-sex relationships while supporting the notion that same-sex relationships are families.¹⁹⁶

B. Weaknesses in the Adams v. Howerton Two-Pronged Rule

When *Adams v. Howerton* was decided in 1982, immigration law denied gay and lesbian immigration rights in the United States.¹⁹⁷ However, in 1990, when the INA homosexual exclusionary provision was repealed, gay and lesbian individuals could no longer be denied admission to the United States based on their sexual orientation.¹⁹⁸ In addition, changes in immigration policy combined with recent legislative and judicial recognition of gay and lesbian rights have eroded the rationale behind *Adams*, the primary case interpreting the INA and denying a U.S. citizen to sponsor his foreign national male partner for immigration purposes. Thus, the evolving law and case precedent support changing the result from *Adams*.

The first prong of the *Adams* test requires courts to determine whether the contested marriage is valid under state law.¹⁹⁹ Prior to *Goodridge*, courts were never faced with a same-sex marriage that was "governed by the law of the place of celebration."²⁰⁰ Now that Massachusetts recognizes same-sex marriages, however, courts will have to evaluate whether

193. *Lawrence*, 539 U.S. at 567.

194. *See Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003).

195. *Id.* at 969.

196. *See id.* at 961-64.

197. *Adams v. Howerton*, 673 F.2d 1036, 1038 (9th Cir. 1982); *see Scaperlanda*, *supra* note 50, at 486;

198. *See Scaperlanda*, *supra* note 50, at 486; discussion *infra* Part II.D.2.

199. *Adams*, 673 F.2d at 1038.

200. *Id.* at 1038-39 (citing *In re Gamero*, 14 I. & N. Dec. 674 (B.I.A. 1974)).

a same-sex marriage under state law meets the *Adams* test.²⁰¹

The second prong of the *Adams* test requires courts to determine whether a state-approved marriage qualifies under the INA.²⁰² The second prong primarily focuses on Congress's plenary power to determine immigration policies, and the court will give deference to Congress.²⁰³ For example, in *Adams*, the court relied upon Congress's intent to exclude gay and lesbian people from the United States, as evidenced by the INA.²⁰⁴ This argument, however, has been weakened. The 1990 repeal of the 1965 amendments upon which the *Adams* decision was based that excluded gay and lesbian people from the United States nullifies the argument in *Adams* that Congress intended to exclude gay and lesbian people from the country.²⁰⁵ Although the repeal of the 1965 amendments removed a major obstacle, the DOMA, which defines marriage as a union between one man and one woman for federal law purposes, creates an additional obstacle for gay and lesbian people in obtaining immigration benefits.²⁰⁶

1. Immigration Law's Treatment of Same-Sex Bi-National Couples Diminishes the Rights of U.S. Citizens

The court in *Adams* noted "that in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'"²⁰⁷ Yet, however true this may be, the decisions regarding immigration and naturalization do not just affect non-citizens. United States citizens involved in same-sex bi-national relationships are equally affected by Congress's immigration policies because they cannot pursue these lasting, loving relationships without being subjected to virtual exile.²⁰⁸

201. See *Goodridge*, 798 N.E.2d at 968.

202. *Adams*, 673 F.2d at 1038.

203. See *id.* at 1039-42; see also *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

204. *Adams*, 673 F.2d at 1040-41.

205. Scaperlanda, *supra* note 50.

206. See DOMA, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as 1 U.S.C. § 7 (1997), 28 U.S.C. § 1738C (2004)).

207. *Adams*, 673 F.2d at 1042 (citing *Fiallo*, 430 U.S. at 792 (quoting *Mathews v. Diaz*, 426 U.S. 67, 80 (1976))).

208. See *Diaz*, *supra* note 5; *Harris*, *supra* note 5; *Headrick*, *supra* note 5; *Sheridan*, *supra* note 5; *Vargas*, *supra* note 5. See also discussion *infra* Part II.A.

The USCIS also denies U.S. citizens the right to live with their same-sex partner in the United States. The denial of such rights is illustrated by the USCIS granting same-sex partners temporary B-2 status to accompany their foreign same-sex partner to the U.S. but not granting such a benefit to a U.S. citizen desiring to bring his or her same-sex partner to the U.S.²⁰⁹ This practice not only denies immigration benefits to United States citizens, but it also sends a negative message to gay and lesbian U.S. citizens wishing to remain with their partners in the United States on a more permanent basis.²¹⁰

2. *The United States Should Follow the Lead of Its International Allies Who Recognize Immigration Rights of Same-Sex Bi-National Couples*

In *Adams*, the court alternatively justified its holding on the broad power of Congress to exclude aliens as “inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachment and dangers - a power to be exercised exclusively by political branches of the government.”²¹¹ Although this rationale was persuasive in 1982, the *Lawrence* and *Goodridge* decisions have greatly weakened the *Adams* rationale.²¹² In addition, Canadian immigration policy serves as a successful model for extending rights to same-sex couples.

