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# The Plight of Bi-National Same-Sex Couples in America

Michael Rivers

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## The Plight of Bi-National Same-Sex Couples in America

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## THE PLIGHT OF BI-NATIONAL SAME-SEX COUPLES IN AMERICA

*Michael Rivers*\*

“Every day, we live with the very real possibility that, despite following every law and every policy of the United States, Tim will be forced to leave the country, and I will be left without my caretaker and the love of my life.”<sup>1</sup>

### I. INTRODUCTION

Independently, immigration and same-sex marriage are contentious issues in the United States. However, the effect these issues have on each other is seldom considered in mainstream debates over either issue. The Immigration and Nationality Act (“INA”)<sup>2</sup> imposes numerical quotas on the number of aliens<sup>3</sup> permitted to immigrate into the United States.<sup>4</sup> Immigrant visas are allocated in accordance with a preference system, which limits eligibility to categories estab-

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\* Touro College Jacob D. Fuchsberg Law Center, J.D. 2011; Southern Connecticut State University, B.S. 2002 in Communications; Hunter College, Master of Urban Affairs 2005. I want to start by thanking God for all of the blessings that He or She has bestowed upon me. I would like to thank my wife and son, Lisa and Aiden Rivers, my parents, Jesse and Gloria Rivers, and my in-laws, Dario and Estella Benitez, for all of their love and support. I would also like to thank Professor Douglas Scherer for being an excellent advisor for this project, and throughout my law school career. Last, but not least, I want to thank all of my unmentioned family members, friends, and colleagues for their support and encouragement.

<sup>1</sup> *Immigration Equality Hails Government Decision Allowing Lesbian and Gay Couples to File Green Card Applications*, NEWSRX, Apr. 15, 2011, available at 2011 WLNR 27684571 (discussing United States citizen Edwin Blesch’s concern over the potential deportation of his husband and South African national, Tim Smulian).

<sup>2</sup> 8 U.S.C. § 1101 (2011).

<sup>3</sup> *Milestones: 1945-1952*, U.S. DEP’T OF STATE, <http://history.state.gov/milestones/1945-1952/ImmigrationAct> (last visited May 2, 2013); 8 U.S.C. § 1101(a)(3) (“The term ‘alien’ means any person not a citizen or national of the United States.”).

<sup>4</sup> 8 U.S.C. § 1151(a)(1)-(3) (2011).

lished by the INA.<sup>5</sup> However, aliens who are “immediate relatives” of United States citizens are exempt from the numerical quotas.<sup>6</sup> Spouses, children, and parents are considered “immediate relatives.”<sup>7</sup>

Section 1101(b) of the INA defines the terms contained in title II of the Act, which provides for the immigration of immediate relatives of United States citizens into the United States.<sup>8</sup> While the terms “child” and “parent” are defined with great detail, the Act is silent on how the term “spouse” should be defined.<sup>9</sup> Consequently, courts have been forced to interpret the Congressional intent of the statute when determining whether people who are partners in legal same-sex marriages fall within the definition of the term spouse.

In *Adams v. Howerton*,<sup>10</sup> the Ninth Circuit Court of Appeals held that “Congress intended that only partners in heterosexual marriages be considered spouses under [the INA].”<sup>11</sup> Though *Adams* was decided in 1982, it remains binding authority in the Ninth Circuit, and continues to be persuasive authority in other jurisdictions. As a consequence of the view adopted by the Ninth Circuit, countless families have been forced to make the painful choice to either be permanently separated from their loved ones or depart from their homeland for a more accepting society.<sup>12</sup> Part II of this Article discusses why *Adams* was erroneously decided in 1982 and why it should be overruled today.

Parts III, IV, V, VI, and VII discuss the Defense of Marriage Act (“DOMA”),<sup>13</sup> its past effect on bi-national same-sex couples, and the reasons it is unconstitutional. Additionally, Part VIII discusses current challenges to DOMA, and its impact on bi-national same-sex

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<sup>5</sup> 8 U.S.C. § 1153(a) (2011).

<sup>6</sup> 8 U.S.C. § 1151(b)(2)(A)(i) (2011).

<sup>7</sup> *Id.*

<sup>8</sup> 8 U.S.C. § 1101(b) (2011).

<sup>9</sup> See 8 U.S.C. § 1101(b)(1)-(2) (2011) (defining the terms child and parent, but failing to define the term spouse).

<sup>10</sup> 673 F.2d 1036 (9th Cir. 1982).

<sup>11</sup> *Id.* at 1041.

<sup>12</sup> Congressional Documents, *Leahy Introduces Bill to Bring Equality to Lawful Partners in Immigration Law*, FED. INFO. & NEWS DISPATCH, INC., Apr. 14, 2011, available at 2011 WLNR 7322481 (noting that at least twenty-five nations offer immigration benefits to same-sex couples, including Argentina, Australia, Belgium, Brazil, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greenland, Hungary, Iceland, Israel, Luxembourg, The Netherlands, New Zealand, Norway, Portugal, Romania, South Africa, Spain, Sweden, Switzerland, and the United Kingdom) [hereinafter Congressional Documents].

<sup>13</sup> 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006).

couples. Part IX discusses the proposed Uniting American Families Act (“UAFA”)<sup>14</sup> as a possible solution to these challenges. Finally, Part X is the conclusion of this Article.

## II. ADAMS *v.* HOWERTON

In *Adams v. Howerton*,<sup>15</sup> United States citizen Richard Adams and his husband, Australian citizen Anthony Sullivan, appealed the decision of the Central California District Court, which held that “two persons of the same sex . . . will not be thought of as being ‘spouses’ to each other within the meaning of the immigration laws.”<sup>16</sup> Adams and Sullivan were married in a ceremony performed by a minister in Colorado after securing a marriage license from the County Clerk in Boulder, Colorado.<sup>17</sup> Subsequently, Adams filed a petition with the Immigration and Naturalization Service (“INS”) to have Sullivan classified as his immediate relative, which was administratively denied.<sup>18</sup>

On appeal, the Ninth Circuit applied a two-step analysis to determine when a person is a spouse for purposes of the INA.<sup>19</sup> The first step is to determine “whether the marriage is valid under state law”; the second step is to determine “whether [the] state-approved marriage qualifies under the [INA].”<sup>20</sup> The court determined that it was unclear whether same-sex marriages were permitted under Colorado law and decided the matter based solely on the second step of the analysis.<sup>21</sup> In light of the fact that the term spouse is not defined in the INA, the court analyzed various factors to ascertain the Congressional intent of excluding immediate relatives from the INA quota limitations.<sup>22</sup> The court’s rationale for affirming the district court was that: (1) substantial deference should be given to the INS’s interpretation of the statute;<sup>23</sup> (2) the “ordinary, contemporary, [and]

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<sup>14</sup> See H.R. 1537, 112th Cong. (2011) (proposing amendments to the Immigration and Nationality Act to accommodate same-sex partners).

