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SAME-SEX BI-NATIONAL COUPLES: THE BENEFITS AND PITFALLS OF JUDICIAL EVOLUTION AND THE VALIDITY OF MARRIAGE

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I. Introduction

"The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."

—U.S. Supreme Court, *Loving v. Virginia* (1967)

The United States has vehemently discriminated against homosexuals throughout its history. A convincing and damaging image has since been ingrained into the minds of Americans that homosexuality is base and vile and threatens traditional family values. This perception allowed for the criminalization and exclusion of homosexuals, and continues to fuel conservative opposition of same-sex marriage today.

For too long homosexual men and women have been dehumanized and discriminated against. For too long "the closet" has allowed the U.S. government to criminalize and exclude homosexuals. For too long homosexuals have been denied their fundamental right to marry and receive the legal benefits of marriage. One of the most inspiring aspects of the law is its constant growth, how it adapts and changes to fit the circumstances of society. Change and truth are here and it is time that this great nation puts an end to the baseless discrimination of homosexuals and recognizes that we are all brothers and sisters in the pursuit of true happiness.

This comment will address the fragile state of immigration benefits provided to same-sex bi-national couples, and how either the Supreme Court or the U.S. Congress can secure said benefits. Part II will discuss in detail the plenary power doctrine and the immense power that is given to Congress and the Executive Branch over immigration law. Part III addresses the history of discrimination, criminalization, and exclusion of homosexuals. Part IV will address Section 3 of DOMA, the rulings in *Windsor, Hollingsworth,* and *Obergefell* and how those rulings apply to immigration. Part V will look at the validity of marriage for same-sex bi-national couples from an immigration standpoint.

II. JUSTIFYING EXCLUSION: THE RISE OF THE PLENARY POWER DOCTRINE

Immigration law is an insolated oddity that defers an enormous amount of power to Congress.[1] The heart of this power is not derived from any enumerated power of Congress, but is the product of case law that dates back over one hundred years.[2] The hallmark case that set the tone for this plenary power is *Chae Chan Ping v. United States*.[3] In *Chae Chan Ping* (commonly referred to as the "Chinese Exclusion Case"), the Supreme Court ruled in favor of an act of Congress that prohibited Chinese laborers from entering the United States.[4] The Court reasoned that Congress had the power to control immigration because such power was inherent in the sovereignty of the United States.[5] Quoting Chief Justice Marshall, the Court stated, "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute."[6] The strongly-held belief that sovereignty, and the need to protect and defend the nation's interests, justified the exclusion of Chinese laborers and gave birth to Congress's vast power to create immigration law without the need for any enumerated power.[7] According to the majority, the very independence of a nation relies on its ability to secure its borders, rendering nearly all other considerations subordinate.[8] The Court has since recognized Congress's exclusionary power as an inherent power[9] that is greatly shielded from judicial review.[10] As discussed below, the breadth of *Chae Chan Ping* allows Congress to openly "discriminate in the admission of aliens on grounds that [would be] unacceptable in other contexts."[11]

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1. Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1986 IMMIGR. & NATIONALITY L. REV. 81, 81.

2. Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 856 (1987); *see also* Chae Chan Ping v. United States, 130 U.S. 581 (1889) (establishing what would become the plenary power doctrine).

3. *Chae Chan Ping*, 130 U.S. at 581.

4. *See generally id.* (recognizing the sovereign power of Congress to exclude any groups from immigration and reaffirming congressional discretion to modify treaties).

5. *Id.* at 604.

6. *Id.* (quoting The Schooner Exchange v. McFaddon, 7 Cranch 116 (1812)).

7. Legomsky, *supra* note 1, at 100; see also Chae Chan Ping, 130 U.S. at 604 (applying the concept of sovereignty to justify its ruling); Henkin, *supra* note 2, at 856 ("The power to regulate immigration is not among the enumerated powers of Congress. In the late nineteenth century, however, it was commonly accepted that regulating the immigration of free persons was plausibly a federal power . . . .").

8. *Chae Chan Ping*, 130 U.S. at 603–04.

9. *Id.* at 585.

10. Legomsky, *supra* note 1, at 100.

11. Henkin, *supra* note 2, at 860.

Following *Chae Chan Ping*, the Court extended the plenary power to include Congress's power to expel or deport persons already in the United States.[12] In *Fong Yue Ting v. United States*, the Court declared the right of Congress to expel or deport aliens who have not taken the proper steps to naturalize.[13] In this case, three Chinese laborers were ordered deported for lacking certificates of residence, and for lacking the testimony of at least one credible white witness who could swear they were in the country lawfully, as required by statute.[14] Relying again on national sovereignty, the Court recognized Congress's "absolute and unqualified" ability to deport or exclude any alien for any reason.[15] The Court did acknowledge that an alien who was permitted by the government to reside in the United States would be afforded the protection of laws and certain Constitutional "safeguards" consistent with their civil duty.[16] It is important to note the Court did not specify exactly what those "safeguards" were, resulting in confusion that persists today.[17]

A. *Married to Chinese Exclusion Precedent*

During the 1950s, when the Court was expanding constitutional protections for the individual, it remained steadfast in its support of the plenary power doctrine.[18] In *United States ex rel. Knauff v. Shaughnessy*, the Court upheld its limited ability to review exclusion decisions, finding that immigration authorities could exclude the alien wife of a U.S. citizen without any hearing.[19] The Court not only reinforced its belief in the sovereign's ability to exclude, but it extended its judicial deference to the Executive.[20] The Court reasoned, "[T]he decision to admit or to exclude an alien may be lawfully placed with the President. . . . The action of the executive officer under such authority is final and conclusive."[21]

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12. *See* Robert Foss, *The Demise of the Homosexual Exclusion: New Possibilities for Gay and Lesbian Immigration*, 29 HARV. C.R.-C.L. L. REV. 439, 443 (1994) (finding unrestricted power to protect U.S. borders was an "inherent" power bestowed upon the government).

13. Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893).

14. *Id.* at 699.

15. *Id.* at 707.

16. *Id.* at 724 (describing the limited protection aliens receive subject to the power of Congress to expel them).

17. *See id.* (illustrating how the Court stays silent on the issue in the case). *See generally* Legomsky, *supra* note 1, at 81 (exploring theories that have attached to the plenary power since *Chae Chan Ping*).

18. Henkin, *supra* note 2, at 860.

19. United States *ex rel.* Knauff v. Shaughnessy, 388 U.S. 537, 547 (1950).

20. *Id.* at 542.

21. *Id.* at 543.

The Court continued to fuel the breadth of Congress's plenary power in *Shaughnessy v. United States ex rel. Mezei*.[22] Mezei found himself trapped on Ellis Island when he was unsuccessful in his attempts to find another country to enter.[23] The Court found the Attorney General's continued exclusion of Mezei without a hearing, did not amount to an unlawful detention.[24] This encouraged the Court in its quest to defer more power to Congress with respect to the exclusion of aliens.[25] The Court reasoned that while aliens who have entered the United States legally "may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law," an alien who has not yet entered lawfully is not afforded the same right.[26] *Mezei* has never been reexamined by the Court,[27] which illustrates the reluctance on the part of the Court to stray from this deeply-rooted doctrine.

In *Galvan v. Press*, the Court upheld Congress's authority to deport an alien who had lawfully resided in the United States for thirty years because of his brief affiliation with the Communist Party.[28] The Court recognized the protections of due process available to an alien who legally entered the United States, and was reluctant to invoke the plenary power as far as a lawfully present alien was concerned.[29] Ultimately, the majority could not conclude Congress's decision to remove members of the Communist party from U.S. soil was unconstitutional.[30] Authority over immigration policy was entrusted exclusively to Congress, and was firmly imbedded in the precedent of the Court.[31]

These three cases, along with many others not herein mentioned, illustrate the predominant influence of *Chae Chan Ping* and *Fong Yue Ting*.[32] The Court continues to confine itself to the doctrine set forth by these early cases, and is reluctant to approach Congress's plenary power.[33] In *Faillo v. Bell*, the Court hinted at its limited authority to review the con-

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22. *See generally* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953) (holding that respondent's continued exclusion, lasting almost two years without a hearing, was not unconstitutional and did not constitute an unlawful detention).

23. *Id.* at 207.

24. *Id.*; *see also* Henkin, *supra* note 2, at 860 (addressing the expansion of the plenary power by the Court's decisions on immigration during the 1950s).

25. Henkin, *supra* note 2, at 860.

26. *Mezei*, 345 U.S. at 212.

27. Henkin, *supra* note 2, at 861.

28. Galvan v. Press, 347 U.S. 522, 522 (1954).

29. *Id.* at 530.

30. *Id.* at 531–32.

31. *Id.*

32. *See* Henkin, *supra* note 2, at 860.

33. *See generally* Legomsky, *supra* note 1, at 81 (discussing the selective restraint the Court has exercised with regard to issues that arise in immigration cases).

stitutionality of an Immigration and Nationality Act (INA) provision that discriminated against illegitimate alien children and fathers of illegitimate American citizens.[34] The Court was faced with the issue of alienage coupled with gender and legitimacy.[35] It recognized that it had "limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens."[36] Ultimately the Court upheld the provision, finding that such Congressional power was immune from even limited judicial control.[37] Such deference has led to an area of the law where normal constitutional principles simply do not apply.[38]

B. *Dodging Substantive Decisions: The Judicial Effect of the Modern Plenary Power Doctrine*

Congressional plenary power has become so deeply imbedded in Supreme Court precedent that hints of even the slightest change can be circumvented by stealth maneuvers on the part of the men and women in black robes. Rather than address the scope of the plenary power, the Court appears to cleverly avoid it when possible.[39] In 1998, the Court addressed an equal protection claim that arose from an INA provision that governed the acquisition of citizenship for children born both outside of the United States and out of wedlock.[40] The Court ultimately found that Miller lacked standing, yet the justices were clearly torn on whether the statute violated Miller's Equal Protection rights under the Fifth Amendment.[41] *Miller v. Albright*, is a perfect example of the Supreme Court's ability to altogether avoid addressing the plenary power doctrine, yet still applying less demanding standards on immigration law than a traditional constitutional analysis would apply.[42] Although this avoidance moves the Court in a direction absent absolute deference to Con-

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34. *See* Faillo v. Bell, 430 U.S. 787, 787 (1977) (noting the Court has no duty to inquire into such legislative decisions).