Also, the increased rights being given to same-sex couples throughout the world has resulted in the United States not being in accord with the international community on this issue.²¹³ As of 2002, Canada has extended immigration benefits to same-sex couples by allowing a Canadian citizen or permanent resident to sponsor a marital partner or a common law

209. McGloin, *supra* note 34, at 168.

210. *See id.*

211. *Adams*, 673 F.2d at 1041 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972)).

212. *See Lawrence*, 539 U.S. at 578; *Goodridge*, 798 N.E.2d at 968.

213. *See* Immigration Equality (formerly the Lesbian and Gay Immigration Rights Task Force), *The Permanent Partners Immigration Act* (July 14, 2003), at <http://www.lgirtf.org/ppia.html> (on file with the *Santa Clara Law Review*) (noting that as of 2004, sixteen countries grant same-sex couples immigration benefits, and of those sixteen countries, three recognize same-sex marriage); Krauss, *supra* note 87; Vargas, *supra* note 5.

partner,²¹⁴ which may include a same-sex partner, for immigration purposes.²¹⁵ This allowance was further substantiated in 2003, when Canada legalized same-sex marriage in *Halpern*.²¹⁶ The changes in Canadian law have resulted in Canada experiencing “gay gain,” while the United States has suffered “gay drain.”²¹⁷ United States citizens have been and will continue to be forced to emigrate to other countries, such as Canada, if they want to sustain their relationships with foreign nationals.²¹⁸ Due to the numerous qualified United States citizens who are driven away from the United States solely because of their sexual orientation, both sustaining a rational basis argument and keeping “normal international relations” with other prominent nations will be an issue Congress must resolve.²¹⁹

3. Adams' Foreign Encroachment Argument Conflicts with Granting Basic Human Rights to Gay and Lesbian People

In *Adams*, the court also cites the need to defend the country against foreign encroachment as a basis for congressional legislation.²²⁰ But such an argument conflicts with judicial and legislative actions, which include prohibiting laws that demean human dignity and providing safety for gay or lesbian individuals who face persecution elsewhere.²²¹

The 1994 recognition of gays and lesbians as a particular social group eligible for receiving asylum in the United States demonstrates that gay and lesbian people are not a threat to national security; rather, the liberties of the Constitution

214. A common law partner is defined as “a person who is cohabiting with a person in a conjugal relationship, having so cohabited for a period of at least one year.” *Thomas v. Canada* (Att’y Gen.) [2004] F.C.J. No. 812 (Nova Scotia) (quoting the Employment Insurance Act, S.C. 1996, c. 23, s. 29(c)).

215. Battista, *supra* note 8, at 4.

216. *Halpern v. Canada* (Att’y Gen.), [2003] 225 D.L.R. 4th 529, 572-73.

217. Harris, *supra* note 5.

218. *See, e.g., Diaz, supra* note 5; Harris, *supra* note 5; Headrick, *supra* note 5; Sheridan, *supra* note 5; Vargas, *supra* note 5.

219. *See* Vargas, *supra* note 5.

220. *See Adams*, 673 F.2d at 1041 (citing *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)), where the Court held that political branches of government have the right to exclude aliens for reasons of national security).

221. *See Lawrence*, 539 U.S. at 567; In re *Fidel Toboso-Alfonso*, Att’y Gen. Order No. 1895-94; discussion *supra* Part II.C.

provide refuge for such persecuted individuals.²²² Such a contradiction between immigration practices and asylum laws is ironic as the USCIS provides a safe haven for non-citizen gay and lesbian people who are persecuted because of their sexual orientation, yet limits the rights extended to these individuals upon arrival in the United States.²²³

C. Litigating Same-Sex Bi-National Immigration Rights is Disfavored Because of Congressional Deference on Immigration Issues

Despite the many changes in the treatment of gay and lesbian individuals since *Adams*, DOMA, which defines marriage and spouse for federal purposes, has kept gay and lesbian interest groups from challenging the *Adams* precedent.²²⁴ Although litigation is the traditional method of challenging precedent, many scholars and public interest groups, such as Immigration Equality,²²⁵ warn against challenging the immigration treatment of same-sex couples in court.²²⁶ Immigration Equality explains that DOMA's virtual insulation of same-sex marriage and any related federal benefits, as well as the Supreme Court's required deference to Congress, makes litigation in immigration a disfavored option for challenging the issue.²²⁷ Further, Immigration Equality warns that a negative decision at this point would create a blockade for same-sex bi-national couple's immigration efforts.²²⁸

