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Department of Justice Not Defending the Defense of Marriage Act: Politically Significant, Legally Irrelevant?

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DEPARTMENT OF JUSTICE NOT DEFENDING THE DEFENSE OF MARRIAGE ACT: POLITICALLY SIGNIFICANT, LEGALLY IRRELEVANT?

INTRODUCTION

On February 23, 2011, Attorney General Eric Holder sent a letter to Speaker of the House John Boehner informing him that the Department of Justice (DOJ) would no longer defend the Defense of Marriage Act (DOMA).[1] The letter insisted that DOMA is unconstitutional[2] and marked a great political success for supporters of same-sex marriage. In the realm of immigration law, the political move by the DOJ was a huge step forward for nonresidents in same-sex relationships with American citizens. Currently, however, the United States Citizenship and Immigration Service (USCIS), bound by judicial precedent, maintains that marital visas for same-sex marriages may not be granted.[3] Further, this precedent is strengthened because DOMA does not recognize same-sex marriages issued under state law.[4] Precedent has created significant hurdles for same-sex couples for decades and DOMA has only added to those hurdles, sparking much debate and controversy. This Comment focuses specifically on the impact the DOJ's decision has had on deportation proceedings in immigration courts and how immigration law needs to be changed to combat the struggles that lesbian, gay, bisexual, or transgendered (LGBT) nonimmigrants face in the United States.

In May of 2011, an immigration judge suspended a deportation case against a nonresident, Henry Velandia, stating that the DOJ and the

1. Letter from Eric H. Holder, Jr., U.S. Attorney Gen., Dep't of Justice, to John A. Boehner, Speaker of the House, U.S. Cong. (Feb. 23, 2011) [hereinafter Holder Letter]. The letter states that the DOJ, as instructed by President Obama, will no longer be defending the validity of DOMA. *Id.* In the letter, Attorney General Holder argues that DOMA is unconstitutional as applied to gay men and women who have entered into valid, state-recognized same-sex marriages. *Id.*

2. *Id.*

3. Adams v. Howerton, 673 F.2d 1036, 1039 (9th Cir. 1982).

4. *See* Jordana Lynne Mosten, Note, *Imagining Immigration Without DOMA*, 21 STAN. L. & POL'Y REV. 383, 384 (2010); *see also* Matthew S. Pinix, *The Unconstitutionality of DOMA + INA: How Immigration Law Provides a Forum for Attacking DOMA*, 18 GEO. MASON U. C.R. L.J. 455, 459 (2008). Both articles discuss the significance of DOMA in conjunction with current immigration law by analyzing the hurdles DOMA presents for same-sex couples seeking immigration status for their noncitizen partners.

courts needed time to determine whether a same-sex marriage would affect eligibility for residency status.[5] Immigration and Customs Enforcement (ICE) subsequently agreed to close deportation proceedings.[6] Mr. Velandia is a gay man and legally married to an American man under Connecticut law.[7] The immigration judge decided to postpone Mr. Velandia's deportation proceedings based on the DOJ's new stance that DOMA is unconstitutional, which caused the judge to question whether immigration law would recognize a valid same-sex marriage for residency purposes.[8]

Advocates of marriage equality for LGBT individuals have heralded the DOJ's decision as "a watershed moment in the fight for LGBT equality."[9] However, this refusal to defend DOMA, and the subsequent refusal to pursue deportation cases, although politically and socially significant, has limited and potentially negative legal consequences for nonresidents in same-sex marriages. First and foremost, refusing to defend DOMA does not actually repeal or invalidate the act[10] and, as such, immigration law still cannot recognize same-sex marriages for purposes of granting marital visas.[11] This stance does not further complicate a process in order to create positive change, but rather creates complications without establishing the necessary legal protections for these individuals. More specifically, this position places married LGBT noncitizens in a state of limbo because even though deportation proceedings have been deferred or dismissed, these individuals are still subject to deportation proceedings in the future. Second, the DOJ position has the potential to mislead many individuals by causing them to believe that their same-sex marriage now provides them the same residency status as noncitizens in heterosexual marriages. This misguided belief is likely to cause married couples in the LGBT community to make poor decisions with regard to their immigration and residency status.

With all of the above in mind, this Comment discusses the historical treatment of gay and lesbian binational couples under U.S. immigration law, and the many hurdles that these individuals have faced in

5. Kirk Semple, *U.S. Drops Deportation Proceedings Against Immigrant in Same-Sex Marriage*, N.Y. TIMES, June 30, 2011, at A16.

6. *Id.*

7. *Id.*

8. *Id.*

9. *HRC Statement on Historic DOJ Brief in Golinski Case*, in *HRC Blog*, HUMAN RIGHTS CAMPAIGN (July 5, 2011), http://www.hrc.org/blog/entry/hrc-statement-on-historic-doj-brief-in-golinski-case.

10. *See* E.J. Graff, *Is DOMA Dead?*, NATION (Feb. 25, 2011), http://www.thenation.com/article/158862/doma-dead.

11. *See* 1 U.S.C. § 7 (2006).

gaining the rights and protections that heterosexual couples have. Although this Comment analyzes the larger problems that DOMA creates, it will more narrowly argue that the recent refusal to defend DOMA is nothing more than a politically driven action that has little legal impact for same-sex couples seeking immigration status through marriage.

Part II illustrates the historical background of U.S. immigration law and its treatment of marriage, DOMA, and the struggles LGBT men and women have faced in gaining rights under immigration law.[12] Part II also discusses Attorney General Holder's letter to Speaker Boehner and will focus on (1) the letter's contents and significance and (2) the letter's influence on deportation proceedings of individuals in same-sex marriages.[13] Part III analyzes the DOJ's position on DOMA's constitutionality and argues that this refusal to defend is primarily a political move that places noncitizens in same-sex marriages with citizens in a state of limbo.[14] Part III then demonstrates the limited, and potentially damaging, legal impact that Attorney General Holder's letter has on such individuals.[15] Finally, Part IV discusses the overall impact this situation has had and will have on both immigration law and the struggle for LGBT individuals to gain rights and protections under federal law.[16]