35. *Id.* at 809.

36. *Id.* at 793 n.5.

37. *Id.* at 792.

38. *See* Legomsky, *supra* note 1, at 86 (discussing the theories for the judicial departure from the normal rules of constitutional law).

39. *Faillo*, 430 U.S. at 787; *see also* Jessica Portmess, *Until the Plenary Power Do us Part: Judicial Scrutiny of the Defense of Marriage Act in Immigration After Flores-Villar*, 61 AM. U. L. REV. 1825, 1839–40 (2012) (focusing on Justice Breyer's dissent).

40. Miller v. Albright, 523 U.S. 420, 424 (1998).

41. Portmess, *supra* note 39, at 1840.

42. *See id.* (discussing how the Court applied an equal protection standard to an immigration case); *see also Miller*, 523 U.S. at 440 (finding the INA provision was "well-tailored" to meet an "important" government interest); *id.* (Breyer, J., dissenting) (arguing the INA provision did not meet the constitutional standard of "exceedingly persuasive").

gressional plenary power, the doctrine has never been overturned and still appears to guide the justice's in their ultimate findings.[43]

In 2011, the Court affirmed a Ninth Circuit's decision in *United States v. Flores-Villar*, to apply special judicial deference to a gender-based immigration claim to citizenship.[44] The Court did so in *per curiam* opinion, by a 4–4 vote, with Justice Kagan taking no part in the decision.[45] The Ninth Circuit followed the reasoning in *Faillo v. Bell*, furthering the argument of a heightened congressional power in the immigration context, and finding that legislative distinctions in such contexts are not required to be as "carefully tuned" as in the domestic context.[46] Although it was silent on the question of the plenary power's influence on the level of scrutiny, the Ninth Circuit applied a less demanding constitutional standard that signaled the continued influence of the plenary power, even when cleverly avoided by the Court.[47]

The Court's refusal to address the scope of the plenary power ensures that Congress and the Executive essentially have unfettered authority over the direction of immigration law, and therefore the fate of many vulnerable human beings.[48] Immigration law has been, and will continue to be insulated from the traditional framework of judicial review,[49] which has contributed to a history of abhorrent discrimination against homosexual persons.[50]

III. Moral and Religious Views on Homosexuality

A. *The Homosexual Exclusion*

The concept that "homosexuality constitutes a foreign threat" is one that dates back to the time of the Crusades.[51] In the New World, beginning as far back as 1909, the homosexual immigrant was deemed unfit to

43. Portmess, *supra* note 39, at 1840–41.

44. United States v. Flores-Villar, 563 U.S. __, 131 S. Ct. 2312, 2313 (2011).

45. *Id.*

46. United States v. Flores-Villar, 536 F.3d 990, 997 (9th Cir. 2008).

47. Portmess, *supra* note 39, at 1842–43.

48. *Id.* at 1865.

49. *See* Peter H. Schuck, *The Transformation of Immigration Law*, 84 Colum. L. Rev. 1, 1 (1984) (stating immigration law remains the realm in which government authority is at the zenith, and individual entitlement is at the nadir).

50. *See* Adams v. Howerton, 673 F. 2d 1036, 1043 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982) (finding a male U.S. citizen's "marriage" to another man would not qualify for immigration purposes). *See generally* S. Comm. on Immigr., Regulation and Restriction of Immigration, S. Rep. No. 64-352 (1916) (providing evidence of Congress's intent to exclude homosexuals from the United States).

51. Joey L. Mogul et al., Queer (In)Justice: The Criminalization of LGBT People in the United States 8 (Michael Bronski ed., 2011).

enter the United States, as seen in a report filed with the Bureau of Immigration by Immigrant Inspector Marcus Braun.[52] In his travels to Europe to study the problem of white slavery, Braun also discovered the "problem" of the homosexual male.[53] Braun contended that wealthy Europeans were exporting "European degeneracy" (homosexuality) to the United States, an issue of grave concern for the Bureau of Immigration due to the large numbers (according to Braun) of homosexuals throughout Europe.[54] His disdain for the homosexual male was made evident by his referral of such men as, "unfortunate men who are afflicted with homosexuality and who are known under the Greek name 'Pederast.'"[55] Oddly, he did not focus on female homosexuality, but only on female prostitutes, which he grouped with male prostitutes, pederasts and sodomites.[56] A study made by Alfred C. Kinsey surveyed several hundred sodomy opinions reported within the United States spanning from 1696 to 1912, finding not a single female was convicted for homosexual activity, distinguishing the profound history of indifference toward female homosexuality.[57] It comes as no surprise then that Braun's findings on homosexuals was male directed, concluding if pederasts or sodomites had managed to achieve U.S. citizenship, said citizenship should be revoked and followed by immediate deportation.[58] Braun's report serves as one of the first recorded federal documents that both illustrates and foreshadows the overt discrimination against homosexual immigrants by the United States.[59]

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52. MARGOT CANADAY, THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA 19 (William Chafe et al. eds., 2009). Following the Immigration Act of 1891, the Bureau of Immigration was created, which would later become the Immigration and Naturalization Service in 1933. *Id.* at 20 n.3.

53. *See id.*, at 19 (explaining the large number of male homosexual prostitutes through the European region). *See generally May Restrict Alien Flood: Marcus Braun Goes to Europe to Make Inquiry for Government*, N.Y. HERALD, Apr. 1, 1909, at 13 (reporting on Braun's trip to Europe under an immigration capacity).

54. *See* CANADAY, *supra* note 52, at 19 (coming to this conclusion after meeting a male prostitute who admitted to having a long relationship with a "well-known Count and high-ranking officer in the German army"); *see also* MOGUL ET AL., *supra* note 51, at 8 (asserting homosexuality was not native to the United States).

55. *See* CANADAY, *supra* note 52, at 19 (explaining how Braun uses the terms "homosexual" and "pederastry" interchangeably).

56. *See id. at* 20 (recognizing how at this point in time, women were viewed as too pure to fall victim to the perverse nature of sodomites and pederasts, illustrating a strong male-driven fear of homosexuality among men).

57. ALFRED C. KINSEY, SEXUAL BEHAVIOR IN THE HUMAN MALE 484–85 (1953).

58. *See* CANADAY, *supra* note 52, at 20 (emphasizing the male "affliction" of homosexuality).

59. *Id.*

B. *Legislative History*

Although it appears the Braun report set the tone for homosexual exclusion, the term homosexual is not found in early immigration statutes.[60] The Immigration Act of 1917 provides:

> That the following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feeble-minded persons, epileptics, insane persons; persons who have had one or more attacks of insanity at any time previously; persons of constitutional psychopathic inferiority, persons with chronic alcoholism; persons afflicted with tuberculosis in any form or with a loathsome or dangerous contagious disease; persons not comprehended with any of the foregoing excluded classes who are found to be and are certified by examining surgeon as being mentally or physically defective, such physical defect being of a nature which may affect the ability of such alien to earn a living.[61]

Although the Act does not use the term homosexual, the Braun report (which preceded the Act) identified a "new species of undesirable immigrant not heretofore met with in the enforcement of the immigration law."[62] At the time, there were obvious moral issues regarding homosexuality, but the administrative history of the Act suggests that officials were concerned with the mental illness of homosexuals.[63] A Senate report from the Immigration Act of 1917 divulges, "[T]he real object of excluding the mentally defective is to prevent the introduction into the country of strains of mental defect that may continue and multiply through succeeding generations."[64] During this time in history, homosexuality was viewed medically, as a form of mental illness, and was being investigated by psychiatrists.[65] It is therefore no surprise that the language used in the Immigration Act of 1917 acted as the precursor for

60. Foss, *supra* note 12, at 447.

61. Immigration Act of 1917, Pub. L. No. 301, ch. 29, 39 Stat. 874, 875 (1917) (amended 1952).

62. CANADAY, *supra* note 52, at 20.

63. *See* Foss, *supra* note 12, at 457 (explaining that Public Health Service physicians had previously been required to identify homosexuals as having a mental disorder because the American Psychiatric Association considered homosexuality to be a psychiatric disorder).

64. S. COMM. ON IMMIGR., *supra* note 50, at 64-352, at 5.

65. *See* Chandler Burr, *Homosexuality and Biology*, ATLANTIC MONTHLY (June 1, 1997, 12:00 PM), http://www.theatlantic.com/magazine/archive/1997/06/homosexuality-and-biology/304683/3 (noting the investigation has lasted over a century, and focuses on the social and cultural causes of homosexuality, which have proven to be slight and ambiguous).

actual exclusion of homosexuals in the Immigration and Naturalization Act (INA) of 1952.[66]

The INA modified the exclusion of "persons of constitutional psychopathic inferiority" to read, "aliens afflicted with psychopathic personality, epilepsy, or a mental defect."[67] The actual term "homosexual" is omitted from the INA itself,[68] but legislative history provides insight as to the actual intent of the legislature to exclude homosexuals.[69] In 1950, a subcommittee of the Senate Judiciary Committee began a study of U.S. Immigration policy, and the following was recorded:

> The present clauses excluding mentally and physically defective aliens, with three exceptions, are sufficiently broad to provide adequate protection to the population of the United States, without being unduly harsh or restrictive. The subcommittee believes, however, that the purpose of the provision against "persons with constitutional psychopathic inferiority" will be more adequately served by changing that term to "persons afflicted with psychopathic personality," and that the classes of mentally defectives should be enlarged to include homosexuals and other sex perverts.[70]

The resulting legislation initially included "an additional clause providing for the exclusion of aliens 'who are homosexuals or sex perverts,'" but on the advice of the Public Health Service, omitted the clause, finding that the term "psychopathic personality" was sufficiently broad enough to include homosexuals and sex perverts.[71] Although the clause excluding homosexuals was omitted, the intent of the final language clearly aimed to exclude all aliens who were homosexuals.[72] In effect, Congress created

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66. *See* Immigration and Nationality Act of 1952, Pub. L. No. 414, ch. 447, 66 Stat. 163, 182–83 (1952) (amended 1990) [hereinafter 1952 INA] (referring to "[a]liens coming to the United States to engage in any immoral sexual act").

67. *See* 1952 INA, 66 Stat. at 182 (explaining how Congress chose to dehumanize all immigrants with the change in terms from "person" to "alien").