<sup>15</sup> 486 F. Supp 1119 (C.D. Cal. 1980), *aff’d*, 673 F.2d 1036 (9th Cir. 1982).

<sup>16</sup> *Id.* at 1125.

<sup>17</sup> *Id.* at 1120.

<sup>18</sup> *Id.* at 1120-21.

<sup>19</sup> *Adams*, 673 F.2d at 1038.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 1039.

<sup>22</sup> *Id.* at 1038-39.

<sup>23</sup> *Id.* at 1040.

common meaning” of spouse should be applied,<sup>24</sup> and (3) other provisions of the INA should be analyzed to determine whether the term “spouse” was intended to include same-sex marriages because the statute should be considered as a whole.<sup>25</sup>

The court stated that “unless there are compelling indications that it is wrong,” substantial deference should be given to the INS’s construction of who constitutes a spouse within the meaning of the INA.<sup>26</sup> However, according to the Administrative Procedure Act (“APA”), “[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”<sup>27</sup> The INS’s main contention was that “one cannot be married to a person of the same sex and thus, if they are of the same sex, one may not be a spouse to the other.”<sup>28</sup> In addition, the INS argued that this was applicable under Colorado and federal law.<sup>29</sup>

However, as stated by the Ninth Circuit on appeal, it was unclear whether same-sex marriage was permissible under Colorado law.<sup>30</sup> Additionally, there was no federal law at the time that prohibited the recognition of same-sex marriages.<sup>31</sup> The INS’s proffered reason for denying Adam’s petition for Sullivan is clearly arbitrary and an abuse of discretion.<sup>32</sup> The INS premised the denial of the petition on fictional state and federal laws.<sup>33</sup> Furthermore, the INS ignored the fact that the marriage license was issued by a state official.<sup>34</sup> Instead, it unilaterally determined that same-sex marriage was impermissible under Colorado and federal law.<sup>35</sup> Therefore, the INS’s finding was arbitrary and an abuse of the discretion that Con-

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<sup>24</sup> *Adams*, 673 F.2d at 1040 (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* (quoting *N.Y. Dep’t. of Soc. Servs. v. Dublino*, 413 U.S. 405, 421 (1973)).

<sup>27</sup> 5 U.S.C. § 706(2)(A) (2011); *see also* *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 445 n.29 (1987); *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984).

<sup>28</sup> *Adams*, 486 F. Supp at 1121.

<sup>29</sup> *Id.*

<sup>30</sup> *Adams*, 673 F.2d at 1039.

<sup>31</sup> *Id.* at 1039-40.

<sup>32</sup> *See Bastidas v. I.N.S.*, 609 F.2d 101, 106 (3rd Cir. 1979) (vacating and remanding the case back to the Board of Immigration Appeals because of a misapplication of applicable case law).

<sup>33</sup> *Adams*, 673 F.2d at 1039-40.

<sup>34</sup> *Id.* at 1038.

<sup>35</sup> *Id.* at 1040.

gress bestowed upon it to enforce the INA.<sup>36</sup>

The Ninth Circuit stated that “[t]he term ‘marriage’ ordinarily contemplates a relationship between a man and a woman. The term ‘spouse’ commonly refers to one of the parties in a marital relationship . . . .”<sup>37</sup> The court concluded that it would be inappropriate to enlarge the ordinary meaning of the words without evidence of Congressional intent to do so.<sup>38</sup> This “argument did little more than state a conclusion [that] lesbians and gay men cannot be spouses because the law does not recognize [homosexual] relationships.”<sup>39</sup> Without explicitly stating it, the reasoning of the Ninth Circuit gave substantial weight to the biases of the majority. However, even though this reasoning makes the court’s job easier, such reasoning is impermissible. As stated by Chief Justice Burger two years after *Adams* was decided, “Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”<sup>40</sup> If court decisions were at the mercy of private biases or popular opinion, states would still be permitted to enact such legislation as anti-miscegenation statutes.<sup>41</sup> Moreover, it would still be permissible for custody disputes to be decided solely based on the race of the parties involved.<sup>42</sup> The court’s decision to defer to the colloquial “common meaning” of the word “spouse” made its members appear as mere lay persons making speculations about the law, as opposed to constitutional experts upholding their duty as members of the United States Court of Appeals.<sup>43</sup>

The Ninth Circuit reviewed other sections of the INA to determine whether Congress intended the term spouse to include indi-

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<sup>36</sup> See 8 U.S.C. § 1101 (2012).

<sup>37</sup> *Adams*, 673 F.2d at 1040 (internal quotations omitted).

<sup>38</sup> *Id.*

<sup>39</sup> Cynthia M. Reed, Note, *When Love, Comity, and Justice Conquer Borders: INS Recognition of Same-Sex Marriage*, 28 COLUM. HUM. RTS. L. REV. 97, 103 (1996).

<sup>40</sup> *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

<sup>41</sup> See *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967). “The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not to marry, a person of another race resides with the individual and cannot be infringed by the State.” *Id.* at 12.

<sup>42</sup> See *Palmore*, 466 U.S. at 434 (“The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.”).

<sup>43</sup> *Adams*, 673 F.2d at 1040 (quoting *Perrin*, 444 U.S. at 42 (1979) (internal quotation marks omitted)).

viduals in same-sex marriages.<sup>44</sup> In doing so, the court found that the 1965 amendments to the INA rendered homosexuals excludable under section 212,<sup>45</sup> and concluded that it was “unlikely that Congress intended to give homosexual spouses preferential admission treatment under section 201(b) of the Act when, in the very same amendments adding that section, it mandated their exclusion. . . . [W]e can only conclude that Congress intended that only partners in heterosexual marriages be considered spouses . . . .”<sup>46</sup> Ironically, this conclusion is flawed despite its viable appearance.