II. BACKGROUND

A. Immigration Law and Congress's Power to Exclude and Admit

Through the Immigration and Nationality Act (INA), Congress has the power to both admit and exclude noncitizens to and from the country.[17] In terms of exclusion, the Supreme Court has consistently held that Congress's right to exclude noncitizens is subject to extremely limited judicial review because it is a plenary power that is inherent in Congress's authority to govern its territory.[18] Congress also retains the right to admit individuals into the country, and

12. *See infra* notes 17–73 and accompanying text.
13. *See infra* notes 74–106 and accompanying text.
14. *See infra* notes 106–38 and accompanying text.
15. *See infra* notes 106–38 and accompanying text.
16. *See infra* notes 138–56 and accompanying text.
17. *See* Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952).
18. *See* Chae Chan Ping v. United States, 130 U.S. 581, 603 (1889); *see also* Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892). These two cases determined the judiciary's responsibility in the realm of immigration law and made it clear that Congress essentially had free reign in the area. In other words, these cases established that the judiciary was not to question an act of Congress concerning immigration law. *See* Fiallo v. Bell, 430 U.S. 787, 792 (1977) (discussing the limited responsibility the judiciary has in reviewing immigration laws enacted by Congress).

through this right it has developed multiple guidelines and complex requirements for admission to the United States.[19] This Part discusses Congress's historical right to exclude, its development through the courts, and ways in which this right to exclude has been enforced. This Part also discusses the basic process through which Congress admits individuals into the United States and illustrates how marital status may be used for admittance.

1. Congressional Right to Exclude Under Plenary Power

A plenary power is defined as "[p]ower that is broadly construed."[20] The Supreme Court clearly stated in *Chae Chan Ping v. United States*, and has since consistently held, that Congress's power to exclude aliens from the United States is a power "which we do not think open to controversy."[21] In *Chae Chan Ping*, the Court held that if Congress determined that the presence of aliens would be dangerous to the country's peace and security, Congress could exclude those individuals whether or not their presence raised any actual concerns.[22] In *Nishimura Ekiu v. United States*, the Court again clarified this point, stating that "every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."[23] Because Congress's power to exclude aliens is so broad, it can exclude based on sexual orientation by choosing not to recognize same-sex marriages, and the power to do so is not to be questioned by the courts.[24]

Another recent illustration of Congress's exclusionary power was its decision to pass legislation that denied admittance to HIV-positive individuals unless they obtained a waiver.[25] A positive test result provided grounds for denying the individual access into the United States,

19. *See* 8 U.S.C. § 1151(a).

20. BLACK'S LAW DICTIONARY 1288 (9th ed. 2009).

21. *Chae Chan Ping*, 130 U.S. at 603. This case dealt with an act of Congress that excluded Chinese laborers from reentering the country after having left. *Id.* at 589. The plaintiffs claimed that the act was unconstitutional. *Id.* However, the Court disagreed and reasoned that an exclusionary act of Congress could not be questioned in the courts. *Id.* at 609–11. This illustrates the larger point that Congress's power in this area is extremely broad, and the Supreme Court has rendered the judicial system almost completely powerless to ever question an act of Congress that excludes noncitizens from being admitted into the country.

22. *Id.* at 606.

23. *Nishimura Ekiu*, 142 U.S. at 659. While this case dealt with *habeas corpus*, it further solidified the reasoning in *Chae Chan Ping*: Congress's power in this realm will only be subjected to the most limited judicial scrutiny. *Id.* at 663–64.

24. *Id.*

25. *See* Sherryl S. Zounes, Note, *Positive Movement: Revisiting the HIV Exclusion to Legal Immigration*, 22 GEO. IMMIGR. L.J. 529 (2008).

regardless of any specific health threats posed.[26] This example demonstrates Congress's power to exclude anyone from the country, regardless of its reasoning and rationale, without judicial review.

2. *Attaining Residency Status Through Marriage*

More than one-third of noncitizens who gain residency status in the United States do so by marrying a U.S. citizen or permanent resident.[27] "The general rule is that the validity of a marriage is ordinarily judged by the law of the place where it is celebrated."[28] This rule, although not absolute, applies to marriages entered into in foreign countries or in states or territories of the United States.[29] However, not all marriages, though otherwise valid, are construed as such for immigration purposes.[30] First, the INA specifically prohibits any marriage in which "the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated."[31] Second, marriages for the sole purpose of permitting a noncitizen to gain immigration status will not be recognized.[32] Finally, courts have held that marriages that are considered valid in other places but would violate public policy or U.S. law will not be valid for immigration purposes.[33]

Marriage is one important way that people can gain admission as legal permanent residents in the United States. However, the determination of what constitutes a valid marriage under immigration law is not necessarily clear. The United States Court of Appeals for the Ninth Circuit, in *Adams v. Howerton*, articulated a two-step analysis to determine whether a marriage is valid for immigration purposes.[34] First, the court must determine whether the marriage is valid under state law.[35] Second, the court must determine whether that same valid

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26. *Id.* at 532.

27. THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 327 (6th ed. 2008); *see also* 8 U.S.C. § 1151(b)(2)(A)(i) (2006) (including spouses in the definition of "immediate relatives," which allows them to be eligible for residency).

28. ALEINIKOFF ET AL., *supra* note 27, at 327 (internal quotation marks omitted).

29. *Id.*

30. *Id.*

31. 8 U.S.C. § 1101(a)(35).

32. ALEINIKOFF ET AL., *supra* note 27, at 327.

33. *Id.*; *see also In re* Darwish, 14 I. & N. Dec. 307, 308–09 (1973) (finding that a polygamous marriage could not be recognized for immigration purposes, although valid under Jordanian law, because polygamy violates U.S. public policy); *In re* Zappia, 12 I. & N. Dec. 439, 442 (1967) (finding that a valid marriage between first cousins in South Carolina was not recognized because the couple lived in Wisconsin, which did not allow such a marriage).