Challenging *Adams* is not the only avenue for changing immigration practices. Many direct avenues for changing immigration practices are possible.²²⁹ For instance, Congress

222. See *In re: Fidel Toboso-Alfonso*, Att'y Gen. Order No. 1895-94.

223. See *Lawrence*, 539 U.S. at 567; *In re: Fidel Toboso-Alfonso*, Att'y Gen. Order No. 1895-94; *Adams*, 673 F.2d at 1041.

224. See, e.g., McGloin, *supra* note 34, at 174; Immigration Equality (formerly Lesbian & Gay Immigration Rights Task Force), *LGIRTF Hails Landmark Massachusetts Decision On The Right Of Same Sex Couples To Marry!* (Nov. 18, 2003), at <http://www.lgirtf.org/releases/massmarriage.html> (on file with the *Santa Clara Law Review*).

225. See Immigration Equality, at <http://www.lgirtf.org>. Immigration Equality is the only organization focusing on the gay and lesbian immigration debate. *Id.*

226. *LGIRTF Hails Landmark Massachusetts Decision On The Right Of Same Sex Couples To Marry!*, *supra* note 224.

227. See *id.*

228. *Id.*

229. Scaperlanda, *supra* note 50, at 489-92.

could repeal or modify the DOMA, which would eliminate the narrow construction of “marriage” as only between one man and one woman.²³⁰ Alternatively, a same-sex bi-national couple could litigate against the current immigration practice by challenging the constitutionality of DOMA.²³¹ Also, although it is unlikely, Congress could pass the PPIA,²³² which would include permanent partners in the group eligible for the immediate relatives visa under the INA.²³³

The PPIA, which proposes the inclusion of the term “permanent partner” within the list of immediate relatives in the INA, has a very small chance of passing because the modernization of immigration laws seems unlikely, especially with the current post-911 emphasis on terrorism.²³⁴ A spokesman for Senator Patrick Leahy noted that the PPIA bills are stagnant, “[t]his [issue] isn’t high on the priority of the Senate right now.”²³⁵

Many indirect avenues for changing this immigration practice are also available.²³⁶ For example, USCIS administrators could continue to use their discretion by granting benefits to same-sex partners on a case by case basis, and the USCIS could grant immigration benefits to same-sex bi-national partners based on “extreme hardship” grounds.²³⁷

While indirect avenues appear to have an opportunity for success, resolving the same-sex bi-national partner immigration dilemma out of the limelight keeps the issue from being directly confronted.²³⁸ Direct opposition to this immigration

230. *Id.* at 489.

231. *Id.* at 490.

232. *See, e.g.,* McGloin, *supra* note 34, at 174; *LGIRTF Hails Landmark Massachusetts Decision On The Right Of Same Sex Couples To Marry!*, *supra* note 224; Crary, *supra* note 92.

233. *See* Scaperlanda, *supra* note 50, at 491.

234. *LGIRTF Hails Landmark Massachusetts Decision On The Right Of Same Sex Couples To Marry!*, *supra* note 224; Crary, *supra* note 92 (noting that the focus of immigration has been on terrorism concerns since the 9-11 terrorist attacks).

235. Vargas, *supra* note 5.

236. *See* Scaperlanda, *supra* note 50, at 492-96.

237. *Id.* Under immigration law, immigration issues resulting in deportation may be forgiven when it can be demonstrated that the individual to be deported (or individual’s spouse of an opposite sex) would experience hardship or extreme hardship as a result of the deportation. However, this tactic of demonstrating hardship or extreme hardship has never been recognized by immigration officials *as applied* to same-sex couples. *Id.*

238. *Id.* at 496-98.

practice, such as re-examining *Adams*, is unlikely because Congress's plenary power in setting immigration policies virtually assures failure.²³⁹ Despite the positive judicial opinions in 2003,²⁴⁰ Immigration Equality agrees that a successful challenge to the immigration treatment of same-sex bi-national couples is unlikely.²⁴¹ Therefore, perhaps the best *current* solution to the same-sex bi-national couple immigration dilemma is to further develop the ideas of family and rights of U.S. citizens.