68. *See id.* at 182–83 (explaining the terms "mental defect" and "immoral sexual act" refer to homosexuals or the act of homosexuality).

69. S. COMM. ON THE JUDICIARY, THE IMMIGRATION AND NATURALIZATION SYSTEMS OF THE UNITED STATES, S. REP. NO. 81-1515, pt. 1, at 66 (2d Sess. 1950).

70. *Id.* at 345.

71. *See* Boutilier v. Immigration and Naturalization Serv., 387 U.S. 118, 121 (1967) ("[T]he Public Health Service report [ ] recommended that the term 'psychopathic personality' be used to 'specify such types of pathologic behavior as homosexuality or sexual perversion.'").

72. *Id.*; *see also* CANADAY, *supra* note 52, at 217 (noting the difference in the INA's harsh exclusion of homosexuals contrasted by the rewards given to heterosexual immigrants, who were given quota-free entrance into the United States for the first time).

a vetting process via their new immigration law that targeted a specific class of people.[73]

C. *Enforcement of Homosexual Exclusion*

In *Boutilier v. Immigration and Naturalization Service*,[74] the Supreme Court of the United States solidified the legislative intent of the INA to exclude homosexuals when it ruled that an alien already living in the United States was deportable for being homosexual at the time of his entry.[75] The Court reasoned the basis of Boutilier's deportation order was his six and a half year "psychopathic personality" prior to his entry into the United States; that at the time of his first entry, "he had been continuously afflicted with homosexuality."[76] The Court focused on the intent of Congress to exclude homosexuals at the time of entry (to be determined by Public Health Service doctors), and asserted that although the term "psychopathic personality" may be medically ambiguous, the intent of Congress was to use that term as an exclusionary standard that included homosexuals who have perverted characteristics.[77]

Note that by identifying homosexuals as persons "afflicted with psychopathic personality," it places them in a category not of moral-based exclusion, but instead of medical-based exclusion intended to protect the United States, solidifying the intent of the Immigration Act of 1917.[78] The INA does, however, also provide a moral basis for homosexual exclusion.[79] Crimes involving moral turpitude allowed for homosexual exclusion, as the sexual act that male homosexuals engage in was considered to satisfy the definition of a crime of moral turpitude: "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men."[80]

In *Rosenberg v. Fleuti*,[81] the Supreme Court addressed the issue of reentry by a homosexual Legal Permanent Resident (LPR).[82] Respondent, Fleuti, was a Swiss national who received his status as a LPR on October

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73. CANADAY, *supra* note 52, at 219.

74. *Boutilier*, 387 U.S. at 118.

75. *Id.* at 125.

76. *Id.* at 124.

77. *Id.*; *see also* Quiroz v. Neelly, 291 F.2d 906, 907 (5th Cir. 1961) (finding the term "psychopathic personality" was intended by Congress to include homosexuals, and dismisses whatever meaning may be assigned by a psychiatrist).

78. *See* 1952 INA, 66 Stat. at 182 (placing *psychotic personality* in the same category as insane, feeble-minded, epileptic, and mentally and medically defective aliens).

79. CANADAY, *supra* note 52, at 218.

80. *See id.* (citing Ng Sui Wing v. United States, 46 F.2d 755, 756 (7th Cir. 1931)).

81. Rosenberg v. Fleuti, 374 U.S. 449 (1963).

82. *Id.* at 451–52.

9, 1952, prior to a trip he made to Ensanada, Mexico, in August of 1956.[83] The trip lasted no more than "about a couple hours," yet Fleuti found himself in deportation proceedings in April 1959.[84] The Immigration and Naturalization Service (INS) found, at the time of Fleuti's re-entry into the United States from Mexico, he "was within one or more of the classes of aliens excludable by the law existing at the time of such entry," as he had been "convicted of a crime involving moral turpitude."[85] The Court focused on the Re-entry Doctrine, which could lead to the exclusion of an alien and a LPR from re-entering the United States from a foreign country.[86] The Court modified the rigid interpretation given to the Re-entry Doctrine in *Volpe v. Smith,*[87] holding in *Fleuti,*

> [W]e declare today simply that an innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been "intended" as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an "entry" into the country on his return.[88]

This ruling had a major impact on immigration law as it provided an exception to the Re-entry Doctrine, allowing aliens and LPRs "innocent, casual, and brief" excursions outside of the United States without disrupting their residency within the United States and therefore not subjecting them to exclusion.[89] This ruling was particularly important to homosexual aliens, as homosexuality itself was an excludable offense.[90]

D. *The Criminalization of Homosexuals*

In 1948, President Truman signed the Miller Sexual Psychopath Law, which greatly increased the penalties for sex crimes in the District of Columbia.[91] The law defined sodomy as "any penetration 'however slight'

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83. *Id.* at 450.

84. *Id.*

85. *Id.* at 450–51. Prior to 1956, Fleuti was convicted of lewd (i.e., homosexual) conduct. *Id.* at 450.

86. *Id.* at 453; *see also* Volpe v. Smith, 289 U.S. 422, 425 (1933) (enforcing a strict interpretation of the term "entry" to include any coming of an alien into the United States, regardless of the duration spent outside of the United States).

87. *Volpe*, 289 U.S. at 425.

88. *Fleuti,* 374 U.S. at 462.

89. Foss, *supra* note 12, at 455–56.

90. *See Quiroz*, 291 F.2d at 907 (holding Congress intended to include homosexuals as sex perverts and therefore excludable pursuant to the INA).

91. DAVID K. JOHNSON, THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT 58 (2004).

of the mouth or anus of one person with the sexual organs of another."[92] Prior to the passage of this law, two men engaged in consensual homosexual activity could be charged with disorderly conduct and released on a twenty-five dollar bond.[93] This law grouped homosexual activity with sexual crimes involving children, strengthening the argument and belief that homosexuality was a psychopathic personality trait.[94] Through propaganda, after the passage of this law, sex between two consenting adult homosexuals was viewed as a criminal act, and only furthered the social contempt held against homosexuals.[95]

Such criminalization would eventually attach concepts of "danger, degeneracy, disorder, deception, disease, contagion, sexual predation, depravity, subversion, encroachment, treachery, and violence" to be synonymous with the homosexual being.[96] The effect of such a pairing created an archetype that continues to evoke fear and anxiety, which easily overpower reason and logic.[97] This is a powerful tool that can establish controlling narratives that guide the general view of how a person's outward appearance and mannerisms are interpreted, regardless of their actual sexual orientation.[98] Homosexuals, or those who appear to be homosexual, became a target for policing and punishment, without having committed any crime or given any reason to be persecuted.[99] In 1960, a LPR named Sara Quiroz was attempting to return to the United States from Juarez, Mexico, to El Paso, Texas.[100] At the border, she was stopped by an immigration officer reputed for his ability to detect "sexual

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92. *Id.*; *see also The Gay Divide,* THE ECONOMIST, Oct. 11, 2013, at 13 (highlighting the fact that at one point, gay sex was illegal in almost every country, including the United States, China, and Britain). Penalties for sodomy could reach fines as high as one thousand dollars or up to twenty years in prison. JOHNSON, *supra* note 91, at 58.

93. JOHNSON, *supra* note 91, at 59.

94. *Id.* ("Propaganda about [this] law continually invoked the dangers posed to children; once passed, however, it was used to further criminalize consensual sex between adult homosexuals . . . ."); *see also* MOGUL ET AL., *supra* note 51, at 26 (arguing criminalization of homosexuals directed the interpretations and actions of the American judicial system).

95. JOHNSON, *supra* note 91, at 59 (describing the Pervert Elimination Campaign created in 1947, which allowed police to harass and arrest suspected homosexuals in the District of Columbia).

96. MOGUL ET AL., *supra* note 51, at 23.

97. *Id.*

98. *Id.* (detailing how these archetypes "shape how a person's appearance and behavior will be interpreted—regardless of individual circumstances or realities").

99. *Id.* Criminalization of LGBT persons continues throughout the world, most notably in Africa and in some Muslim countries. *See The Gay Divide*, *supra* note 92, at 13 (stating "[e]xtra-judicial beatings are depressingly common in much of Africa and in some Muslim countries").

100. MOGUL ET AL., *supra* note 51, at 36–37.

deviates" (homosexuals).[101] He stopped Sara, a mother and domestic worker, based on her appearance—through his visual assessment alone, he characterized her as a lesbian.[102] Sara's experience is an example of how dehumanizing terms such as "sexual deviate" conjure emotional responses that easily affect the reasoning process; so much so, it can literally change how people think about a particular class.[103] Laws targeting homosexuals became less about protecting the innocent and more about punishing a particular group.[104] The principle guiding our criminal judicial system has always been one of innocent until proven guilty, yet laws that target homosexuals cultivate a culture of guilty by association.[105]

E. *"Communism and Queers"*

The immigration reform that took place via the INA in the early 1950s was guided in great part by the McCarthy-Era mission to rid the United States of communists.[106] Prior to the reform, governmental bodies in both the civil services as well as the military were linking homosexuals to communists.[107] "Communists and queers" were onerously paired by the Chambers-Hiss trial.[108] Whittaker Chambers, a former member of the Communist Party and a homosexual, asserted "[b]oth groups seemed to comprise hidden subcultures, with their own meeting places, literature, cultural codes, and bonds of loyalty."[109] This pairing led to a scare, fu-

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101. *Id.* at 37.

102. *Id.*

103. *See id.* at 26 (describing the science behind human thought process and the "'objective' reasoning process" that changes how the human race things about controversial issues); *see also* Karl M. Bowman & Bernice Engle, *A Psychiatric Evaluation of Laws of Homosexuality*, 29 TEMP. L.Q. 273, 315 (1956) (explaining how "[u]nproved gossip about a person's homosexuality may cause his dismissal from government employment or the armed services").

104. Bowman & Engle, *supra* note 103, at 315; *see* MOGUL ET AL., *supra* note 51, at 39 (addressing the entrapment schemes that targeted vulnerable students and faculty at the University of Florida in the mid 1950s).

105. *Id.*

106. *See* JOHNSON, *supra* note 91, at 35 (stating McCarthy's first Senate speech suggested all communists were mentally twisted, and the culture in the 1950s believed communism and homosexuality were thought to be caused by "psychological maladjustment and early childhood development problems").