The Ninth Circuit erred in its review of the Act in a number of ways. The court failed to thoroughly review the Act, the basis of the amendment to the Act, or the subsequent changes in medical views since the 1965 Amendment took effect. Prior to the 1965 amendment, the 1952 amendment provided that “all suspected homosexuals attempting to enter into the U.S. were to endure an evaluation by the Public Health Service (PHS).”<sup>47</sup> The 1952 amendment did not expressly exclude homosexuals, but it did exclude individuals with a psychopathic disorder or a mental defect.<sup>48</sup> If PHS diagnosed the individual seeking admission with a psychopathic, personality, or other condition, it issued a certificate, which “constituted the sole evidence for exclusion or deportation of the foreign national.”<sup>49</sup> Certificates were routinely issued for people found to be homosexuals because homosexuality was “classified as a psychological ailment in the Statistical and Diagnostic Manual of Mental Disorders (DSM).”<sup>50</sup>

In *Fleuti v. Rosenberg*,<sup>51</sup> the Ninth Circuit held that the term “psychopathic personality” was too vague to exclude homosexuals because it failed to give “sufficiently definite warning” that homosexuality actually fell into the definition of this term.<sup>52</sup> Reacting to this holding, Congress amended the INA to exclude individuals who

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1040-41.

<sup>47</sup> Dennis A. Golden, *The Policy Considerations Surrounding the United States' Immigration Law as Applied to Bi-National Same-Sex Couples: Making the Case for the Uniting American Families Act*, 18-SPG KAN. J.L. & PUB. POL'Y 301, 302 (2009).

<sup>48</sup> *Id.*

<sup>49</sup> Lena Ayoub & Shin-Ming Wong, *Separated and Unequal*, 32 WM. MITCHELL L. REV. 559, 564 (2006).

<sup>50</sup> Golden, *supra* note 47, at 302.

<sup>51</sup> 302 F.2d 652 (9th Cir. 1962).

<sup>52</sup> *Id.* at 658.



exhibited “sexual deviation” in 1965.<sup>53</sup> Additionally, in 1967, the United States Supreme Court held that “Congress used the phrase ‘psychopathic personality’ not in the clinical sense, but to effectuate its purpose to exclude entry from all homosexuals and other sex perverts.”<sup>54</sup>

The paradigm shift began to occur in 1973 when the American Psychiatric Association determined that homosexuality was not a clinical disorder and eliminated it from DSM-II.<sup>55</sup> Consequently, in 1979, PHS announced that it would no longer issue certificates solely on the basis on one’s homosexuality.<sup>56</sup> Ironically, the Department of Justice opined that it would continue to exclude self-proclaimed homosexuals due to Congress’s addition of the term “sexual deviation” to the statute.<sup>57</sup>

If the *Adams* court would have properly analyzed the Act, it would have realized that the exclusion of homosexuals was largely based on the belief that homosexuality was a mental disorder, which was manifested through sexually deviant behavior. In addition, the court would have been cognizant that Congress’s intent was to exclude all aliens with mental disorders, not only homosexuals.<sup>58</sup> Should the court have viewed the statute in light of the American Psychiatric Association’s determination that homosexuality was not a clinical disorder, the court would have recognized that the congressional intentions of the 1965 Amendment were, in fact, moot.

Additionally, if the court acknowledged Congress’s belief—that homosexuality was a mental disorder as opposed to an exercise of moral and social deviance—it would have analyzed section 212 of the INA in greater detail. As a result, the court would have discovered that waivers were available which permitted persons with mental

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<sup>53</sup> Golden, *supra* note 47, at 302-03 (quoting Act of Oct. 3, 1965, Pub. L. No. 89-236, § 15(b) (1990) (amending 8 U.S.C. § 1182(a)(4) (2002))) (internal quotation marks omitted).

<sup>54</sup> *Boutilier v. INS*, 387 U.S. 118, 122 (1967).

<sup>55</sup> Golden, *supra* note 47, at 303.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* (internal quotation marks omitted).

<sup>58</sup> See 8 U.S.C. § 1182(a)(1)(A)(iii)(I)-(II) (2011) (stating in relevant part that “[a]ny alien . . . who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General)—(I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or (II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior . . .”).

disorders to enter the United States.<sup>59</sup> As Cynthia Reed pointed out, the court “expressly failed to analyze discretionary waivers as evidence of Congress’s intent to allow the Attorney General to resolve conflicts within the Act.”<sup>60</sup> The Ninth Circuit’s failure to carefully analyze the statute caused it to overlook the reasons why Congress intended to exclude homosexuals, and whether the basis of the exclusion was applicable in determining how Congress intended for the term “spouse” to be defined in INA section 201(b).

### III. DEFENSE OF MARRIAGE ACT’S EFFECT ON BI-NATIONAL SAME-SEX COUPLES

The rationale for the holding in *Adams* lost validity when Congress enacted the Immigration Reform Act of 1990, which eliminated the statutory ground for exclusion based on “sexual deviancy.”<sup>61</sup> This gave bi-national same-sex couples new hope. However, this hope was diminished when President William Jefferson Clinton<sup>62</sup> signed the Defense of Marriage Act (“DOMA”) into law.<sup>63</sup> In accordance with DOMA, the federal government would only recognize marriages entered into between one man and one woman.<sup>64</sup> This legislation was unprecedented because this marked the first time the federal government prescribed a definition for marriage.<sup>65</sup> With the exception of the Supreme Court’s decision holding that anti-

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<sup>59</sup> 8 U.S.C. § 1182(g) (stating in relevant part that “[t]he Attorney General may waive the application of . . . any alien who (A) is the spouse or the unmarried son or daughter, or the minor unmarried lawfully adopted child, of a United States citizen, or of an alien lawfully admitted for permanent residence, or of an alien who has been issued an immigrant visa, (B) has a son or daughter who is a United States citizen, or an alien lawfully admitted for permanent residence, or an alien who has been issued an immigrant visa; or (C) is a VAWA self-petitioner, in accordance with such terms, conditions, and controls, if any . . .”).

<sup>60</sup> Reed, *supra* note 39, at 105; *see also* 8 U.S.C. § 1182(g)(3) (“[T]he Attorney General, in the discretion of the Attorney General after consultation with the Secretary of Health and Human Services, may by regulation prescribe.”).