V. A PROPOSAL TO REFOCUS ON THE DEFINITION OF "FAMILY" AND THE DENIAL OF RIGHTS TO U.S. CITIZENS

The *Lawrence* and *Goodridge* decisions mark a change in the treatment of gay and lesbian individuals with respect to extending spousal rights to same-sex couples in the United States.²⁴² Canada's *Halpern* decision may also be viewed as a model for extending spousal rights to same-sex couples in the United States. Despite these developments, the United States still does not grant spousal-like immigration benefits to same-sex bi-national couples.²⁴³

It is clear that immigration law grants preferential status to families by trying to unite families of United States citizens.²⁴⁴ Therefore, advocates of granting immigration rights to same-sex bi-national couples should shift their focus towards changing the definition of family so that family is neither defined by sexual orientation nor marital status, and the rights of *United States citizens*, rather than the rights of immigrants, are the main concern.

239. *Id.*

240. See *Lawrence*, 539 U.S. at 578; *Goodridge*, 798 N.E.2d at 968.

241. *LGIRTF Hails Landmark Massachusetts Decision On The Right Of Same Sex Couples To Marry!*, *supra* note 224.

242. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003).

243. See *LGIRTF Hails Landmark Massachusetts Decision On The Right Of Same Sex Couples To Marry!*, *supra* note 224.

244. See *id.* When advocating for the PPIA in his address to the Senate, Senator Edward Kennedy (D. Mass.) noted that "[t]he reunification of families is one of the cornerstones of our immigration policy. The American Dream is about opportunity and it is about family life . . ." PPIA of 2003, S. 1015, CONG. REC. S. at 10634. Kennedy's words note that the reason for this policy—family unification—is a valid and valued ground to extend the country's resources. *Id.*

A. The Goal of Family Unification Should be Consistent with the Evolving Definition of Family in the United States

Many of the arguments against recognizing same-sex bi-national couples' immigration benefits center on the DOMA.²⁴⁵ In particular, the strong deference given to Congress's definition of "spouse" has blocked further progress in this area of immigration law.²⁴⁶ However, the focus has been misguided by looking only at whether same-sex couples should be able to marry instead of whether same-sex bi-national couples are a family.

One of the most important features of the INA is its focus on family.²⁴⁷ Yet, despite this focus, "family" is not defined in the statute.²⁴⁸ In passing DOMA, Congress passed a statute defining what constitutes a legal "spouse," and consequently uses this to deny recognition of same-sex couples.²⁴⁹ Furthermore, Webster's dictionary more accurately defines family without regard to sexual orientation or marital status.²⁵⁰ The definition of "family" represents an area where same-sex couples have not been limited by a narrow interpretation, such as the limitation associated with the federal definition of marriage.²⁵¹ Rather than Angela being precluded from sponsoring Paula under immigration because of their limited ability to marry, an evolving definition of family without regard to sexual orientation or marital status would strengthen the case for Angela and Paula in order for Angela to sponsor Paula based on the family unification goal of the INA.

Particularly, the discussion in *Goodridge* focused on the capability of same-sex couples to become involved in committed relationships equal to those of heterosexual couples and an increase in the ability of same-sex couples to adopt children.²⁵² In this way, *Goodridge* advocated for recognizing same-sex couples' family bonds, which was evident in the

245. See *LGIRTF Hails Landmark Massachusetts Decision On The Right Of Same Sex Couples To Marry!*, *supra* note 224.

246. DOMA, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as 1 U.S.C. § 7 (2000), 28 U.S.C. § 1738C (2000)); *LGIRTF Hails Landmark Massachusetts Decision On The Right Of Same Sex Couples To Marry!*, *supra* note 224.

247. McGloin, *supra* note 34, at 164.

248. See INA, 8 U.S.C. § 1101 (2000).

249. See 1 U.S.C. § 7.

250. See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 20.

251. See 1 U.S.C. § 7; Kelly, *supra* note 20.

252. See *Goodridge*, 798 N.E.2d at 961-64.

court's language: "[n]o one disputes that the plaintiff couples *are families*, that many are parents, and that the children they are raising, like all children, need and should have the fullest opportunity to grow up in a secure, protected *family unit*."²⁵³ Advocates should stress the current reality of the definition of family as recognizing other units accepted as equal to the traditional nuclear family.²⁵⁴ This evolved definition of "family" would provide a basis for people such as Angela and Paula to petition for family immigration benefits in the United States.