107. *See id.* at 31–33 ("The constant pairing of 'Communists and queers' led many to see them as indistinguishable threats."); *see also* CANADAY, *supra* note 52, at 217 ("Immigration law—like the civil service's lavender scare and the 1950's military purges—targeted the homosexual as an excluded figure against which a citizenry supposedly unified along racial and class lines could define itself.").

108. JOHNSON, *supra* note 91, at 31–33.

109. *Id.* Whittaker Chambers was a prominent catalyst in the paring of "Communists and queers" when, in 1948, he accused several individuals of being Communist, including Alger Hiss, a State Department official. *Id.*

eled by McCarthy, to rid the government of any homosexual government workers, who were considered a danger to have in government posts.[110] The pairing campaign was so successful that persons even suspected of homosexuality were banned from their government positions.[111]

When addressing the topics of homosexuals and communists, McCarthy would not refer to them as individuals, but instead would use a collective term such as, "these types" to blur the differences that distinguish homosexuals from communists.[112] Homosexuals and communists were viewed in the same light as members of sinister social cliques made up of psychologically disturbed individuals.[113] McCarthy explained this connection in a speech to the Senate on subversives in the State Department, suggesting that all communists were "mentally twisted."[114] The pairing campaign reached all levels of government.[115] FBI agents were commissioned with the task of routinely asking government workers their views on marriage, with the goal of finding those persons who were adverse to marriage.[116] McCarthy and his followers were able to paint the view of a world divided by the Judeo-Christian West fighting against the degenerate atheist homosexual communists.[117] He viewed the conflicting ideologies between the United States and the Soviet Union under an apocalyptic magnifying glass that motivated baseless charges that homosexual perversions threatened the very survival of the United States.[118]

To a large extent McCarthy succeeded in his pairing campaign, ensuring that homosexual discrimination would span across all government agencies, and affect the lives of homosexuals for decades. The history of discrimination and the current state of homosexual rights are testaments

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110. *Id.* at 35; *see* Bowman & Engle, *supra* note 103, at 300 (noting several congressional committees were adamantly adverse to the employment of homosexuals in government positions); *see also id.* at 315 (recognizing an adverse approach toward homosexuals could result in men being stigmatized as homosexuals, possibly causing them to lose their jobs and livelihoods). Eventually ninety-one State Department Officials were terminated for being homosexual, though the basis of the terminations involved "office morale and efficient administration." JOHNSON, *supra* note 91, at 35.

111. Bowman & Engle, *supra* note 103, at 299.

112. JOHNSON, *supra* note 91, at 33.

113. *Id.* at 35 (2004). McCarthy and others often made the link from homosexual to Communist using medical language. *Id.*

114. *Id.*

115. *See* Bowman & Engle, *supra* note 103, at 300 (highlighting a 1950 Senate investigation into homosexual employment within the U.S. government).

116. JOHNSON, *supra* note 91, at 37.

117. *Id.*

118. *Id.; see also* Bowman & Engle, *supra* note 103, at 300 (discussing the view that homosexuals were a security risk because they were less stable than their heterosexual counterparts, they were susceptible to blackmail, and were more apt to congregate and gossip).

to the success that McCarthy had with respect to the criminalization and dehumanization of homosexuals.[119]

IV. Modern Discrimination of Homosexuals

A. *DOMA*

Marriage is central to all citizens within the United States; it spans religions, races, and social classes, and is a key to the pursuit of happiness.[120] Marriage has both a civil rights aspect and an expressive aspect, both of which bond two people together in the eyes of their state as well as their family and friends.[121] The third aspect is for many the most important—the religious aspect.[122] It is important to note that although a majority of marriages performed within the Unites States are solemnized by religious institutions,[123] marriage is a public right of passage that is governed by the state, emphasizing the importance of the civil rights aspect.[124] Married couples receive a myriad of rights and benefits that single people or couples unable to marry are refused.[125]

Section 3 of the Defense of Marriage Act (DOMA) was considered to strengthen and support the U.S. government's interest in protecting the traditional moral teachings found in marriages between heterosexual couples.[126] It was not viewed as radical legislation, rather legislation that

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119. *See* Defense of Marriage Act, Pub. L. No. 104-699, 110 Stat. 2419, 2419 (1996) [hereinafter DOMA] (defining "marriage" as between a man and a woman, excluding homosexual same-sex couples from the federal benefits and rights enjoyed by their heterosexual counterparts); *see also* Immigration Act of 1990, Pub. L. No. 101-649, § 601(a), 104 Stat. 4978 (1990) (abandoning the provision that excluded homosexual from entering the United States, almost four decades after the McCarthy-Era pairing campaign).

120. Martha C. Nussbaum, From Disgust to Humanity: Sexual Orientation and Constitutional Law 127 (Geoffrey R. Stone ed., 2010).

121. *Id.* at 128–29.

122. *Id.* at 129.

123. *Id.*

124. *Id.* at 128–29.

125. *Id.* at 129.

126. S. Comm. on the Judiciary, Defense of Marriage Act, H.R. Rep. No. 104-664 (2d Sess. 1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906; *see* Amy D. Ronner, Am. Psychological Ass'n, Homophobia and the Law 8 (2005) (pointing out Washington determined same-sex couples could not be "marital-like," which causes a problem with disposition of property upon death between these couples); *see also* Nussbaum, *supra* note 120, at 148 (arguing the idea that same-sex unions will somehow degrade traditional marriage is based on a disgust of the sexual acts in which same-sex couples engage); Walter Frank, Law and the Gay Rights Story: The Long Search for Equal Justice in a Divided Democracy 173 (2014) (asserting the decision in *Hollingsworth v. Perry*, while a milestone for California's same-sex couples, did not technically affect other States with statutes or constitutional provisions that reserve marriage for heterosexual couples.).

intended to preserve the status quo.[127] Section 3 defined the terms "marriage" and "spouse" as between a man and a woman, in an attempt to define and protect the institution of marriage.[128] Put more clearly, this section blatantly excluded same-sex couples from the federal rights and protections afforded heterosexual couples,[129] and authorized states to refrain from legally recognizing same-sex marriages or unions performed in other states.[130] Then-Senate Majority leader, Trent Lott (R-Mississippi), claimed DOMA was vital to preempt judges from imposing a radical social agenda that would affect the entire nation.[131] The Supreme Court of Hawaii fueled this paranoia of a so-called "radical social agenda" when it ruled in favor of three same-sex couples who challenged the denial of their marriage license petitions.[132] Around the same time, Democratic President, Bill Clinton attempted to support the cause that gay and lesbian service members should be able to openly serve their country.[133] The backlash from anti-gay organizations was severe, resulting in the abhorrent "don't ask don't tell" policy in 1993, and the eventual passage of DOMA in 1996.[134] Approximately 75% of the nation supported DOMA.[135] Congress responded with an overwhelming 342 to 67 vote in the House of Representatives and an 85 to 14 vote in the Senate.[136] Democratic President, Bill Clinton signed DOMA into law on September 21, 1996, denying homosexuals of a fundamental human right based solely on their sexual orientation.[137]

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127. FRANK, *supra* note 126, at 188.

128. DOMA § 3; *see also* Sharita Gruberg, *What the DOMA Decision Means for LGBT Binational Couples*, THINK PROGRESS (June 26, 2013, 1:47 PM), http://thinkprogress.org/immigration/2013/06/26/2218471/doma-lgbt-binational-couples (asserting DOMA prevented same-sex couples from accessing essential federal benefits by requiring the government and its agencies to ignore the validity of legal marriages held by same-sex couples); *Id.* (identifying DOMA denied same-sex couples access to more than one thousand federal benefits).

129. DOMA § 2 (mirroring the language of the INA of 1952 with the same discriminatory sentiments towards homosexual exclusion).

130. SUSAN GLUSK MEZEY, GAY FAMILIES AND THE COURTS: THE QUEST FOR EQUAL RIGHTS 85 (2009).

131. *Id.*

132. Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993); *see also* MEZEY, *supra* note 130, at 85 (claiming the court's decision in *Baehr v. Lewin* instilled the fear of a domino effect and prompted Congress to enact DOMA).

133. E. J. Graff, *15 Years After DOMA: Hearing Reveals a Nation Transformed*, ATLANTIC MONTHLY (July 20, 2011, 6:09 PM), http://www.theatlantic.com/politics/archive/2011/07/15-years-after-doma-hearingreveals-a-nation-transformed/242273/2.

134. *Id.*

135. *Id.*

136. MEZEY, *supra* note 130, at 85.

137. *Id.*

B. *The Effect of DOMA on Same-Sex Bi-National Couples*

When applying DOMA to immigration law, two marginalized groups are created: the undocumented population and the homosexual population.[138] DOMA did not specifically reference immigration, but its impact on same-sex bi-national couples was both harsh and devastating.[139] Under DOMA, American citizens and LPRs were not able to "sponsor their same-sex spouses or partners for immigration visas or immigration benefits;" rights and benefits that are awarded heterosexual couples.[140] The consequences of such discrimination affected same-sex bi-national couples in such an adverse way that many were faced with the decision of remaining in the United States without their non-citizen partner,[141] or leaving to the foreign national's country.[142] Same-sex bi-national couples were thus in constant fear of separation and upheaval.[143] Prior to the Supreme Court ruling that struck down Section 3 of DOMA, there were an estimated 36,000 same-sex couples that were forced to live their daily lives in this fear.[144]

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138. CROSBY BURNS ET AL., LIVING IN DUAL SHADOWS: LGBT UNDOCUMENTED IMMIGRANTS 1 (2013), *available at* http://cdn.americanprogress.org/wpcontent/uploads/2013/03/LGBTUndocumentedReport-6.pdf.

139. Scott Titshaw, *A Modest Proposal, to Deport the Children of Gay Citizens, and etc.: Immigration Law, the Defense of Marriage Act and the Children of Same-Sex Couples*, 25 GEO. IMMIGR. L.J. 407, 407 (2011) (implying while DOMA applies to the federal definitions of "marriage" and "spouse," it also has an impact on U.S. immigration law).

140. Bijal Shah, *LGBT Identity in Immigration*, 45 COLUM. HUM. RTS. L. REV. 100, 112 (2013). DOMA effectively reinstated a new form of homosexual exclusion to the United States. *Id.* "Therefore, many LGBT Americans and their noncitizen partners have had to relinquish their U.S. residences and other rights and privileges because of the disparate government treatment of the LGBT noncitizen partners." *Id.* at 114.