<sup>61</sup> Golden, *supra* note 47, at 304; *see also* *Yepes-Prado v. U.S. I.N.S.*, 10 F.3d 1363, 1369 n.12 (9th Cir. 1993) (“In addition to stressing its views regarding ‘privacy and personal dignity,’ the House Report for the Reform Act stated that the amendments demonstrate ‘that the United States does not view personal decisions about sexual orientation as a danger to other people in our society.’”) (citation omitted).

<sup>62</sup> *William J. Clinton*, THE WHITE HOUSE, <http://www.whitehouse.gov/about/presidents/williamjclinton> (last visited May 2, 2013). William Jefferson Clinton, Democrat, was the forty-second President of the United States. *Id.*

<sup>63</sup> *See supra* note 61 and accompanying text.

<sup>64</sup> Golden, *supra* note 47, at 304.

<sup>65</sup> *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 392 (D. Mass. 2010).

miscegenation statutes are unconstitutional, the task of defining marriage was generally left to the states.<sup>66</sup>

DOMA was Congress's reaction to the Hawaii Supreme Court's decision in *Baehr v. Lewin*,<sup>67</sup> which held that it was unlawful sex-based discrimination for Hawaii to refuse to grant same-sex couples marriage licenses under the Hawaiian Constitution.<sup>68</sup> Moreover, the court held that the state is burdened with establishing that the prohibition of same-sex marriage can pass the "strict scrutiny" standard of review.<sup>69</sup>

DOMA does two things that have had the effect of limiting the recognition of same-sex marriages to the states that elect to recognize same-sex marriage. First, section 2 permits states, despite the Full Faith and Credit Clause of the Federal Constitution,<sup>70</sup> to refuse recognition of same-sex marriages legally entered into in other states.<sup>71</sup> Secondly, section 3 of DOMA has the most detrimental effect on bi-national same-sex marriages as it provides that:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.<sup>72</sup>

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<sup>66</sup> *Loving*, 388 U.S. at 12 ("The Fourteenth Amendment requires that the freedom of choice [of marriage] not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.").

<sup>67</sup> 852 P.2d 44 (Haw. 1993).

<sup>68</sup> *See id.* at 67 (discussing how the voters of Hawaii voted in favor of allowing the Hawaiian State Legislature to amend the Constitution to define marriage as only between a man and a woman); *see also Gill*, 699 F. Supp. 2d at 377 n.9 (discussing that the Hawaiian constitution was amended to allow same-sex marriage following the decision in *Baehr*).

<sup>69</sup> *Baehr*, 852 P.2d at 67 (internal quotation marks omitted).

<sup>70</sup> U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.").

<sup>71</sup> 28 U.S.C. § 1738C ("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.").

<sup>72</sup> 1 U.S.C. § 7.

In 1996, when DOMA was enacted, it had minimal effect because no state recognized same-sex marriages.<sup>73</sup> By 2011, six states and the District of Columbia had legalized same-sex marriage.<sup>74</sup> Section 3 denies same-sex couples that were legally married in one of these seven jurisdictions a myriad of federally based marriage benefits that are available for similarly situated heterosexual couples.<sup>75</sup> In fact, in 1997, the General Accounting Office conducted an investigation, which found that “at least 1,049 federal laws, including those related to entitlement programs, such as Social Security, health benefits, and taxation,” are affected by DOMA.<sup>76</sup> Beyond the restriction of pecuniary benefits, bi-national same-sex couples have to live with the horror of being separated from their life partner forever. DOMA has had the effect of creating a per se rule that an American citizen cannot enjoy the federal benefit of petitioning for their same-sex spouse to enter the United States as an immediate relative.<sup>77</sup>

#### IV. DOMA VIOLATES EQUAL PROTECTION RIGHTS EMBODIED IN THE FIFTH AMENDMENT

Until recently, there have not been many judicial challenges to DOMA. This is partially due to the fact that no one had standing to challenge it because no state recognized same-sex marriage.<sup>78</sup> However, section 3 of DOMA suffered its first loss when United

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<sup>73</sup> See Sheryl Gay Stolberg, *In Fight for Marriage Rights, ‘She’s our Thurgood Marshal,’* NY TIMES, Mar. 27, 2013, <http://www.nytimes.com/2013/03/28/us/maine-lawyer-credited-in-fight-for-gay-marriage.html?pagewanted=all&r=0> (stating that Massachusetts became the first state to legalize gay marriage in 2003).

<sup>74</sup> *Gill*, 699 F. Supp. 2d at 377 n.9 (discussing that Iowa, New Hampshire, Connecticut, Vermont, Massachusetts, and the District of Columbia have legalized same-sex marriage); N.Y. DOM. REL. LAW § 10-a (2) (McKinney 2011) (“No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex.”).

<sup>75</sup> See, e.g., *Windsor v. United States*, 833 F. Supp. 2d 394, 396 (S.D.N.Y. 2012) (“This case arises from Plaintiff’s constitutional challenge to section 3 of the Defense of Marriage Act (“DOMA”), the operation of which required Plaintiff to pay federal estate tax on her same-sex spouse’s estate, a tax from which similarly situated heterosexual couples are exempt.”), *aff’d*, 699 F. 3d 169 (2d Cir. 2012), *cert. granted* 133 S. Ct. 786 (2012).

<sup>76</sup> *Gill*, 699 F. Supp. 2d at 379.

<sup>77</sup> *Id.* at 395-96.

<sup>78</sup> See, e.g., *Smelt v. County of Orange*, 447 F.3d 673, 685-86 (9th Cir. 2006) (holding that the plaintiffs did not have standing to challenge DOMA because their same-sex marriage was not recognized by any state).