34. Adams v. Howerton, 673 F.2d 1036, 1038 (9th Cir. 1982).

35. *Id.*

marriage qualifies under the INA.[36] In answering the first question, the court noted that "the validity of a marriage is governed by the law of the place of celebration."[37] For the second step of the analysis, the court ruled that Congress has the right to determine the conditions of immigration status, and thus the court must look to the intent of Congress to determine whether a marriage qualifies under the INA.[38]

3. *Structure and Authority of Deportation Proceedings*

The INA empowered the Attorney General with the authority to properly execute the immigration laws passed by Congress.[39] Accordingly, the Attorney General has the power to "establish such regulations, prescribe such forms of bond, reports, entries and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary" for carrying out the laws enacted under the INA.[40] The INA further declared that an immigration judge has the responsibility for conducting any proceedings that determine whether or not to deport an alien residing in the United States.[41] Any decision to deport or not deport an alien residing in the Unites States is at the discretion of the immigration judge overseeing the proceeding.[42]

Once a decision has been made by an immigration judge in a deportation proceeding, that decision can be appealed to the Board of Immigration Appeals (BIA), which has nationwide jurisdiction over decisions made by immigration judges.[43] The BIA is the final administrative remedy for reviewing a decision made in an immigration court.[44] Once a BIA decision has been rendered, however, that decision can be further appealed to the federal courts for judicial review.[45] In addition to being appealed to federal courts, decisions made by an individual immigration judge or the BIA can be overruled independently by the Attorney General.[46]

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36. *Id.*

37. *Id.* at 1038–39.

38. *Id.* at 1039 ("[A] valid marriage is determinative only if Congress so intends.").

39. *See* 8 U.S.C. § 1103(g)(1) (2006).

40. *Id.* § 1103(g)(2).

41. *See id.* § 1229a(a)(1).

42. *See id.* § 1229a(c)(1)(A).

43. *Board of Immigration Appeals*, U.S. DEPARTMENT JUST., http://www.justice.gov/eoir/biainfo.htm (last updated Nov. 2011).

44. *Id.*

45. *See* 8 U.S.C. § 1252(a)(1).

46. *See Board of Immigration Appeals*, *supra* note 43.

With the above background information in mind, the remainder of this Comment will focus specifically on DOMA's interaction with current immigration law and the problems associated with the removal of aliens that are in valid, state-recognized same-sex marriages. The following parts will outline DOMA, the DOJ's responsibility to defend federal laws, and the DOJ's recent decision to stop defending DOMA in federal court.

B. DOMA

DOMA has been an often debated and controversial topic since its enactment in 1996.[47] Because it is a federal statute, DOMA has greatly impacted many areas of the law at all levels of government. DOMA states:

> 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.[48]

Some supporters of DOMA argued that "marriage has been an institution that represents a union between a man and woman" and same-sex couples have other legal options, which "should not include changing the definition of marriage to allow same-sex marriages."[49] DOMA does not prohibit states from granting same-sex marriages; instead, it asserts that the federal government will refuse to recognize any same-sex marriage granted by a state.[50] It accomplishes this by unambiguously denying same-sex couples federal benefits that are provided to couples in heterosexual marriages.[51] Indeed, DOMA prevents same-sex couples from obtaining over 1,000 benefits based on marital status.[52] Additionally, DOMA mandates that any other federal statute define "spouse" and "marriage" in the same manner,[53] and offers further guidance for 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

47. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

48. Defense of Marriage Act, sec. 3, § 7, Pub. L. No. 104-199, 110 Stat. 2419, 2419–20 (1996) (codified at 1 U.S.C. § 7 (2006)).

49. *See* 142 CONG. REC. S10552 (1996) (statement of Sen. Byron Dorgan).

50. Mark P. Strasser, *"Defending" Marriage in Light of the* Moreno-Cleburne-Romer-Lawrence *Jurisprudence: Why DOMA Cannot Pass Muster After* Lawrence, 38 CREIGHTON L. REV. 421, 436 (2005).

51. *Id.* at 437.

52. *Id.*

53. Pinix, *supra* note 4, at 459.

> 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.[54]

When drafting this portion of the law, the intent was clearly to "prevent individuals from marrying their same-sex partners in a state recognizing such unions and then going back to their domiciles demanding that their marriages be recognized."[55] It is clear from both the text of the statute and its legislative history that its aim was to "protect" the traditional notion of marriage at all costs.[56] In sum, DOMA's refusal to recognize same-sex marriages creates a significant hurdle to same-sex couples seeking immigration status for their spouses.

C. LGBT Historical Struggles to Gain Immigration Rights and Protections

By defining "marriage" as a union between one man and one woman, DOMA presents the most difficult hurdle to overcome in granting same-sex couples immigration rights and protections.[57] However, LGBT struggles in attaining immigration rights dates back long before DOMA's enactment. In 1982, for example, in *Adams v. Howerton*, the Ninth Circuit reviewed whether a male noncitizen qualified as a "spouse" under the INA for purposes of immigration status after obtaining a marriage license in Colorado with a male citizen.[58] The court first articulated that determining whether or not a marital visa would be granted was dependent on a two-step analysis: (1) whether the marriage is valid under state law, and (2) whether that state-recognized marriage is valid under the INA.[59] However, the court then completely ignored the first step of this analysis, and concluded that the validity of the marriage under Colorado law was irrelevant because nothing in section 201(b) of the INA indicates that "spouse" was intended to include a person of the same sex.[60] In making its

54. Defense of Marriage Act, sec. 2, § 1738C, Pub. L. No. 104-199, 110 Stat. 2419, 2419 (1996) (codified at 28 U.S.C. § 1738C (2006)).

55. Strasser, *supra* note 50, at 422 (citing *The Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. 2 (1996) (statement of Sen. Orrin Hatch, Chairman, Comm. on the Judiciary)); *see also* 142 CONG. REC. 16,799 (1996) (statement of Rep. Steve Largent).

56. *See* 28 U.S.C. § 1738C; Strasser, *supra* note 50, at 422.

57. Mosten, *supra* note 4, at 384.

58. Adams v. Howerton, 673 F.2d 1036, 1038–39 (9th Cir 1982).

59. *Id.* at 1038.