141. *Id.*

142. Scott C. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World Without DOMA*, 16 WM. & MARY J. WOMEN & L. 537, 537 (2010). *See generally* Jeremy Roebuck, *Former Popular TX Gay Mayor Moved to Mexico for Undocumented Partner,* NBC LATINO (May 1, 2013, 5:00 AM), http://nbclatino.com/2013/05/01/former-popular-tx-gay-mayor-moved-to-mexico-for-undocumented-partner (describing a gay (former) mayor of Texas's decision to abandon his position as mayor of San Angelo and move to Mexico with an undocumented immigrant whom he had fallen in love with).

143. *See generally* Gruberg, *supra* note 128 (celebrating the decision in *U.S. v. Windsor*, which brought relief from fear of separation to bi-national couples).

144. *See* Miles Graham, *DOMA Ruling's Impact on Immigration*, TIME (June 27, 2013), http://swampland.time.com/2013/06/27/doma-rulings-impact-on-immigration ("The decision in the DOMA case, which gives married gay couples all the federal benefits and rights that straight married couples are entitled to, could mean citizenship for an estimated 36,000 couples, according to Immigration Equality, a gay rights and immigration advocacy group.").

U.S. citizens from all walks of life were affected by DOMA's discriminatory grasp, including former San Angelo, Texas Mayor, J.W. Lown.[145] After his re-election to a fourth term, Mayor Lown moved to Mexico with his noncitizen partner.[146] Mayor Lown's upsetting story is one that, until recently, has been shared by thousands of same-sex bi-national couples whose relationships were not recognized under federal immigration laws.[147] The idea of what tradition of marriage means should not be narrowed to exclude consenting adults, but should reflect the emotional and personal significance of marriage between two individuals. It is well established that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[148]

The Obama Administration signaled its support against the constitutionality of DOMA, in February 2011, when Attorney General Eric Holder proclaimed, in a letter to Congress, the Executive Branch would no longer defend DOMA in the courts as the act failed to withstand intermediate scrutiny.[149] In the same breath however, Mr. Holder conceded that the Executive would continue to enforce DOMA at the administrative agency level, which included the adjudication of visa petitions for foreign nationals.[150] Substantial change to the treatment of same-sex bi-national couples did not come until the Supreme Court's decision in *United States v. Windsor*.[151]

DOMA was defective on a number of levels, but its greatest flaw was denying expansive rights, not on the basis of any particular conduct, but because of one's sexual orientation—unconstitutionally singling out a particular minority.[152] The full inclusion of same-sex couples is a needed change in America, as it is clear that denying such rights is unconstitutional.[153] On a very human level, homosexual and heterosexual couples

145. Roebuck, *supra* note 142.

146. *Id.*

147. Titshaw, *supra* note 142, at 537.

148. Loving v. Virginia, 388 U.S. 1, 12 (1967).

149. Letter from Eric H. Holder, Jr., U.S. Attorney General, to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act.

150. *Id.*; *see also* Shah, *supra* note 140, at 103–04 (noting the decision in *Windsor* discusses that prior to DOMA being addressed by the Judiciary, the Executive Branch had discretion on whether or not to enforce it at an administrative level).

151. *See* United States v. Windsor, 563 U.S. __, 133 S. Ct. 2675, 2678 (2013) (finding Section 3 of DOMA, defining the term "marriage" as between a man and a woman and the term "spouse" as a member of the opposite sex, unconstitutional).

152. RONNER, *supra* note 126, at 12 (elevating marriage to "one of the vital personal rights essential to the orderly pursuit of happiness by free men").

153. *See generally id.* (identifying the constitutional right for full inclusion of homosexual rights).

have the same reasons for wanting to recognize their relationship through marriage.[154] Marriage communicates a very symbolic significance beyond legal benefits, such as proudly and openly raising a family.[155] Although U.S. immigration law has always focused on the unity of the family, same-sex bi-national families have routinely been excluded from such focus, which was greatly enhanced by DOMA.[156]

C. United States v. Windsor

The Supreme Court's decision in *United States v. Windsor* dealt a staggering blow against the historic discrimination of homosexuals in the United States, addressing the adversarial nature of DOMA against the dignity of same-sex marriages.[157] Although the Court's decision in *Windsor* was an overwhelming triumph for same-sex bi-national couples, it did not address the issue of whether the U.S. Constitution guarantees same-sex couples the right to marry.[158] Additionally, it did not address the legal ambiguities surrounding same-sex couples that still remain within the actual text of the INA.[159] The Court instead decided to leave the issue of same-sex marriage to the individual states, arguing that "DOMA, because of its reach and extent, departs from th[e] history and tradition of reliance on state law to define marriage."[160] After addressing the historical connection between the states and their domestic relations, the Court concluded the essence of Section 3 was to discourage states' enactment of same-sex marriage laws.[161] Further, "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom by the state, by its marriage laws, sought to protect in personhood and dignity."[162] The Court was within reach of addressing and ruling on the

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154. NUSSBAUM, *supra* note 117, at 164.

155. *See* FRANK, *supra* note 126, at 191 (referring to expert testimony given during proceedings against California's controversial Proposition 8).

156. *See* Titshaw, *supra* note 142, at 546 (addressing the fact that the primary category for immigrant visa's that do not have a quota include "spouse").

157. *Windsor*, 563 U.S. __, 133 S. Ct. at 2681.

158. Richard Socarides, *The Supreme Court's Marriage Choice*, NEW YORKER (Sept. 29, 2014), http://www.newyorker.com/news/news-desk/supreme-courts-marriage-choice.

159. *See* Scott Titshaw, *Revisiting the Meaning of Marriage: Immigration for Same-Sex Spouses in a Post-Windsor World*, 66 VAND. L. REV. EN BANC 167, 168 (2013) (addressing at least three immigration questions that were not addressed by the *Windsor* Court); *see also* Alberto R. Gonzales & David N. Strange, *What the Court Didn't Say*, N.Y. TIMES (July 17, 2013), http://www.nytimes.com/2013/07/18/opinion/what-the-court-didnt-say.html?ref=opinion&_r=3& (addressing the Court's silence on congressional authority over the benefits given to same-sex couples with regard to immigration law).

160. FRANK, *supra* note 126, at 189.

161. *Windsor,* 563 U.S. __, 133 S. Ct. at 2693–96.

162. *Id.* at 2693–96.

equal protection guarantees of the Constitution, the level of scrutiny that sexual orientation classifications warrant, and whether a state may refuse to recognize a valid same-sex marriage from a jurisdiction that does allow it.[163] The Court consciously chose to sidestep these key issues, perhaps to test the divided waters with a more diluted approach to furthering same-sex marriage.[164]

D. Hollingsworth v. Perry

The Supreme Court heard *Hollingsworth v. Perry* the same week as it heard *Windsor*. *Hollingsworth* dealt with a challenge to California's Proposition 8, which banned same-sex marriage.[165] Proposition 8 was a 2008 ballot measure that reversed the decision of the California Supreme Court that allowed same-sex couples to marry; 1.7 million California voters who elected President Obama also voted to ban same-sex marriage.[166] It is important to note that California, where Proposition 8 passed, is arguably one of the most liberal states in the Union.[167] *Hollingsworth*, and the eventual outcome of Proposition 8, was decided on standing, which left the question as to whether the Constitution required that same-sex marriages be recognized as a fundamental right.[168] In his dissent in *Windsor*, Justice Scalia argued the federal government has the right to forbid practices that offend society's sense of morality.[169] Scalia's assertion harkens back to his 2003 dissent in *Lawrence v. Texas*, championing the view that society had every right to both condemn and single out homosexual sodomy.[170] Unfortunately, Scalia's view is shared by an

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163. ALISON M. SMITH, CONG. RESEARCH SERV., R43481, SAME-SEX MARRIAGE: A LEGAL BACKGROUND AFTER UNITED STATES V. WINDSOR (2014), *available at* http://www.fas.org/sgp/crs/misc/R43481.pdf.

164. *See* FRANK, *supra* note 126, at 194 (hypothesizing that the Courts ruling in *Perry v. Schwarzenegger* might suggest the justices found their decision in *Windsor* to be sufficient social change for the moment).

165. *See generally* Hollingsworth v. Perry, 563 U.S. __, 133 S. Ct. 2652 (2013) (examining whether denying the same sex couple a marriage license was in violation of due process and equal protection laws under the Constitution, and ultimately held proponents did not have standing to bring suit).

166. FRANK, *supra* note 126, at 195.

167. Chris Cillizza & Sean Sullivan, *How Proposition 8 Passed in California—And Why It Wouldn't Today*, WASH. POST (MAR. 26, 2013), http://www.washingtonpost.com/blogs/the-fix/wp/2013/03/26/how-proposition-8-passed-in-california-and-why-it-wouldnt-today.

168. *Hollingsworth*, 563 U.S. __, 133 S. Ct. at 2652–53.

169. *Windsor,* 563 U.S. __, 133 S. Ct. at 2707 (Scalia, J., dissenting).

170. Lawrence v. Texas, 539 U.S. 558, 586 (2003).

overwhelming number of Americans, who view homosexuality as an immoral act or behavior.[171]

The ruling in *Windsor* largely expanded the number of states that allow same-sex marriage from seventeen to thirty-seven, both statistics including the District of Columbia.[172] This notable rise in gay marriage approval ratings was not solely because the great majority of Americans accepted same-sex marriage as a new norm,[173] it was in large part the product of judicial rulings.[174] This prompted many conservatives to shout from the rooftops, condemning this as judicial activism at its worst.[175] Texas Senator Ted Cruz, introduced a bill that would protect the authority of state legislators to define marriage.[176] Prior to *Windsor*, thirty-eight states had defined marriage as between a man and a woman by statutory or constitutional means.[177] When the Supreme Court began its term in October 2014, the Court consciously declined to hear cases on same-sex marriage, which resulted in many of those thirty-eight states providing same-sex couples the same marriage rights as heterosexual

171. *See* Katherine B. Coffman et al., *The Size of the LGBT Population and the Magnitude of Anti-Gay Sentiment are Substantially Underestimated* (Nat' Bureau of Econ. Research, Working Paper No. 19508), *available at* http://www.nber.org/papers/w19508 (asserting it is difficult to gauge how people feel about homosexuals due to responses that are biased towards socially acceptable answers).