States District Court judge, Joseph L. Tauro,<sup>79</sup> held in *Gill v. Office of Personnel Management*<sup>80</sup> that DOMA violated “the equal protection principles embodied in the Fifth Amendment of the United States Constitution.”<sup>81</sup> Judge Tauro opined that a fundamental principle of the Constitution is that it does not recognize or promote classes among citizens, and it is because of this commitment to the neutral application of law “that legislative provisions which arbitrarily or irrationally create discrete classes cannot withstand constitutional scrutiny.”<sup>82</sup>

Judge Tauro analyzed the interests cited by Congress when DOMA was enacted and the current interest the Department of Justice proffered during litigation.<sup>83</sup> He applied the most deferential standard of review, “rational basis scrutiny,”<sup>84</sup> and found that no rational relationship existed between DOMA and a legitimate governmental interest.<sup>85</sup>

## V. DOMA’S ASSERTED OBJECTIVES AT THE TIME OF ENACTMENT

In 1996, Congress cited the following as the interests it sought to advance through the enactment of DOMA: “(1) encouraging responsible procreation and child-bearing, (2) defending and nurturing the institution of traditional heterosexual marriage, (3) defending traditional notions of morality, and (4) preserving scarce resources.”<sup>86</sup> Even the government distanced itself from this absurd reasoning pre-

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<sup>79</sup> *Boston: Judge Information: Tauro, Joseph L.*, UNITED STATES DISTRICT COURT, <http://www.mad.uscourts.gov/boston/tauro.htm> (last visited May 2, 2013) (describing Judge Tauro as follows: “[He] has served as a Judge of the United States District Court since 1972. He was elevated to the position of Chief Judge in January 1992 and served in that capacity until January 1999. His public service prior to being appointed to the bench included that as United States Attorney for Massachusetts, Chief Legal Counsel to the Governor of Massachusetts, and two years in the Army as a Nike Guided Missile Officer”).

<sup>80</sup> 699 F. Supp. 2d 374.

<sup>81</sup> *Id.* at 397; *see also* U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . .”).

<sup>82</sup> *Gill*, 699 F. Supp. 2d at 386 (citing *Romer v. Evans*, 517 U.S. 620, 623 (1996)).

<sup>83</sup> *Id.* at 388, 390.

<sup>84</sup> *See id.* at 386-87 (reasoning that if a law does not “burden a fundamental right or target a suspect class” it is to be examined under rational basis scrutiny where it will be upheld unless the challenging party can establish that the law “bears [no] rational relationship to a legitimate governmental interest”).

<sup>85</sup> *Id.* at 387.

<sup>86</sup> *Id.* at 388.

viously asserted by Congress.<sup>87</sup> Nonetheless, Judge Tauro found it necessary to invalidate all four interests cited above.<sup>88</sup>

With regard to the first interest, Judge Tauro stated that denying same-sex marriages recognition “does nothing to promote stability in heterosexual parenting.”<sup>89</sup> DOMA only prevents children of same-sex couples from benefiting from the numerous advantages that flow from having married parents who are able to enjoy benefits available under federal law.<sup>90</sup> Moreover, “the ability to procreate is not now, nor has it ever been, a precondition to marriage in any state in the country. Indeed, ‘the sterile and the elderly’ have never been denied the right to marry . . . .”<sup>91</sup>

The second interest was just as indefensible as the first. Judge Tauro stated that “Congress’ asserted interest in defending and nurturing heterosexual marriage is not ‘grounded in sufficient factual context [for this court] to ascertain some relation’ between it and the classification DOMA effects.”<sup>92</sup> Unless there is substantial evidence that the denial of benefits will dramatically increase the likelihood that a homosexual will choose to marry a person of the opposite sex, it is completely irrational to believe that denying benefits to same-sex couples, who are legally married under state law, will defend and nurture heterosexual marriage.<sup>93</sup> Moreover, the concept of “equal protection of the laws” does not permit Congress to promote one group at the expense of a politically unpopular group.<sup>94</sup>

The third interest asserted by Congress is “defending traditional notions of morality.” A remedial review of United States Supreme Court jurisprudence over the past thirty years would reveal that the Court’s “obligation is to define liberty of all, not to mandate our own moral code.”<sup>95</sup> The fourth interest asserted, preservation of

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<sup>87</sup> *Gill*, 699 F. Supp. 2d at 388 (“For purposes of this litigation, the government has disavowed Congress’s stated justifications for the statute . . .”).

<sup>88</sup> *See id.* at 390 (“[T]he rationales asserted by Congress in support of the enactment of DOMA are either improper or without relation to DOMA’s operation . . .”).

<sup>89</sup> *Id.* at 389.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting)).

<sup>92</sup> *Gill*, 699 F. Supp. 2d at 388 (alteration in original) (quoting *Romer*, 517 U.S. at 632-33).

<sup>93</sup> *Id.* at 389.

<sup>94</sup> *Id.*

<sup>95</sup> *Lawrence*, 539 U.S. at 571 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992) (internal quotation marks omitted)); *see also Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) (“[T]he fact that the governing majority in a State has tradi-

scarce government resources, appears to be a legitimate purpose on the surface. However, “financial considerations did not motivate the law[,] . . . [and] the House [of Representatives] rejected a proposed amendment to DOMA that would have required a budgetary analysis . . . .”<sup>96</sup> Additionally, “the Congressional Budget Office concluded in 2004 that federal recognition of same-sex marriages by all fifty states would . . . result in a net *increase* in federal revenue.”<sup>97</sup>

## VI. CURRENT REASONS ASSERTED IN DEFENSE OF DOMA

In *Gill*, the court elected to cite interests in defense of DOMA that were different from the interests originally asserted by Congress when DOMA was enacted. The court’s first reason was that “DOMA was necessary to ensure consistency in the distribution of federal marriage-based benefits.”<sup>98</sup> It was important to the court to preserve the “status quo” and not interfere with the “pending . . . resolution of a socially contentious debate taking place in the states over whether to sanction same-sex marriage.”<sup>99</sup> The second reason asserted is that federal agencies could not deal with the administrative burden of adjusting to the “changing patchwork of state approaches to same-sex marriage[s].”<sup>100</sup>

Judge Tauro held that the “status quo” reasoning does not survive rational basis scrutiny.<sup>101</sup> Domestic Relations Law, which establishes marriage eligibility requirements, has been the “exclusive province of the states.”<sup>102</sup> Furthermore, “[m]arital eligibility for heterosexual couples has varied from state to state throughout the course of history . . . [and] individual states have changed their marital eligibility requirements in a myriad [of] ways over time.”<sup>103</sup> Yet, when it comes to heterosexual marriages, the federal government has not had trouble dealing with the differing marriage laws amongst the states.<sup>104</sup>

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tionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.”); *Romer*, 517 U.S. 620.

<sup>96</sup> *Gill*, 699 F. Supp. 2d at 390 n.116.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 390.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 395 (citation omitted) (internal quotation marks omitted).

<sup>101</sup> *Gill*, 699 F. Supp. 2d at 390.

<sup>102</sup> *Id.* at 391.