60. *Id.* at 1040.

ruling, the court relied on a well-known canon of statutory construction: "[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."[61] The court, relying on dictionary definitions, stated that "'marriage' ordinarily contemplates a relationship between a man and a woman."[62] Based on this definition, the court decided that DOMA could not be construed to include same-sex partners as "immediate relatives."[63]

Long before *Adams*, in 1952, the INA had express language excluding "aliens afflicted with psychopathic personality, epilepsy, or a mental defect from entering the country."[64] At the time this exclusion was in effect, courts had concluded that this language was also "intended to exclude homosexuals from admission into the country."[65] This position was bolstered by a Senate subcommittee that conducted a study and determined that when Congress chose to use the term "psychopathic personality," it intended to include "*homosexuals and other sex perverts*."[66] Consequently, in *Boutilier v. INS*, the Supreme Court held that the Senate did not clearly intend to exclude all homosexuals from being admitted to the country, but found that Boutilier's deportation was based on the fact that his homosexuality occurred over a continuous and uninterrupted period of time.[67] It has been noted that "[t]he majority of the Court concluded that it was better for a man to be separated from his family, including his partner of eight years, than to allow another homosexual to enter the country."[68] The INA endorsed this type of discrimination until 1990, when Congress finally removed "psychopathic personality" from the act.[69]

More recently, LGBT individuals have made some gains in obtaining rights and protections under immigration law; however, these gains have not necessarily been either enacted by Congress or supported by law.[70] For example, some rights have been expanded to

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61. *Id.* at 1040 (internal quotation marks omitted).

62. *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1384 (1971); BLACK'S LAW DICTIONARY 876 (5th ed. 1979)).

63. *Id.* at 1038, 1040.

64. Immigration and Nationality Act, Pub. L. No. 414-477, 66 Stat. 163, 182 (1952) (codified at 8 U.S.C. § 1182(a)(4) (1952) (repealed)).

65. Christopher A. Dueñas, Note, *Coming to America: The Immigration Obstacle Facing Binational Same-Sex Couples*, 73 S. CAL. L. REV. 811, 817 (2000).

66. *Id.* at 820 (citing Boutilier v. INS, 387 U.S. 118, 121 (1967)).

67. Boutilier v. INS, 387 U.S. 118, 123 (1967).

68. Dueñas, *supra* note 65, at 820.

69. *Id.* at 825.

70. Blythe Wygonik, *Refocus on the Family: Exploring the Complications in Granting the Family Immigration Benefit to Gay and Lesbian United States Citizens*, 45 SANTA CLARA L. REV. 493, 501–02 (2005).

include same-sex couples on a case-by-case basis.[71] USCIS administrators may confer spousal benefits to same-sex couples at their discretion in special, and usually extreme, circumstances.[72] As a result, only a small number of people have been able to obtain rights and protections through this practice.[73] Therefore, it is clear that the struggle for LGBT individuals in gaining the legal protections and rights that married, heterosexual couples receive is still ongoing. Accordingly, the decision by the DOJ to stop defending DOMA in federal courts, as outlined in the next Part, is one way in which the federal government is attempting to combat the struggles faced by the LGBT community.

D. Attorney General Eric Holder's Letter

The letter from the Attorney General to the Speaker of the House on February 23, 2011, informed Speaker Boehner that President Obama had determined that DOMA, "as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment."[74] With the above history and considerations in mind, this Part reviews the DOJ's general responsibilities to defend federal laws and its determination that DOMA is unconstitutional, resulting in the decision to not defend it in federal courts.

1. DOJ's Responsibility to Enforce and Defend the Laws of the United States

Congress, through the Judiciary Act of 1789, created the Office of the Attorney General, which was originally conceived as a one-person position that had the responsibility to prosecute all suits in the Supreme Court in which the United States government had an interest.[75] Over time, however, the government's interest in litigation increased far beyond the capacity of a single person. Thus, Congress established the DOJ with the Attorney General as its head to aid the federal government with its litigation responsibilities.[76] The DOJ is an executive department,[77] and the Attorney General has the authority to "make such provisions as he considers appropriate authorizing the perform-

71. *Id.* at 501.
72. *Id.* at 501–02.
73. *See id.* at 502.
74. Holder Letter, *supra* note 1, at 1.
75. *About DOJ*, U.S. DEPARTMENT JUST., http://www.justice.gov/about/about.html (last updated Mar. 2012).
76. *Id.*
77. 28 U.S.C § 501 (2006).

ance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General."[78] Furthermore, Congress determined that "the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice."[79]

Because Congress authorized the DOJ's discretion and control over suits involving the United States, it follows that the DOJ may decide not to defend a federal statute that is being challenged in the courts. Accordingly, the DOJ has taken this position with regard to DOMA, and the remainder of this Part focuses on that decision.

2. *DOJ Concludes that Heightened Scrutiny Is the Appropriate Standard of Review for Classifications Based on Sexual Orientation*

Attorney General Holder's letter began by stating that the DOJ had previously defended DOMA in jurisdictions where circuit courts had held that "classifications based on sexual orientation are subject to rational basis review."[80] However, the DOJ changed course and concluded that classifications based on sexual orientation should be analyzed under heightened scrutiny.[81] The DOJ conceded that while the Supreme Court has not directly articulated the proper level of scrutiny for classifications based on sexual orientation,[82] many Supreme Court decisions outline certain factors that courts consider when determining the appropriate level of scrutiny, including

> (1) whether the group in question has suffered a history of discrimination; (2) whether individuals "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group"; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's "ability to perform or contribute to society."[83]

After considering these factors, the DOJ determined that classifications based on sexual orientation should clearly be reviewed under heightened scrutiny.[84]

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78. *Id.* § 510.
79. *Id.* § 516.
80. Holder Letter, *supra* note 1, at 1–2.
81. *Id.* at 2.
82. *Id.*
83. *Id.* (citing Bowen v. Gilliard, 483 U.S. 587, 602–03 (1987); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441–42 (1985)).
84. *Id.*

In reviewing the first factor, the DOJ determined that there is "a significant history of purposeful discrimination against gay and lesbian people," noting that "until very recently states have 'demean[ed] the[ ] existence' of gays and lesbians by 'making their private sexual conduct a crime.'"[85] As to the second factor, the DOJ determined that "while sexual orientation carries no visible badge, a growing scientific consensus accepts that sexual orientation is a characteristic that is immutable."[86] The DOJ also noted that "it is undoubtedly unfair to require sexual orientation to be hidden from view to avoid discrimination."[87]