172. Maureen McCarty, *Marriage Equality Begins in Florida*, HUM. RTS. CAMPAIGN (Jan. 6, 2015), http://www.hrc.org/blog/entry/marriage-equality-begins-in-florida.

173. *See* Coffman et al., *supra* note 171 (finding the majority of participants found that discrimination against LGBT persons is acceptable).

174. SMITH, *supra* note 163 (highlighting the number of states that had either a statutory or constitutional ban on same-sex marriage); *see also* Robert Barnes, *Appeals Court Upholds Bans on Same-Sex Marriage for First Time,* WASH. POST (Nov. 6, 2014), http://www.washingtonpost.com/politics/appeals-court-upholds-bans-on-same-sex-marriage-in-four-states/2014/11/06/6390904c-65fc-11e4-9fdc-d43b053ecb4d_story.html (concluding the Supreme Court's recent decision not to hear cases on same-sex marriage greatly expanded marriage equality).

175. *See generally* Seth McLaughlin, *GOP 2016 Hopefuls Weigh Court's Gay Marriage Punt*, WASH. POST (Oct. 7, 2014), http://www.washingtontimes.com/news/2014/oct/7/gop-2016-hopefuls-weigh-courts-gay-marriage-punt/?page=all (examining conservative issues with the recent Supreme Court decisions allowing gay-marriage laws to be decided at a state level).

176. Genevieve Wood, *Where do Potential GOP Presidential Candidates Stand on Marriage?*, DAILY SIGNAL (Nov. 14, 2014), http://dailysignal.com/2014/11/14/words-2016-gop-hopefuls-marriage.

177. SMITH, *supra* note 163; *see also* Sarah Torre, *The Facts on Marriage Law in America*, THE DAILY SIGNAL (June 25, 2013), http://dailysignal.com/2013/06/25/the-facts-on-marriage-laws-in-america (asserting in thirty-one states, citizens voted for state constitutional amendments banning same-sex marriage).

couples.[178] This is an important distinction because many of these states had already decided the issue of same-sex marriage, and the ruling in *Windsor* prompted lower courts to expand the view of the fundamental right to marry to include same-sex couples.[179]

After *Windsor*, there continued to be a great divide on the issue of same-sex marriage among the lower courts. The U.S. Court of Appeals for the Sixth Circuit upheld four state bans on same-sex marriage, becoming the first appeals court to do so after *Windsor*.[180] Judge Sutton, one of the three judges on the Sixth Circuit panel, asserted that people should decide this divisive issue, not judges and lawyers.[181] As stated above, prior to *Windsor*, thirty-eight states had decided the issue, either through its legislatures or through ballot measures, which fueled the sentiment among many conservatives that the Court was essentially hijacked traditional marriage.[182] The circuit split on the issue of gay marriage ensured that the Supreme Court would have to address two issues: (1) "whether the constitution requires states 'to license a marriage between two people of the same sex,'" and (2) "whether states must recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of state."[183] These issues were indeed decided in *Obergefell v. Hodges*.

E. Obergefell v. Hodges

This July, a split Supreme Court handed down a historic victory for same-sex marriage activists who have fought for decades for equality under the law.[184] Unlike *Windsor* and *Hollingsworth*, *Obergefell* provides a bright line rule for lower courts to follow regarding same-sex marriages within the United States. The Court held that the Fourteenth Amendment's guarantees of equal protection and due process provide same-sex couples with a fundamental right to marry, and "that there is no

178. *See generally* Barnes, *supra* note 174 (explaining why the Supreme Court is declining to review gay-marriage cases, and analyzing the increasing possibility of a gay-marriage case being heard by the Supreme Court).

179. SMITH, *supra* note 163.

180. Barnes, *supra* note 174. The Sixth Circuit's ruling upheld bans on same-sex marriage in Ohio, Michigan, Kentucky, and Tennessee. *Id.*

181. *Id.*

182. *See* McLaughlin, *supra* note 175 (addressing Senator Ted Cruz's statement that the Court's ruling was "tragic" and he intended to introduce legislation that would prevent such rulings in the future).

183. Adam Liptak, *Supreme Court to Decide Marriage Rights for Gay Couples Nationwide*, N.Y. TIMES (Jan. 16, 2015), http://www.nytimes.com/2015/01/17/us/supreme-court-to-decide-whether-gays-nationwide-can-marry.html?hp&action=click&pgtype=Homepage&module=span-ab-top-region&region=top-news&WT.nav=top-news&_r=0.

184. Obergefell v. Hodges, 576 U.S. __, 135 S. Ct. 2584 (2015).

lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character."[185] The Court reasoned that regardless of sexual orientation, the decision to marry is among the most intimate within a couple's autonomy, and asserted that same-sex couples, like heterosexual couples, have the absolute right to "enjoy intimate association, a right extending beyond mere freedom from laws making same-sex intimacy a criminal offense."[186] It further added that marriage is a keystone of this Nation's social order—a principle that the Constitution extends to same-sex couples.[187]

Important to note is the backlash to *Obergefell*, which in a national election cycle, has been swift and divisive. Texas Senator, and one of several 2016 presidential candidates, Ted Cruz responded to *Obergefell* with a battle cry advising states not specifically named in the decision to ignore it.[188] Senator Cruz contends that if one is not a named party to the suit, they are not bound to the judgment.[189] Although Senator Cruz is technically correct, he fails to address the fact that in our judicial system, federal district and circuit courts are indeed obligated to adhere to precedents set by the Supreme Court. Senator Cruz is one of many condemning the ruling in *Obergefell.*

Opponents of same-sex marriage have signaled that the battle over same-sex marriage is far from over, and will push cases in the lower courts that center around the theme of religious liberty.[190] County clerks are refusing to issue marriage licenses based on their religious beliefs that conflict with homosexuality.[191] Even States have signaled their opposition to *Obergefell*, just days after the ruling, the Alabama Supreme Court ordered probate judges not to issues marriage licenses to same-sex couples for a 25-day period so it could petition the U.S. Supreme Court to rehear the case.[192] Marriage for same-sex bi-national couples will likely

185. *Id.* at 2607–2608.

186. *Id.* at 2589.

187. *Id.* at 2590.

188. Adam B. Lerner, *Ted Cruz: States should ignore gay-marriage ruling*, POLITICO, (June 29, 2015, 6:16PM), http://www.politico.com/story/2015/06/ted-cruz-gay-marriage-ruling-reaction-npr-interview-119559.html#ixzz3eVdufZmE.

189. *Id.*

190. Greg Allen, *For Same-Sex Marriage Opponents, The Fight is Far From Over,* NPR, (June 27, 2015, 5:06PM), http://www.npr.org/2015/06/27/418038177/for-same-sex-marriage-opponents-the-fight-is-far-from-over.

191. Lauren Hodges, *Kentucky Clerk's Office Continues to Refuse Marriage Licenses,* NPR, (Aug. 27, 2015, 12:40PM), http://www.npr.org/sections/thetwo-way/2015/08/27/435185521/kentucky-clerks-office-continues-to-refuse-marriage-licenses.

192. Polly Mosendz, *To Avoid Supreme Court Decision, Alabama Temporarily Bans Gay Marriage Licenses,* NEWSWEEK, (June 29, 2015, 3:16PM), http://www.newsweek.com/avoid-supreme-court-gay-marriage-decision-alabama-temporarily-bans-gay-348366.

continue to be an uphill battle considering the complexities of immigration law coupled with a conservative backlash to same-sex marriage advancements.

F. *Immigration for Same-Sex Couples Post-*Windsor *and* Obergefell

Neither *Windsor* nor *Obergefell* directly addressed immigration, and therefore did not specifically address several very vital issues with respect to same-sex bi-national couples including the recognition of "civil unions" or "registered partnerships."[193] There is virtually no question by the Board of Immigration Appeals (BIA) and most federal courts, that "Congress has the authority to define 'marriage' and 'spouse'" within immigration law.[194] As noted above, Congressional plenary power is deeply rooted within American jurisprudence, leaving the door wide open for Congress to define these important terms as they pertain to immigration law.[195] As both terms are not specifically defined within the INA,[196] there is continued uncertainty surrounding the fate of same-sex bi-national couples.

G. Adams v. Howerton

Only one federal court of appeals case has addressed the validity of a same-sex marriage for immigration purposes.[197] It come as no surprise, given the history of gay plight addressed above, the outcome did not advance the same-sex marriage cause.[198] In *Adams v. Howerton*, the Ninth Circuit found same-sex marriage is not valid, and further ruled that even if the marriage were valid in the state (Colorado) where it was issued, said marriage is not valid for immigration purposes.[199] Although *Windsor* and *Obergefell* have improved the current state of homosexual family unity,[200] *Adams* specifically addressed the definition of marriage as it per-

193. Titshaw, *supra* note 159, at 168. "The Obama administration appears to have answered the first question, concluding that same-sex spouses who celebrate their marriage in a jurisdiction where it is valid are married for immigration purposes, even if they reside in a state where it is not valid." *Id.*

194. Titshaw, *supra* note 142, at 555.

195. *See generally* Henkin, *supra* note 2, at 853 (addressing Congress's vast authority over immigration law through the plenary power doctrine).

196. Immigration and Nationality Act § 101, 8 U.S.C. § 1101 (1996) [hereinafter INA].

197. *See Adams,* 673 F. 2d at 1036 (analyzing the INA's two-step analysis as applied to same-sex couples); *see also* Titshaw, *supra* note 142, at 596 (highlighting that at the time *Adams* was adjudicated, homosexual aliens were inadmissible).

198. *See* Titshaw, *supra* note 142, at 595–96 (arguing *Adams v. Howerton* is no longer relevant for today's definition of "marriage" and the test used is misleading).

199. *Adams*, 673 F.2d at 1042–43.

200. *See* Socarides, *supra* note 158 (highlighting the Supreme Court's willingness to substantially advance the rights of LGBT bi-national couples).

tains to the INA, and it has not been overturned.[201] The Ninth Circuit relied heavily on the implied intent of Congress to define "marriage" under the INA as between heterosexual couples.[202] The court reasoned nothing in the legislative history suggests the term "spouse," in § 201(b) of the act, intends to include persons of the same sex.[203] The court also deferred to the guidance of the INS, one of many administrative agencies tasked with enforcing the INA.[204] This ruling clearly enforced the Congressional plenary power to make immigration laws,[205] and has been upheld as recently as 2010.[206] *Adams* was not challenged by *Windsor* or *Obergefell* and therefore must not be overlooked or forgotten by defenders of LGBT bi-national equality in light of the two rulings.