<sup>103</sup> *Id.*

<sup>104</sup> *See id.* (noting that the federal government has had little trouble “embrac[ing] [the]

Furthermore, federal administrative agencies do not bear a greater burden simply because some married “couples are of the same sex.”<sup>105</sup> Regardless of whether a couple is heterosexual or homosexual, the marriage license is issued by the state.<sup>106</sup> Conversely, DOMA adds complexity to the administrative task “by sundering the class of state-sanctioned marriages into two, those that are valid for federal purposes and those that are not.”<sup>107</sup> These facts led Judge Tauro to the logical conclusion that “DOMA does not provide for nationwide consistency in the distribution of federal benefits among married couples.”<sup>108</sup> “Rather it denies to same-sex married couples the federal marriage-based benefits that similarly situated heterosexual couples enjoy.”<sup>109</sup>

## VII. DOMA IS AN INFRINGEMENT ON STATE SOVEREIGNTY

In the companion case, *Massachusetts v. U.S. Dep’t of Health and Human Services*,<sup>110</sup> Judge Tauro granted the Commonwealth of Massachusetts’s motion for summary judgment, holding that section 3 of DOMA “encroaches upon the firmly entrenched province of the state, and, in doing so, offends the Tenth Amendment.”<sup>111</sup> In this litigation, Massachusetts contended that DOMA violated the “Tenth Amendment of the Constitution, by intruding on areas of exclusive state authority, as well as the Spending Clause, by forcing the Commonwealth to engage in invidious discrimination against its own citizens in order to receive and retain federal funds in connection with . . . federal-state programs.”<sup>112</sup>

In opposition, the government insisted that Congress had authority under the “Spending Clause to determine how money is best spent to promote the ‘general welfare’ of the public.”<sup>113</sup> In *South*

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variations and inconsistencies in state marriage laws” for heterosexuals).

<sup>105</sup> *Id.* at 395.

<sup>106</sup> *Gill*, 699 F. Supp. 2d at 395.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 394.

<sup>109</sup> *Id.*

<sup>110</sup> 698 F. Supp. 2d 234 (D. Mass. 2010).

<sup>111</sup> *Id.* at 253; U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

<sup>112</sup> *Health and Human Servs.*, 698 F. Supp. 2d at 236.

<sup>113</sup> *Id.* at 247.



*Dakota v. Dole*,<sup>114</sup> the United States Supreme Court held that when Congress exercises its Spending Clause authority, the following requirements must be satisfied: (1) the legislation “must be in pursuit of ‘the general welfare;’ ” (2) any condition that is made applicable to the states for the receipt of federal funds must be unambiguous enough for “the [s]tates to exercise their choice knowingly, cognizant of the consequences of their participation;” (3) the conditions cannot be “unrelated ‘to the federal interest in particular national projects or programs;’ ” and (4) the legislation cannot be constitutionally impermissible.<sup>115</sup> Judge Tauro found, based on the same reasoning utilized in *Gill*, that “DOMA imposes an unconstitutional condition on the receipt of federal funding,” in violation of the fourth requirement stated above.<sup>116</sup>

### VIII. CURRENT IMPACT OF DOMA ON BI-NATIONAL SAME-SEX COUPLES

The Department of Justice initially filed appeals to Judge Tauro’s decisions in *Gill* to the United States Court of Appeals for the First Circuit.<sup>117</sup> However, on February 23, 2011, Attorney General Eric Holder, Jr., announced in a letter to Congress that “[a]fter careful consideration, including review of a recommendation from me, [President Barack Obama] has made the determination that Section 3 of [DOMA], as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment.”<sup>118</sup>

Attorney General Holder further stated that “the President has instructed the Department [of Justice] not to defend [DOMA],” but “the President has informed me that Section 3 will continue to be en-

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<sup>114</sup> 483 U.S. 203 (1987).

<sup>115</sup> *Id.* at 207-08 (citing *Helvering v. Davis*, 301 U.S. 619, 640 (1937)) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *Massachusetts v. U.S.*, 435 U.S. 444, 461 (1978)).

<sup>116</sup> *Health and Human Servs.*, 698 F.Supp.2d at 249.

<sup>117</sup> Chris Geidner, *DOJ Files DOMA Defense in First Circuit Cases*, METRO WEEKLY (Jan. 13, 2011, 7:01 PM), <http://metroweekly.com/poliglot/2011/01/doj-files-doma-defense-in-firs.html> (“Although each is slightly different, these three “rationales” do read like different shades of the same argument, which is more or less that DOMA made sense—or, is rational—because the states hadn’t reached a uniform decision.”).

<sup>118</sup> Letter from Eric Holder, Att’y Gen., to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

forced by the Executive Branch.”<sup>119</sup> In essence, this proclamation by the Attorney General stopped, by executive order, the Department of Justice from raising a defense in suits where DOMA is challenged. This was a major victory for those who oppose DOMA. However, in reaction to the Attorney General’s letter, on April 18, 2011, led by Speaker of the House, Representative John Boehner, the House of Representatives Bipartisan Legal Advisory Group<sup>120</sup> announced that it would be hiring a law firm to defend challenges to DOMA.<sup>121</sup>

The conflict between the official positions of the House of Representatives and the Executive Branch, combined with the current judicial challenges to DOMA have had the effect of leaving binational same-sex couples in limbo.<sup>122</sup> The Director of Immigration and Customs Enforcement (“ICE”), John Morton, issued a memorandum instructing immigration officials to focus their “removal”<sup>123</sup> efforts on undocumented immigrants who are criminals, gang members, or security threats.<sup>124</sup> Additionally, he advised officials to exercise “prosecutorial discretion” favoring undocumented immi-

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<sup>119</sup> *Id.*

<sup>120</sup> RULES OF THE HOUSE OF REPRESENTATIVES, ONE HUNDRED THIRTEENTH CONGRESS (2013), Rule II, cl. 8, available at <http://clerk.house.gov/legislative/house-rules.pdf> (last visited May 2, 2013).

There is established an Office of General Counsel for the purpose of providing legal assistance and representation to the House. Legal assistance and representation shall be provided without regard to political affiliation. The Office of General Counsel shall function pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisory Group, which shall include the majority and minority leaderships. The Speaker shall appoint and set the annual rate of pay for employees of the Office of General Counsel.