When reviewing the third issue, the DOJ considered anti-sodomy laws, Don't Ask, Don't Tell, and the fact that the federal government grants no protection for employment discrimination based on sexual orientation.[88] Based on this historical evidence, the DOJ concluded that LGBT individuals have "limited political power and 'ability to attract the [favorable] attention of the lawmakers.'"[89] The DOJ further argued that evidence showing "that the political process is not closed *entirely* to gay and lesbian people was irrelevant."[90] It concluded that absolute exclusion was not the standard used by the Court when it raised the level of scrutiny for gender-based classifications, which led to greater political protections for women.[91]

Finally, the DOJ determined that, in regards to the fourth factor, "there is a growing acknowledgement that sexual orientation 'bears no relation to ability to perform or contribute to society.'"[92] The DOJ stated that changes in legislation, community practices and attitudes, and social sciences "all make clear that sexual orientation is not a characteristic that generally bears on legitimate policy objectives."[93]

After analyzing and discussing all of the above factors, the DOJ concluded that the appropriate standard of review for classifications based on sexual orientation is heightened scrutiny.[94] As such, the DOJ proceeded to apply this heightened standard of review in deter-

85. *Id.* (alteration in original) (quoting Lawrence v. Texas, 539 U.S. 558, 578 (2003)).

86. Holder Letter, *supra* note 1, at 3 (citing RICHARD A. POSNER, SEX AND REASON 101 (1992)).

87. *Id.* (citing Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515).

88. *Id.*

89. *Id.* (alteration in original) (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445 (1985)).

90. *Id.* at 2.

91. *Id.* at 3.

92. Holder Letter, *supra* note 1, at 3 (quoting Frontiero v. Richardson, 411 U.S. 677, 686 (1973)).

93. *Id.*

94. *Id.* at 3–4.

mining whether DOMA was constitutional under the Equal Protection Clause of the Fifth Amendment.[95]

3. Application of Heightened Scrutiny to DOMA

The DOJ, after finding that heightened scrutiny was the appropriate standard of review, explained that in order for the United States to defend DOMA it must do more than advance "hypothetical rationales" allowable under rational basis review. For instance, in *United States v. Virginia*, the Supreme Court utilized heightened scrutiny in reviewing a discriminatory state action based on gender.[96] The Court articulated that, under this standard of review, the state must show that its discriminatory action furthers an important government objective and that the action is substantially related to that objective.[97] Any justification under this standard must be genuine and cannot be based on overbroad generalizations.[98]

The DOJ, after parsing heightened scrutiny precedent, determined that it must only defend DOMA "by invoking Congress' actual justifications for the law."[99] The DOJ reviewed the legislative record, which showed "numerous expressions reflecting moral disapproval of gays and lesbians and their intimate family relationships."[100] Further, the DOJ noted that these types of overbroad generalizations are "precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against."[101]

As a result of the above findings, President Obama instructed the DOJ to stop defending DOMA in cases pending in the southern district of New York and the district of Connecticut.[102] However, Attorney General Holder informed Speaker Boehner that the executive branch would continue to enforce DOMA until either Congress has repealed it or the Supreme Court ruled it unconstitutional.[103] This meant that the DOJ would continue to enforce judicial rulings that order deportation of individuals who used same-sex marriage as the qualification for immigration status because of the restrictions created

95. *Id.* at 4.

96. United States v. Virginia, 518 U.S. 515, 531 (1996).

97. *Id.* at 533.

98. *Id.* (noting that in this case the state could not rely on any generalizations based upon the differences between men and women).

99. Holder Letter, *supra* note 1, at 4.

100. *Id.*

101. *Id.* at 4–5 (citing Romer v. Evans, 517 U.S. 620, 635 (1996); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985); Palmore v. Sidotti, 466 U.S. 429, 433 (1984)).

102. *Id.* at 5.

103. *See id.*

by DOMA. However, it would not otherwise actively defend the validity of DOMA in the court system. The letter made clear that the DOJ has previously "declined to defend statutes despite the availability of professionally responsible arguments, in part because the Department does not consider every plausible argument to be a 'reasonable' one."[104] Further, the DOJ has previously ceased defending a statute when a President unilaterally determined that it was unconstitutional, as is the case here.[105] Therefore, the DOJ instructed its attorneys to refrain from defending DOMA in the courts because of its unconstitutionality.[106]

III. ANALYSIS

This Part of the Comment argues that Attorney General Holder's letter, a so-called "landmark document," is nothing more than a political action that is potentially progressive, but fails to legally protect noncitizens in valid same sex-marriages. This legal insignificance can be seen in two ways. First, the DOJ's position does not give noncitizens in same-sex marriages any certainty as to their residency status. The main reason for this is that DOMA is only one hurdle that same-sex couples must overcome to gain legal protections under federal immigration law. Second, this political move may lead individuals in this situation to misread its actual legal impact and cause them to make misguided decisions affecting their immigration status.

As a result, refusing to defend DOMA in the courts is only granting noncitizens in same-sex marriages temporary protection, which places them in a state of limbo with substantial uncertainty regarding their future immigration status.

A. The DOJ Decision and Its Creation of Complex Uncertainty

1. The House of Representatives Has Elected to Defend DOMA in Place of the DOJ

Two weeks after receiving Attorney General Holder's letter, Speaker Boehner announced that he was beginning a process that would essentially "witness the House of Representatives taking over the legal responsibilities of arguing for the constitutionality of the De-

104. *Id.*

105. Holder Letter, *supra* note 1, at 5 (citing Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1083 (2001)).

106. *Id.* at 6.

fense of Marriage Act."[107] Speaker Boehner convened a meeting of the Bipartisan Legal Advisory Group (BLAG) and stated that "[t]he constitutionality of this law should be determined by the courts—not by the [P]resident unilaterally—and this action by the House will ensure the matter is addressed in a manner consistent with our Constitution."[108]

The BLAG voted to direct the House General Counsel to defend DOMA if the DOJ was no longer willing to do so.[109] To support this new responsibility, Speaker Boehner insisted that funds needed to be diverted from the DOJ and given to the House.[110] The letter indicates a clear intent by Speaker Boehner and House Republicans to defend DOMA in the court system,[111] regardless of President Obama's determination that DOMA is unconstitutional.[112]

This clear intent to defend DOMA undercuts the seemingly progressive and successful aspects of the DOJ's refusal to defend DOMA because DOMA is still a legally enacted statute; until it is repealed or held unconstitutional, both Congress and outside groups who petition the courts to intervene on behalf of the DOJ can defend the law.[113] Further, as previously explained, decisions in immigration courts can eventually be appealed to the federal courts, as well as the Supreme Court.[114] Although the DOJ, sole executive agency in charge of litigation involving the United States, has the authority to choose whether to defend a federal statute, Congress can step in if it chooses to do so. Thus, if the DOJ refuses to defend DOMA in deportation proceedings, then the House can step in its place and appeal decisions from immigration courts to the federal courts. In this way, the House would defend the constitutionality of DOMA by arguing that immigration courts cannot recognize same-sex marriages for purposes of noncitizens gaining marital visas.