Former Attorney General (under President George W. Bush), Alberto Gonzales, contends the decision in *Windsor* in no way extended federal immigration benefits to same-sex bi-national couples.[207] He highlighted that *Windsor* was silent with regard to Congressional authority to regulate immigration benefits for same-sex couples, and further argued that because immigration is reserved to the federal government, those states that have legalized same-sex marriages cannot impose those state-recognized marriages on the federal government.[208] It would follow that Mr. Gonzales's first claim would extend to *Obergefell* as well considering the ruling was also silent with regard to Congressional authority over immigration law and regulation. Although the Obama Administration extended many immigration benefits to same-sex bi-national couples following the *Windsor* decision, there are still uncertainties that surround the future security of these new benefits.[209] The U.S. Supreme Court and Congress have failed to clarify the legal uncertainty that surrounds immigration benefits for same-sex bi-national couples,[210] leaving their fate in an extremely vulnerable state.

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201. *Adams,* 673 F.2d at 1040; *see also* Gonzales & Strange, *supra* note 159 (arguing *Windsor* does not overturn *Adams*).

202. *Adams,* 673 F.2d at 1042.

203. *Id.* at 1040.

204. *Id.*

205. *See id.* ("Our role is only to ascertain and apply the intent of Congress."); *see also* Henkin, *supra* note 2, at 853–54 (emphasizing courts will abide by laws Congress enacts even though they may be inconsistent with other laws).

206. Barragan v. Holder, No. CV 09-08564 RGK, 2010 WL 9485872, at *2 (D. Cal. Apr. 30, 2010); *see* Gonzales & Strange, *supra* note 159 (citing a California federal court that upheld *Adams*).

207. Gonzales & Strange, *supra* note 159.

208. *Id.*

209. *See id.* (arguing immigration benefits for same-sex couples has not been solved by either the Supreme Court or the Obama Administration).

210. *Id.*

V. Analyzing the Validity of Marriage under the INA

U.S. immigration law clearly states that the recognition of a foreign national's marriage determines the benefits that the foreign national will receive.[211] The validity of a marriage is generally analyzed by a three-pronged test: (1) the validity of the marriage in the place that it was celebrated, (2) whether the marriage is bona fide, and (3) the marriage does not violate public policy.[212] For heterosexual bi-national couples this test has been systematically applied to determine the validity of marriage for immigration purposes.[213] Unfortunately, this three-pronged test does not easily fit the social constructs surrounding same-sex marriages, civil unions, or permanent partnerships.[214]

A. *Place of Celebration Rule*

Almost immediately after *Windsor*, President Obama's Administration fully embraced its authority to act where both the Supreme Court and Congress had failed to do so.[215] President Obama's Secretary of Homeland Security, Janet Napolitano, directed Department of Homeland Security (DHS) officials to recognize marriage equality.[216] The United States Citizenship and Immigration Service (USCIS), under the DHS, began to process and approve visa petitions by U.S. citizens on behalf of their noncitizen spouse.[217] The Department of State (DOS) has instructed U.S. embassies and consulates to adjudicate visa applications based on same-sex marriage just as they would any marriage between members of the opposite sex.[218] President Obama's policy is to enforce a

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211. Titshaw, *supra* note 142, at 547–48.

212. *Id.* at 550; *see also* Agyeman v. INS, 296 F.3d 871, 879 n.2 (9th Cir. 2002) (enforcing this three-pronged test while considering the validity of a heterosexual bi-national marriage).

213. Titshaw, *supra* note 142, at 549.

214. *See* Legal Action Ctr., Immigration Benefits and Pitfalls for LGBT Families in a Post-DOMA World 8 (2013), *available at* http://www.immigrationequality.org/wp-content/uploads/2013/08/Immigration-Benefits-and-Pitfalls-for-LGBT-Families-in-A-Post-DOMA-World-FIN-8-5-13.pdf (highlighting the continued issues that adversely affect LGBT bi-national couples post-*Windsor*).

215. *See id.* at 1 (discussing federal immigration agency efforts "to minimize delay and unnecessary hurdles in order to ensure that noncitizens in same-sex marriages are afforded the same immigration benefits as all other couples"); *see also Shaughnessy*, 388 U.S. at 543 (examining limited judicial review with regard to the enforcement of immigration law by the executive).

216. Legal Action Ctr., *supra* note 214, at 2.

217. *Id.*

218. *Id.*

place of celebration rule,[219] which ensures a marriage is recognized for immigration purposes, even if the same-sex couple chooses to live in a jurisdiction that does not recognize same-sex marriage.[220] Although the President is aware that a uniform place of celebration rule may not be applied across the federal spectrum, he is doing his part to help simplify and define the ambiguity and confusion that surrounds the legitimacy of marriages entered into between members of the same sex.[221] Furthermore, the Department of Justice's (DOJ) Board of Immigrations Appeals (BIA) recently found in favor of the recognition of a same-sex Vermont marriage, applying the place of celebration rule.[222]

Arguably the most significant event to occur after *Windsor* for same-sex bi-national couples was the ruling in *In re Zeleniak,* which upheld the current administration's enforcement of place of celebration rule.[223] In *In re Zeleniak*, the BIA ruled that *Windsor* "removed Section 3 of DOMA as an impediment to the recognition of lawful same-sex marriages and spouses if the marriage is valid under the laws of the State where it was celebrated."[224] The Obama Administration's bold interpretation of *Windsor* effectively created a uniformed place of celebration rule that can guide the DHS, the DOS, and the DOJ on how to proceed with immigration benefits applied to same-sex bi-national couples.[225] There are still issues that remain unanswered—specifically regarding civil unions and permanent partnerships. There are several countries that only provide civil unions or registered partnerships to same-sex couples.[226] Under the current policy, the DOS does not recognize either of these to

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219. *See* INA § 216(d)(1)(A)(i)(I), 8 U.S.C. § 1186a(d)(1)(A)(i) (adopting the rule that states a qualified marriage should be "entered into in accordance with the laws of the place where the marriage took place"); *see also Agyeman*, 296 F.3d at 879 n.2 (describing a three-prong test to determine the validity of a heterosexual marriage for immigration purposes as (1) legal validity at the place of celebration, (2) be bona fide, and (3) not violate public policy).

220. Titshaw, *supra* note 159, at 169.

221. *See generally id.* at 168 (describing how the Obama administration recognizes "that same-sex spouses who celebrate their marriage in a jurisdiction where it is valid are married for immigration purposes, even if they reside in a state where it is not valid").

222. *In re* Zeleniak, 26 I. & N. Dec. 158, 158 (BIA 2013).

223. *Id.* at 160.

224. *Id.*

225. *See* Victor C. Romero, *Reading (into) Windsor: Presidential Leadership, Marriage Equality, and Immigration Policy*, 23 REV. L. & SOC. JUST. 1, 1 (2013) (stating that post-*Windsor*, the Obama Administration is taking a proactive stance concerning immigration law enforcement by directing immigration enforcement agencies to treat "bi-national same-sex couples the same as opposite-sex couples").

226. *See The Freedom to Marry Internationally*, FREEDOM TO MARRY, http://www.freedomtomarry.org/landscape/entry/c/international (last visited Feb. 1, 2015) (identifying the global landscape of gay-marriage rights).

constitute "marriage," and therefore, does not afford them immigration benefits.[227] If two women enter into a civil union, and one of them is denied her asylum claim and is removed back to her country of Nigeria,[228] she would not be eligible for a waiver to return to the United States because her civil-union U.S. citizen partner would not be considered her spouse.[229] The uniform place of celebration rule would generally allow for a same-sex couple to obtain a marriage in a state that is not their domicile,[230] but what of the couples who are not economically equipped to entertain such an obstacle? What of the widow of a twenty-year same-sex civil union or permanent partnership? The INA provides "the widow of a United States citizen normally qualifies for permanent residence in the United States."[231] Since civil unions are not recognized as valid marriages for immigration purposes, the widow would be without any other recourse to receive immigration benefits from her former U.S. citizen partner.[232] Should homosexuals be punished because they do not have the financial means to comply with continued legally endorsed discrimination? Even with the Obama Administration's bold push for a unified approach, there are still a great number of disenfranchised people who find themselves in a world that continues to discriminate against them for no other reason than their sexual orientation.[233]

B. "Bona Fide" *Marriage*

All bi-national couples are required to meet evidentiary requirements that prove the marriage is a "bona fide" marriage,[234] primarily to prove the marriage was not entered into to evade immigration laws.[235] Evidence that is often presented includes, but is not limited to: a marriage license, joint bank account statements, lease agreements that have both parties listed, and joint tax returns as a married couple.[236] Many of these

227. LEGAL ACTION CTR., *supra* note 214, at 10.

228. *See The Gay Divide*, *supra* note 92, at 13 (reporting Nigeria has passed anti-gay legislation).

229. LEGAL ACTION CTR., *supra* note 214, at 10.

230. Titshaw, *supra* note 159, at 169.

231. *Id.* at 176.

232. *See id.* (discussing the possibility that immigration officials may need to recognize these past civil unions as valid so that widows and widowers, who find themselves in this type of situation, are not excluded from the benefits they would have received had their partner still been alive).

233. *See id.* (explaining the widow of a U.S. citizen does not qualify for permanent residence in the United States if her partner dies pre-*Windsor*, and a child born out of marriage who has immigrated may also have similar issues).