*Id.*

<sup>121</sup> Chris Geidner, *Speaker Boehner’s DOMA Defense Lawyer, Paul Clement, is Announced and Faces Questions*, METRO WEEKLY, Apr. 18, 2011, 11:02 PM, <http://www.metroweekly.com/poliglot/2011/04/paul-clements-defense-pro-and.html> (“Word then came that former Solicitor General Paul Clement—the top appellate litigator during part of the George W. Bush administration—will be serving as the outside counsel to the House BLAG in its DOMA defense . . .”).

<sup>122</sup> See, e.g., *Gill*, 699 F. Supp. 2d 374; *Health and Human Servs.*, 698 F.Supp. 2d 234; *Pedersen v. Office of Pers. Mgmt.*, No. 3:2010cv01750 (D. Conn. filed Nov. 09, 2010); *Windsor v. U.S.*, No. 1:2010cv08435 (S.D.N.Y. filed Nov. 09, 2010).

<sup>123</sup> 8 U.S.C. § 1227(a) (2011) (“Any alien . . . in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the . . . classes of deportable aliens.”).

<sup>124</sup> John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Alien*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Jun. 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

grants who have a “spouse, child, or parent” who is a United States citizen or who is the “primary caretaker” for one who is disabled or ill.<sup>125</sup>

Though Director Morton’s memo does not explicitly mention bi-national same-sex couples, it does create an environment where enforcement of DOMA is not compulsory upon immigration officials; however, the fates of bi-national same-sex couples are left to the subjective attitudes of various immigration officials.<sup>126</sup> Furthermore, non-citizen same-sex spouses of United States citizens still will not be granted the legal status typically afforded to immigrants who have heterosexual spouses.<sup>127</sup> Thus, until the DOMA issue is resolved, bi-national same-sex couples will not enjoy the same rights as similarly situated bi-national heterosexual couples.

## IX. UNITING AMERICAN FAMILIES ACT

It is painfully apparent that DOMA is a contentious issue and the uncertainty surrounding its validity will likely be resolved in the near future.<sup>128</sup> In the meantime, many bi-national same-sex couples will have to live with the anxiety that is born from the fear that their family may be permanently severed one day because the non-citizen partner cannot gain legal status. However, a solution may be on the horizon. The Uniting American Families Act (“UAFAs”) is intended

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<sup>125</sup> *Id.*

When weighing whether an exercise of prosecutorial discretion may be warranted for a given alien, ICE officers, agents, and attorneys should consider all relevant factors, including, but not limited to . . . whether the person has a U.S. citizen or permanent resident spouse, child, or parent[; and] whether the person is the primary caretaker of a person with a mental or physical disability, minor, or seriously ill relative . . . .

*Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Compare Mallory Simon, *Same-Sex Couples Fight for Immigration Rights*, CNNPOLITICS.COM (Jun. 3, 2009, 11:16 AM), <http://www.cnn.com/2009/POLITICS/06/03/same.sex.immigration/index.html?s=PM:POLITICS> (discussing how federal immigration laws do not allow United States citizens to “sponsor their foreign-born same-sex partners for citizenship as a man may do for his wife or a woman for her husband”), with Morton, *supra* note 124.

<sup>128</sup> On Wednesday, March 27, 2013, the United States Supreme Court heard oral arguments challenging the key section of DOMA that prohibits the federal government from recognizing same-sex marriages in the case of *United States v. Windsor*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012) (No. 12-307). *Audio highlights from DOMA oral argument*, SCOTUSBLOG (Apr. 30, 2013, 11:21 PM), <http://www.scotusblog.com/?p=161937>.

to remedy this issue by amending the INA to include “permanent partners.”<sup>129</sup>

The UAFA defines “permanent partner” as:

[A]n 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 individual; “(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 other individual.”<sup>130</sup>

The proposed legislation is not intended to alter DOMA and how it functions.<sup>131</sup> The federal benefits afforded to legally married heterosexuals are not extended to same-sex couples under the UAFA.<sup>132</sup> Instead, it is intended to operate within the confines of DOMA by including permanent partners to the list of immigrants that a U.S. citizen can file a petition for as an immediate relative.<sup>133</sup>

As expected, there are many who oppose this amendment to the INA for a variety of reasons. The chairman of the Catholic Bishops’ Committee of Migration, Bishop John C. Wester, stated that the Act “would ‘erode the institution of marriage and family’ by taking a position ‘that is contrary to the very nature of marriage which pre-dates the Church and the State.’ ”<sup>134</sup> Additionally, in testimony before the Senate Judiciary Committee, the Executive Director of NumbersUSA, Roy Beck, testified that the UAFA and other legisla-

<sup>129</sup> H.R. 1537, 112th Cong. § 2 (2011) (describing a bill proposed by Representative Jerrold Nadler of New York, which amends the Immigration and Nationality Act to accommodate same-sex partners.); *see also* S. 424, 111th Cong. (2009).

<sup>130</sup> H.R. 1537, 112th Cong. § 2 (2011).

<sup>131</sup> Golden, *supra* note 47, at 319.

<sup>132</sup> Letter from Caroline Fredrickson, Dir. of the Washington Legislative Office of the Am. Civil Liberties Union, to the United States Senate (Jun. 1, 2009), *available at* [http://www.aclu.org/files/images/asset\\_upload\\_file966\\_39743.pdf](http://www.aclu.org/files/images/asset_upload_file966_39743.pdf).

<sup>133</sup> *Id.* (“If enacted, UAFA would require bi-national same-sex couples to meet the same standards as opposite-sex couples. For example, same-sex couples would be required to produce evidence of their relationship, such as affidavits from friends or family, and evidence of financial interdependence.”).