Thus, the primary concern is what happens to individuals who have had their deportation proceedings suspended when the House defends DOMA. For Mr. Velandia, the noncitizen from Venezuela whose de-

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107. Sam Stein, *Boehner-Led Group Will Defend DOMA in Court*, HUFFINGTON POST, http://www.huffingtonpost.com/2011/03/04/john-boehner-DOMA-defense_n_831548.html (last updated May 25, 2011, 7:35 PM).

108. *Id.* (internal quotation marks omitted).

109. Letter from John Boehner, Speaker of the House, U.S. Cong., to Nancy Pelosi, House Minority Leader, U.S. Cong. (Apr. 18, 2011) [hereinafter Boehner Letter], *available at* http://www.speaker.gov/News/DocumentSingle.aspx?DocumentID=237431.

110. *Id.*

111. *Id.*

112. *See* Holder Letter, *supra* note 1, at 1.

113. Graff, *supra* note 10.

114. ALEINIKOFF ET AL., *supra* note 27, at 292.

portation was delayed, this question is extremely important.[115] Because Mr. Velandia is not currently facing deportation, he is fortunate enough to begin building his life with his spouse, Josh Vandiver, a U.S. citizen.[116] But assume Mr. Velandia and Mr. Vandiver start their lives together as a family, and then DOMA is held to be a constitutional act of Congress. Without an express allowance from Congress, immigration courts, under DOMA, have no authority to recognize their marriage for purposes of admittance to the United States.[117]

The ultimate concern is that until DOMA is repealed or held unconstitutional, these noncitizens face an insurmountable obstacle to beginning their lives as citizens or residents of this country. Deferring these deportations gives noncitizens in same-sex marriages a distorted view of reality because it does not guarantee a future in this country. This will likely foster a perpetual feeling of anxiety because at any moment these noncitizens could be deported and their new lives would be taken from them.

2. *Immigration Judges Suspending Removal Cases Provides No Legal Precedent or Authority on DOMA in the Federal Court System*

An immigration judge suspending a deportation proceeding does not settle the issue of DOMA and its application to aliens in same-sex marriages. Immigration courts are part of a separate administrative body with the authority to specifically determine deportation proceedings. As such, any decision in immigration court surrounding DOMA has no legal weight beyond that proceeding. It provides no precedent for other courts in the federal system, and as such, the constitutionality of DOMA is still left to be determined by the Supreme Court.

Accordingly, the judicial response to the DOJ's refusal to enforce DOMA provides further evidence that this position offers no significant legal protections to individuals in same-sex marriages.[118] In Newark, the immigration judge who suspended Mr. Velandia's deportation stated that he "wanted to allow time for the [A]ttorney [G]eneral and the courts to work out whether, under some circumstances, a gay partner might be eligible for residency."[119] Furthermore, the judge in that case placed significant weight on *In re Dorman*, which Attorney General Holder, through his authority to

115. *See* Semple, *supra* note 5.
116. *Id.*
117. *See* Pinix, *supra* note 4, at 459.
118. *See* Semple, *supra* note 5.
119. *Id.*

review and overrule any immigration court or BIA decision, vacated due to the BIA's application of DOMA.[120] Again, an immigration judge articulated the notion that the issue of DOMA and federal recognition of same-sex marriages in general is something that the courts need to figure out.[121] Experts stated that the decision in Mr. Velandia's deportation case "represented a significant shift in policy and could open the door to the cancellation of deportations for other immigrants in same-sex marriages."[122] However, courts are still left to resolve the issue of DOMA's constitutionality until and unless Congress repeals it.[123]

3. *Problematic Implications Regardless of the Supreme Court's DOMA Decision*

In December 2012, the Supreme Court granted certiorari in *Windsor v. United States*, in which two women challenged DOMA's constitutionality.[124] The case was scheduled for oral arguments in March 2013 with a decision expected in June.[125] Regardless of whether the Court holds DOMA constitutional, the decision will have a significant impact on aliens seeking residency who are legally married to U.S. citizens under state law.

First, if the Supreme Court holds that DOMA is constitutional, this entire conversation will be moot—Attorney General Holder's directives to the DOJ will be rendered meaningless. The DOJ, as an agency of the executive branch, is not in a position to question the authority and decisions of the U.S. Supreme Court. The Supreme Court has the ultimate power to determine the constitutionality of any law enacted by Congress. As such, if the Supreme Court rules that the DOMA is constitutional, the DOJ's position on the matter will have no legal significance. Federal judges must abide by DOMA's provisions and continue with scheduled deportation proceedings.

On the other hand, in the event that the Supreme Court holds DOMA unconstitutional, Congress will still have to take affirmative

120. *See In re* Dorman, 25 I. & N. Dec. 485 (2011); *see also* Chris Geidner, *Henry Velandia's Deportation Proceeding Adjourned, AG Holder's Decision Cited as Reason*, METRO WEEKLY (May 6, 2011, 2:17 PM), http://www.metroweekly.com/poliglot/2011/05/henry-velandias-deportation-pr.html.

121. *See In re* Dorman, 25 I. & N. Dec. at 485; *see also* Boehner Letter, *supra* note 109.

122. Semple, *supra* note 5.

123. *Id.*

124. *See* Jonathan Capehart, *The Supreme Court Takes Up DOMA*, WASH. POST (Dec. 10, 2012), http://www.washingtonpost.com/blogs/post-partisan/wp/2012/12/07/the-supreme-court-takes-up-doma; *see also* United States v. Windsor, 133 S. Ct. 786 (2012); Windsor v. United States, 797 F. Supp. 2d 320, 321 (S.D.N.Y. 2011).