234. INA § 216(d)(1)(A), 8 U.S.C. § 1186a(d)(1)(A).

235. LEGAL ACTION CTR., *supra* note 214, at 8.

236. *Id. at* 6.

key pieces of required evidence are extremely difficult for same-sex couples to provide because of the discrimination against them that is still prevalent around the world.[237] To date, in the United States, the majority of states do not have explicit protections to protect LGBT citizens from housing discrimination, employment discrimination, education discrimination, and credit discrimination.[238] There are no federal anti-discrimination laws that specifically cover sexual orientation, making it quite difficult for many homosexuals who are afraid of being targeted to provide the pieces of evidence required to prove a "bona fide" marriage.[239] Fear of being outed at work might prompt a lesbian not to put her partner on her employer-sponsored health benefits. Fear of being outed abroad—in say Russia, where anti-gay laws have recently been passed—would surely prompt a same-sex couple to be as discreet as possible, and therefore without proof of a joint bank account.[240] Many same-sex couples may be so fearful of being outed they do not have photos displaying their love and affection for one another, and thus, are unable to provide photos of their courtship.[241] Countless gay men and women are in successful relationships but are so afraid of a world that continues to dehumanize and outlaw who they are, they are fearful even to share with their parents and siblings a relationship even exists.[242] These are some of the many considerations that are not accounted for by immigration services because this country has a long and continued history of discriminating against homosexuals,[243] anyone who suggests otherwise need only look at DOMA and the continued debate regarding same-sex marriage. It will take the education of immigration judges and consular officials regarding the specific circumstances that surround many LGBT individuals to ensure that same-sex bi-national couples are fairly adjudicated.[244]

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237. *Id.*

238. Sarah McBride et al., *We the People*, CTR. FOR AMERICAN PROGRESS (Dec. 10, 2014), https://www.americanprogress.org/issues/lgbt/report/2014/12/10/102804/we-the-people.

239. LEGAL ACTION CTR., *supra* note 214, at 6.

240. *See The Gay Divide*, *supra* note 92, at 13 (discussing the divide between countries that embrace LGBT equality with those that continue to discriminate against the LGBT community).

241. LEGAL ACTION CTR., *supra* note 214, at 6.

242. *Id.; see also* Burns et al., *supra* note 138, at 24 (identifying Iran, Mauritania, Saudi Arabia, Sudan, and Yemen as countries with anti-gay laws that are punishable by death).

243. *See* 1952 INA, 66 Stat. at 182–83 (excluding homosexuals from admission into the United States of America).

244. LEGAL ACTION CTR., *supra* note 214, at 21.

C. *Public Policy*

The demise of Section 3 of DOMA created the presumption there is "no strong federal policy against same-sex marriage recognition."[245] This left the issue of state public policies that choose not to recognize same-sex marriage.[246] As discussed above, many individual state bans on same-sex marriage were overturned by federal courts,[247] the remaining of which were overturned by *Obergefell*. Prior to *Obergefell,* the question was whether U.S. immigration law would rely only on the place of celebration rule and disregard state public policy.[248] The Obama Administration chose to enforce the place of celebration rule, making immigration benefits available to same-sex bi-national couples residing in states that prohibit same-sex marriage.[249] This approach—basically ignoring state policy to ensure a more uniformed rule and application with regard to same-sex bi-national couples—did not follow BIA case law that has taken a much more traditional approach with respect to honoring state marriage laws.[250] The decision in *Windsor* was clearly driven by a respect for federalism, yet the Obama Administration's interpretation of that decision, for immigration purposes, appeared to usurp a portion of the individual state's right to define marriage.[251] This is important because, even if not challenged by an individual state, a more conservative administration could, and likely would, revert back to the traditional approach, honoring a state's discriminatory marriage laws.[252] This does not appear to be an issue after *Obergefell*, but is worth addressing due to the rhetoric that is surrounding the 2016 republican presidential primary.

VI. CURRENT POLITICAL CLIMATE PROVES OMINOUS FOR THE LGBT COMMUNITY

The 2014 mid-term elections were brutal for the Democratic Party. Not only did it lose more seats to republicans in an already republican led

245. Titshaw, *supra* note 142, at 602.

246. *Id.*

247. *Id.* at 603.

248. *Id.*

249. Kerry Abrams, *Marriage and Immigration—Which State's Law Applies?*, CONCURRING OPINIONS (July 8, 2013), http://concurringopinions.com/archives/2013/07/marriage-and-immigration-which-states-law-applies.html; LEGAL ACTION CTR., *supra* note 214, at 4.

250. *Id.*

251. Romero, *supra* note 225, at 26.

252. *See* Abrams, *supra* note 249 (highlighting, absent an Obama-enforced place of celebration rule, in some instances the BIA would honor state laws prohibiting the recognition of same-sex marriage).

House of Representatives,[253] but it also lost its control of the Senate.[254] Since then, Speaker of the House Boehner has already indicated that his congress will move more to the right on immigration issues,[255] which is an ominous sign for same-sex bi-national couples. It is unlikely that any immigration reform in the near future will include recognition of same-sex marriages, as the Republican Party and many of its officials oppose equality for homosexual persons.[256] The Senate's most recent efforts to pass comprehensive immigration reform did not include any provisions for same-sex bi-national couples.[257] Furthermore, when an amendment was introduced by Vermont Senator Leahy that would allow for U.S. citizens to petition for their same-sex bi-national spouses, it was swiftly attacked by republicans, most notably Republican Senator, and one of several 2016 presidential candidates, Marco Rubio who stated "If this bill has something in it that gives gay couples immigration rights and so forth, it kills the bill."[258] Such is the sentiment of a Republican Party that is moving farther to the right with each election.[259]

Many of the potential 2016 republican presidential hopefuls have criticized the recent ruling in *Obergefell*, indicating a continued fight for LGBT rights in this country.[260] In 2012, the Republican Party included within its platform a plank demanding a constitutional amendment that would not recognize same-sex marriage.[261] It will be telling to see how the Republican Party addresses its concerns regarding same-sex marriage

253. *2014 House Election Results*, POLITICO, http://www.politico.com/2014-election/results/map/house/#.VLrjU1bjwds (last updated Dec. 23, 2014).

254. *Id.*

255. Charles Babington, *Boehner's Embrace of GOP Rebels Nudges House to Right,* HUFFINGTON POST (Jan. 10, 2015, 1:59 AM), http://www.huffingtonpost.com/2015/01/10/boehner-gop-rebels-house_n_6449484.html.

256. TONY CLARK, CTR. FOR AMERICAN PROGRESS ACTION FUND, 10 THINGS TO EXPECT NEXT YEAR IF REPUBLICANS WIN THE SENATE, 6 (Oct. 24, 2014), https://www.americanprogressaction.org/issues/general/report/2014/10/24/99598/10-things-to-expect-next-year-if-republicans-win-the-senate.

257. Chris Johnson, *Gay Couples Missing from Senate Immigration Plan*, WASH. BLADE (Jan. 28, 2013), http://www.washingtonblade.com/2013/01/28/senate-immigration-plan-lacks-uafa.

258. Trudy Ring, *Marco Rubio: Immigration Reform Shouldn't Include Gay Couples,* THE ADVOCATE (June 13, 2013, 1:47 PM), http://www.advocate.com/politics/politicians/2013/06/13/marco-rubio-immigration-reform-shouldnt-include-gay-couples.

259. *See* Babington, *supra* note 255 (discussing the conservative mindset of newly elected Senators).

260. *See* Sam Levine, *Republican Presidential Candidates Criticize Supreme Court Same-Sex Marriage Ruling,* HUFFINGTON POST, HTTP://WWW.HUFFINGTONPOST.COM/2015/06/26/REPUBLICANS-GAY-MARRIAGE_N_7672066.HTML?1435335224 (last updated June 26, 2015) (indicating the campaign platforms of several right-leaning republican candidates against gay-marriage).

261. McLaughlin, *supra* note 175.

now in 2016. There is currently a resolution to be addressed at the Republican National Committee's 2015 summer meeting titled "To Reserve, Strip and Pursue," a direct response to *Obergefell* calling for Congressional action to find the decision unconstitutional.[262] The rhetoric includes many of the themes that have historically been used to dehumanize homosexuals including the assertion that the ruling in *Obergefell* would force religious institutions to perform same-sex ceremonies,[263] a baseless claim that is explicitly addressed in the decision,[264] but one that evokes fear and anxiety that easily overpowers reason and logic. If the midterm elections signaled anything, it is that the country is more than willing to elect socially conservative politicians who can derail much of the progress that has come from *Windsor* and *Obergefell*. The current political climate within the Republican National Party suggests that the gay-marriage battle is far from over and will be a contentious issue in the 2016 presidential elections

VII. RECOMMENDATIONS

The plenary power grants Congress overwhelming control over immigration law and despite the immense progress that has resulted from the *Windsor* and *Obergefell* rulings, there is nothing that would prevent a conservative Congress from implementing limitations for bi-national same-sex marriages for immigration purposes. There is also nothing that would prevent a conservative Executive from completely abandoning the Obama Administration's policy of applying a unified place of celebration rule to same-sex bi-national couples. It is recommended that the Supreme Court define the scope of Congress's plenary power and apply less deference when adjudicating issues that address fundamental rights. This would provide protection to same-sex bi-national couples and ensure the legal recognition of their respective marriages.

The sheer swiftness of the changes that were implemented by the Obama Administration after *Windsor*, and the ruling in *Obergefell*, have emboldened the conservative right in its ambition to prevent any further advancement of LGBT rights. In order to prevent the continued disenfranchisement of homosexuals with regard to immigration, it is further recommended that Congress pass comprehensive immigration reform that amends the INA to recognize the validity of same-sex marriages, civil unions, and permanent partnerships. Such reform would ensure legal

262. Chris Johnson, *RNC set to vote on anti-gay resolutions at summer meeting,* WASH. BLADE (Aug. 1, 2015, 12:35PM), http://www.washingtonblade.com/2015/08/01/rnc-set-to-vote-on-anti-gay-resolutions-at-summer-meeting/.

263. *See* Levine, *supra* note 260.

264. *Obergefell*, 135 S. Ct. 2584, at 2607.

protection for an already persecuted group and promote family unity—the bedrock principal of immigration.[265] It is unlikely the current Congress will pass such legislation, which is why LGBT advocates must remain vigilant in their efforts to promote reform that coincides with the ruling in *Obergefell.*

VIII. Conclusion

This country has a history of systematically discriminating against LGBT individuals, and has created a perception of sexual deviancy and immorality. This perception led to the criminalization of U.S. citizens and the exclusion of non-citizens based solely on their sexuality. Such rhetoric continues to fuel conservative opposition of same-sex marriage today, intending to divide an already more unified nation. When the Supreme Court struck down Section 3 of DOMA, it signaled to the world that the United States was no longer willing to promote hate and discrimination against individuals based solely on their sexuality. The same body declared that sentiment when it recognized that marriage is indeed a fundamental right to be extended to heterosexual and homosexual couples alike. Let this declaration urge lawmakers in Washington to pass immigration reform that honors the very bedrock of this great nation—family unity.

265. Titshaw, *supra* note 159, at 168.