<sup>134</sup> Julia Preston, *Bill Proposes Immigration Rights for Gay Couples*, N.Y. TIMES, Jun. 2, 2009, [http://www.nytimes.com/2009/06/03/us/politics/03immig.html?\\_r=1](http://www.nytimes.com/2009/06/03/us/politics/03immig.html?_r=1).

tion that will potentially increase the number of green cards issued will have a negative impact because “every new adult permanently added to the U.S. population through immigration legislation would be a potential competitor to unemployed and underemployed American workers. And every new immigrant increases the total U.S. carbon footprint and ecological footprint . . . .”<sup>135</sup> Others argue that that the UAFA will result in an increase in visa fraud.<sup>136</sup>

The argument that this Act will “erode the institution of marriage and family” is unfounded. Nuclear families are not the only families entitled to constitutional recognition.<sup>137</sup> An essential principle of the United States immigration policy is preserving family unity. “Yet gay and lesbian Americans are still forced to choose between their country and being with those they love. This destructive policy tears families apart and forces hardworking Americans to make the heart-wrenching choice to leave the country . . . .”<sup>138</sup> The impact of the separation of bi-national same-sex couples does not only affect the individuals involved in the relationship but will also affect the adopted children of these couples who will surely suffer tremendous emotional harm resulting from the forced severance of their families.<sup>139</sup>

There may or may not be rational arguments that increases in immigration have the potential to strain the resources of the United States. However, these arguments do not defeat the overwhelming goal of family reunification already built into the INA. When President George H.W. Bush signed the Immigration Act of 1990<sup>140</sup> into law, he stated that “the law ‘maintains our Nation’s historic commitment to family reunification by increasing the number of immigrant

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<sup>135</sup> *No New Categories of Immigration Should be Considered Until Overall Green Card Numbers Are Dramatically Reduced: Hearings on S. 424 Before the U.S. Senate Judiciary Committee*, 111th Cong. (2009) (statement of Roy Beck, Executive Director of NumbersUSA), available at <http://www.numbersusa.com/content/nusablog/beckr/june-2-2009/my-testimony-today-senate-judiciary-committee-asks-decisions-be-made-nati>.

<sup>136</sup> Congressional Documents, *supra* note 12 (statement of Senator Patrick Leahy of Vermont when re-introducing the UAFA).

<sup>137</sup> See *Moore v. City of East Cleveland*, 431 U.S. 494, 504 (1977).

<sup>138</sup> Congressional Documents, *supra* note 12 (statement of Senator Patrick Leahy of Vermont when re-introducing the UAFA).

<sup>139</sup> Elizabeth Ricci, *Will Binational Same-Sex Couples Get Justice?*, GAY AND LESBIAN REV., Jul. 1, 2011, available at 2011 WLNR 14289846.

<sup>140</sup> *Immigration Act 1990*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=84ff95c4f635f010VgnVCM1000000ecd190aRCRD&vgnnextchannel=b328194d3e88d010VgnVCM10000048f3d6a1RCRD> (last visited May 2, 2013).

visas allocated on the basis of family ties.’<sup>141</sup>

Moreover, Congress’s intent to maintain family unity is apparent. The INA permits “children, spouses and parents” of United States citizens to gain immediate legal permanent residency.<sup>142</sup> It also permits adult children of United States citizens and brothers and sisters of United States citizens to enter the United States “subject to the worldwide level . . . [of] family-sponsored immigrants.”<sup>143</sup> It is clear that unifying families has and continues to take precedence over economic concerns. In addition, the argument that there will be an increase in visa fraud if the UAFA is enacted does not prevail. A permanent partner will be subject both to the same scrutiny as a partner in a heterosexual marriage and to the same marriage fraud penalties.<sup>144</sup>

The UAFA does not grant immediate relief for bi-national same-sex couples from all of the ills of DOMA. It is an imperfect solution that arguably promotes the notion that gays and lesbians are to be treated as second-class citizens, and that their marriages should not be recognized as real marriages. At the same time, it does create an avenue for the families of bi-national same-sex couples to remain intact until the nation advances enough to repeal DOMA, legislatively or judicially.

## X. CONCLUSION

It is apparent that bi-national same-sex couples are not afforded the same rights as similarly situated heterosexual couples. However, since *Adams* was decided in 1982, stronger arguments have developed that bi-national same-sex marriages should be recognized for immigration purposes. First, the ambiguity regarding the exclusion of homosexuals as part of the “sexual deviancy” exclusion was eliminated by the Immigration Reform Act of 1990. This invalidated the court’s rationale in *Adams* that since homosexuals are excludable they cannot be considered “spouses” for immigration purposes.

Second, there are now states in the union that recognize same-

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<sup>141</sup> Matthew J. Hrutkay, Note, “Give Me Your Tired, Your Poor, Your Huddled Masses,” *But Not Your Homosexual Partners: International Solutions to America’s Same-Sex Immigration Dilemma*, 18 CARDOZO J. INT’L & COMP. L. 89, 98 (2010) (citation omitted).

<sup>142</sup> 8 U.S.C. § 1151(b)(2)(A)(i).

<sup>143</sup> 8 U.S.C. § 1153.

<sup>144</sup> Congressional Documents, *supra* note 12 (statement of Senator Patrick Leahy of Vermont when re-introducing the UAFA).

sex marriages. This invalidates the other portion of the rationale in *Adams* that gave recognition to the common usage of the word spouse. The recognition of same-sex marriage in some states has had the effect of including same-sex couples in the definition of spouse, which is simply defined as a married person.<sup>145</sup>

Though the Ninth Circuit's rationale in *Adams* has been invalidated, United States citizens still do not have the right to petition for their same-sex partners to enter the United States as an immediate relative. This is mainly due to section 3 of DOMA, which mandates that the federal government must grant recognition to heterosexual marriages and must deny federal marriage benefits to same-sex couples. At the same time, Judge Tauro's decisions in *Gill* declared DOMA unconstitutional because it violates the equal protection component of the due process clause of the Fifth Amendment, and infringes on state sovereignty in violation of the Tenth Amendment.<sup>146</sup> Additionally, the Obama administration announced that it has found DOMA to be unconstitutional, and the Department of Justice announced that it will discontinue its current defense of section 3 of DOMA, and will not defend DOMA in future litigation.<sup>147</sup>

The UAFA is a viable alternative for bi-national same-sex couples while the legality of DOMA is pending. The UAFA is intended to work within the limitations of DOMA. Though the UAFA does not afford bi-national same-sex couples the same rights afforded to bi-national heterosexual couples, it does create an option that prevents the devastating effect of forced severance of families. Ultimately, there is no reasonable basis for the denial of immigration benefits to bi-national same-sex couples. Yet, legally married bi-national same-sex couples are forced to live with the fear of having their families permanently separated. It would be unthinkable for heterosexual couples to endure. This harmful and unreasonable distinction between similarly situated people should be eliminated.

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<sup>145</sup> MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/spouse> (last visited May 2, 2013).

<sup>146</sup> *Massachusetts*, 698 F. Supp. 2d at 248, 253.

<sup>147</sup> Letter from Att'y Gen., Eric Holder, to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.