125. Capehart, *supra* note 124.

steps to grant these individuals residency rights in the United States. DOMA simply represents an obstacle to the legal recognition of same-sex marriages at the federal level; its invalidation would not automatically grant immigration rights to noncitizen spouses in same-sex relationships. Instead, this decision would simply remove this hurdle.

Moreover, the impact of the Court's decision to invalidate DOMA would depend on the level of scrutiny used to do so. Commentators have argued that if the Supreme Court invalidates DOMA based on the heightened scrutiny argument postulated by the DOJ, then "it is likely that couples within all fifty states would be able to invoke that ruling to secure the freedom to marry."[126] On the other hand, if the Supreme Court were to rule that DOMA is unconstitutional based upon the lesser standard of rational basis, "the impact, though significant, would most certainly be far less dramatic (at least in the immediate term) than a ruling requiring heightened scrutiny."[127] This is because some barriers would remain if rational basis is used, but heightened scrutiny would likely clear the way entirely for homosexuals in the United States.[128]

The implications of the Supreme Court's decision are clear. On one hand, a finding that DOMA is constitutional, would foreclose immigration status to same-sex spouses, at least for now. On the other hand, if it decides that DOMA is unconstitutional, immigration law still does not grant rights to these individuals. Federal judges may still have to authorize deportations if immigration law is not changed to protect foreign aliens in same-sex marriages to U.S. citizens. Thus, the Supreme Court's invalidation of DOMA would be progressive, but would not conclude the issue: Congress must still take affirmative steps to provide immigrant status to those same-sex couples currently in limbo.

B. Congress May Still Need to Explicitly Grant Same-Sex Immigration Benefits Even if DOMA Is Deemed Unconstitutional

The final concern regarding the delayed deportation proceedings is that Congress still holds its plenary power in the realm of immigration law. Thus, Congress's decision to admit or exclude aliens based on

126. Joseph Landau, *DOMA and Presidential Discretion: Interpreting and Enforcing Federal Law*, 81 FORDHAM L. REV. 619, 623 (2012).

127. *Id.*

128. *Id.* at 623–24.

sexual orientation, or its choice to not recognize same-sex marriages, cannot be questioned by the courts.[129]

This authority was clearly demonstrated in *Chae Chan Ping v. United States*. Doctrinally, the case granted broad deference to Congress in immigration matters. Factually, however, and far more personally, the case allowed Congress to enact a law that specifically excluded Chinese individuals based solely on their race.[130] This is especially significant because racial discrimination is the most suspect classification and subject to the highest degree of judicial scrutiny when reviewed by the courts.[131] However, the *Chae Chan Ping* Court upheld the law (although it was later repealed in 1943).[132] Unlike racial discrimination, as Attorney General Holder's letter made clear, sexual orientation has not been made a "suspect class," and therefore, does not undergo the same scrutiny when used as a basis for discrimination.[133] As such, it is even more important for Congress to extend rights and protections to LGBT individuals in same-sex marriages because if the courts are not able or willing to prevent racial discrimination in immigration law, they will almost certainly be less willing to prevent discrimination based on sexual orientation.

Another recent illustration of Congress's exclusionary power impacting people entering the United States is when Congress excluded HIV-positive individuals.[134] To be considered for admittance, U.S. immigration procedure requires all noncitizens to be medically examined, part of which includes HIV testing.[135] The law in question disallowed individuals who were HIV-positive from being admitted into the United States without being issued a waiver.[136] Furthermore, this exclusion did not classify these people based on any threat they posed to the public health of the country; it was simply a blanket rule that encompassed all individuals who had contracted HIV.[137] This example reinforces the notion that Congress has the power to exclude anyone from the country, regardless of its reasoning and rationale, and such power is not subject to judicial review or question.

The question then remains the same: how long will same-sex couples have to wait in order to gain the protections necessary for

129. Mosten, *supra* note 4, at 384.
130. Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889).
131. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).
132. 15 U.S.C. § 2301 (2006).
133. *See* Holder Letter, *supra* note 1, at 1–2.
134. *See* Zounes, *supra* note 25, at 531.
135. *Id.*
136. *Id.* at 532.
137. *Id.*

them to be guaranteed a secure life in the United States? Even if DOMA is successfully repealed, either through the courts or Congress, in terms of immigration, these individuals must still seek rights and protections under the law. This places them in a continued state of uncertainty because not only may they have to wait for DOMA to be repealed, they must also wait for Congress to explicitly grant them immigration status in the United States. Although the DOJ's refusal to defend DOMA may have a significant political and social policy effect, it does nothing to alleviate the waiting period for noncitizens in same-sex marriages seeking resident status in the United States.

IV. IMPACT

Taken as a whole, the DOJ's decision to stop defending DOMA will adversely impact individuals who are similarly situated to Mr. Velandia. Although refusing to defend what the executive branch has deemed to be an unconstitutional statute seems relatively straightforward, the DOJ has essentially placed individuals in a state of confusion regarding their legal status. Further, the decision has created a situation that might cause inconsistent decisions from different immigration judges. It has also led to uncertainty regarding what the law actually is, which can cause people in these situations to make poor decisions regarding their immigration status. Finally, the DOJ has created tension between the branches of government.