B. Current United States Immigration Practices Wrongly Deny United States Citizens the Right to Remain in Same-Sex Bi-National Relationships

In addition to changing the definition of "family," much judicial treatment of same-sex bi-national immigration law grounds itself in the ability of Congress to deny non-citizens those rights that would normally be afforded to citizens.²⁵⁵ In doing so, Congress has incorrectly presumed that citizens would not be affected by these policies. Congress failed to understand that the same-sex bi-national couple immigration debate challenges the rights of United States citizens because many are being forced to leave the country to stay in committed same-sex bi-national relationships. This result conflicts with Supreme Court precedent established in *Loving v. Virginia*.²⁵⁶ In *Loving*, the court held that any individual has the right to marry the individual of his or her choosing.²⁵⁷ Congress has articulated that this right extends to U.S. citizens who marry foreign spouses and guarantees immigration rights for these foreign spouses.²⁵⁸

And to further complicate matters, in some instances, non-citizens are guaranteed greater immigration rights than

253. *Id.* at 964 (emphasis added).

254. *See* Kelly, *supra* note 20; MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 20.

255. *See Fiallo*, 430 U.S. at 792. Justice Marshall, in his dissent, noted that such treatment of non-citizens failed to focus on those rights that should be accorded to actual citizens. *See id.* at 805-07.

256. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (declaring an anti-miscegenation statute in Virginia unconstitutional on equal protection grounds).

257. *Id.* at 12.

258. *See* 8 U.S.C. § 1151(b)(2)(A)(i) (2000).

actual citizens where a foreign same-sex partner of a non-U.S. citizen in the United States on a non-immigrant visa obtains a B-2 visa to stay in the country for the duration of his partner's non-immigrant visa.²⁵⁹ Meanwhile, many gay and lesbian United States citizens are emigrating to remain in bi-national relationships.²⁶⁰ Advocates of same-sex bi-national immigration benefits should shift their efforts to solve the dilemma same-sex bi-national couples face by turning their focus to the rights of United States citizens who are often forced to choose between remaining in the United States or leaving in order to remain in a committed relationship with a same-sex foreign national.

The focus of this debate has shifted away from one of the purposes of immigration, to unite families, and away from rights of United States citizens.²⁶¹ There is an opportunity, however, for advocates to seize this moment where the law and legislature seem stagnant on the issue of same-sex bi-national couples' immigration rights to refocus the issue so expansion of same-sex rights directly correlates to supporting traditional goals of immigration: family and citizenship. If there is a concerted effort to address the changing family unit as well as the rights of United States citizens, Congress's current immigration laws must change to reflect the new reality. Such efforts will make it difficult for the courts to recognize a rational basis for such discriminatory treatment much longer.²⁶²

VI. CONCLUSION

Although the issue of whether same-sex couples have a right to marry in the United States has yet to be decided and continues to be debated within the legal community, as the number of other countries granting immigration benefits to same-sex couples increases, the "land of liberty" is more exclusionary than free.²⁶³

259. McGloin, *supra* note 34, at 168.

260. Diaz, *supra* note 5; Harris, *supra* note 5; Headrick, *supra* note 5; Sheridan, *supra* note 5; Vargas, *supra* note 5.

261. See McGloin, *supra* note 34, at 164-65; Fiallo v. Bell, 430 U.S. 787, 792, 805-07 (1977).

262. See *Adams*, 673 F.2d at 1042.

263. See *The Permanent Partners Immigration Act*, *supra* note 81; Vargas, *supra* note 5.

Directly challenging *Adams v. Howerton* in court is discouraged because a challenge could fail.²⁶⁴ Therefore, proponents of same-sex bi-national couples' immigration benefits should focus more attention on the changing definition of family and the rights of citizens. These changes are evolving at their own rate, yet advocates have to give them a more prominent role in the argument supporting same-sex bi-national couples' immigration benefits.²⁶⁵ Once these arguments are more fully developed, gay and lesbian proponents will be better prepared to effectively challenge immigration practices and possibly, DOMA itself.

A broader definition of family that is proven by a loving and lasting relationship, valid citizenship, sharing a home, and raising children could help expand current immigration benefits to same-sex bi-national couples.²⁶⁶ Were this expansion to happen, same-sex bi-national couples could keep their families united, instead of leaving the United States to take refuge in Canada or elsewhere.²⁶⁷ Otherwise, United States immigration practices will continue to fail to respond to separation and emigration of gay and lesbian citizens in same-sex bi-national relationships.

264. See *LGIRTF Hails Landmark Massachusetts Decision On The Right Of Same Sex Couples To Marry!*, *supra* note 224.

265. *Id.*

266. See Kelly, *supra* note 20.

267. See, e.g., Diaz, *supra* note 5; Harris, *supra* note 5; Headrick, *supra* note 5; Sheridan, *supra* note 5; Vargas, *supra* note 5.