Although the DOJ's decision to stop defending DOMA is a positive and significant step toward attaining equal rights for individuals in same-sex marriages, it is not nearly as significant considering how much depends on the judiciary's decision regarding DOMA's constitutionality.[138] Instead, it merely adds uncertainty to the residency status of noncitizens in same-sex marriages. Ultimately, these individuals must hope that the Supreme Court finds DOMA unconstitutional and that Congress takes further action. If the Supreme Court holds that DOMA is constitutional, individuals living in these same-sex marriages will revert back to where they were prior to the DOJ's determination that DOMA is not constitutional. In addition, immigration law judges will have no choice but to continue to find same-sex marriages invalid for residency purposes, and deportations of these individuals would resume. Therefore, federal judges currently staying deporta-

138. Semple, *supra* note 5.

tion proceedings have simply placed these individuals in a state of uncertainty.[139]

In addition to the issues facing same-sex spouses in delayed deportation proceedings, the DOJ's decision provides courts no guidance on how to manage individual cases, which could lead to inconsistent results. There are over one hundred immigration judges throughout the United States, and because the DOJ's directive is not legal precedent, each judge has the discretion to decide whether or not to affirmatively act in favor of individuals in same-sex marriages.[140] For example, Frederic Deloizy, a French national married to an American citizen, Mark Himes, is currently facing deportation before an immigration judge.[141] Mr. Deloizy, hoping that his proceeding will be suspended, is living in a state of limbo because he does not know how his judge will react to the DOJ's decision.[142] Deloizy's spouse, Himes, explained the impact: "You live constantly with the stress of knowing that you're a second-class citizen and at any moment your family could be torn apart by the same government that permitted you to become a family."[143] Thus, the discretion given to immigration judges to suspend deportation proceedings in response to the DOJ's decision not only contributes to the current state of limbo for these same-sex couples, it may also lead to inconsistent results for cases that should be decided uniformly.

A third effect that the DOJ's decision has on individuals is the possibility that it may create confusion, which could lead to poor decision making by noncitizens in same-sex marriages. As discussed earlier, there are several ways for a noncitizen to obtain residency status in the United States.[144] Regardless of the category under which a noncitizen is admitted, he must meet certain requirements.[145] For immigration purposes, the system currently allows for four categories of immigrants: "(1) family-sponsored immigrants; (2) employment-based immigrants; (3) diversity immigrants; and (4) refugees."[146] A noncitizen may also be admitted to the United States by qualifying as an "immediate relative," which includes the spouse of a United States

139. *See id.*; *see also* Sarah Hoye, *Man Faces Deportation Despite Marriage to U.S. Citizen*, CNN, http://www.cnn.com/2012/01/11/us/philadelphia-gay-couple-deportation/index.html?iref=obnetwork (last updated Jan. 12, 2012, 9:01 AM).

140. *EOIR Immigration Court Listing*, U.S. DEPARTMENT OF JUST., http://www.justice.gov/eoir/sibpages/ICadr.htm (last updated Mar. 1, 2013).

141. Hoye, *supra* note 139.

142. *Id.*

143. *Id.* (internal quotation marks omitted).

144. *See* ALEINIKOFF ET AL., *supra* note 27, at 296.

145. *Id.*

146. *Id.* at 297.

citizen.[147] More than one-third of noncitizens who gain immigrant status in the United States do so through this latter category.[148]

The problem, and greater concern, is that noncitizens in these situations may think that the DOJ's decision grants them residency status and ultimately protects them from deportation. This false assumption may lead them to make poor decisions regarding their immigration options. With the complexities of immigration law come many different alternatives to gaining protections under its provisions. Thus, it is critical to understand that the DOJ decision does not grant a special status or classification for gaining residency status. Same-sex couples in this situation need to continue to explore other viable immigration options. A failure to do so may result in a missed opportunity to qualify for residency status through an alternative method, ultimately risking deportation. It would be tragic if these individuals had other options, but ceased looking into these options in light of the DOJ decision.

The final significant impact of the DOJ's decision is the way in which it implicates deeply rooted principles of federalism. The U.S. Constitution charges the Executive Branch with enforcing and defending the laws of the United States.[149] Further, the power to make laws has always been vested in the Congress,[150] and the power to adjudicate laws of Congress rests with the Supreme Court and its inferior federal courts.[151] Now, it is true that the lines have been blurred between the separate powers of the three branches since the inception of the Constitution, but the DOJ, as an executive entity, does not hold the legal power to declare a statute unconstitutional; this power is vested solely in the judicial branch.[152] One commentator has even been so bold as to state,

> This was political spin. This is existing federal law. It is getting tougher and tougher to defend in the current environment. But it is the law of the land. I am certain the administration will keep fighting the challenges to Obamacare. You don't get to pick and choose which laws to defend.[153]

147. 8 U.S.C. § 1151(b)(2)(A)(i) (2006).

148. ALEINIKOFF ET AL., *supra* note 27, at 327.

149. U.S. CONST. art. II, § 3.

150. *Id.* art. I, § 1.

151. *Id.* art. III, § 1.

152. *Id.*

153. Fred Lucas, *DOJ Shirking Duty in Not Defending DOMA, Critics Say*, CNSNEWS.COM (Feb. 23, 2011), http://cnsnews.com/news/article/doj-shirking-duty-not-defending-doma-critics-say (quoting Jordan Sekulow, attorney and director of policy for the American Center for Law and Justice).

Ultimately, the problem affects the relationship between the branches of the federal government. Although the Obama administration claimed to have "had no choice," it had a choice: enforce the laws of the United States, as is its duty, or completely disregard them.[154] To some, this move may seem to advance the rights of a "politically powerless" minority.[155] However, one could also advance the argument that although this may be a step toward equality for minorities in a social and political context, it also can be viewed as the executive branch continuing down a path of ignoring its duties under the Constitution and disregarding the rights and powers of the judiciary and Congress.

V. CONCLUSION

The DOJ, at the direction of President Obama, made the bold decision to halt its defense of DOMA in the courts. This is unquestionably a positive step in attaining equal rights for a historically disadvantaged group. However, although it may be categorized by some as a huge step in obtaining rights for a minority group of individuals, the decision is not without its criticisms and pitfalls. Unfortunately, the decision ultimately has a limited legal impact on individuals living in the United States.

Noncitizens in valid, same-sex marriages under state law are placed in a state of limbo in which one lives "constantly with the stress of knowing that you're a second-class citizen and at any moment your family could be torn apart by the same government that permitted you to become a family."[156] Life is already complicated for these individuals because they are constantly faced with the prospect of deportation, but the situation is even further complicated because some individuals are being given a pseudo legal status by judges who are willing to stay deportations as a result of the decision.[157] This decision has also created the potential for misunderstanding, which can ultimately cause individuals to make poor decisions that leave them in a worse situation than before. Although the decision may be revered by many as politically and socially significant, it is also a decision that comes with negative consequences.

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154. *See id.*
155. *See* Holder Letter, *supra* note 1, at 2–3.
156. *See* Hoye, *supra* note 139.
157. *See* Semple, *supra* note 5.