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The Slow, Yet Long-Anticipated Death of DOMA and Its Impact on Immigration Law.

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THE SLOW, YET LONG-ANTICIPATED DEATH OF DOMA AND ITS IMPACT ON IMMIGRATION LAW

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I. INTRODUCTION

In June 2013, when the U.S. Supreme Court struck down Section Three of the Defense of Marriage Act (DOMA) and called into doubt Section Two's continued validity, an immeasurable impact was immediately felt. The scope of the U.S. Supreme Court's decisions in *Hollingsworth v.*

*Perry*¹ and *United States v. Windsor*² transcend federal law. Finding Section Three of DOMA unconstitutional, the U.S. Supreme Court's *Windsor* decision will ultimately affect over 1,000 federal statutes and regulations, including those applying to immigration benefits.³

This Article explores DOMA and the ways in which the U.S. Supreme Court's recent DOMA decisions will impact United States immigration laws. This Article begins with a brief history of DOMA, paying particular attention to Sections Two and Three. Next, this Article addresses the potential impact of overturning Section Three upon immigration law. Finally, this Article discusses inevitable—yet often unaddressed—friction between federal expansion of the definition of marriage and each state's definition of marriage, and the ways in which this friction impacts immigration law.

II. DEFENSE OF MARRIAGE ACT

A. DOMA's Passage

DOMA was signed into law by President Bill Clinton on September 20, 1996, in the midst of his re-election campaign.⁴ At the time, President Clinton faced a power struggle between Republicans and Democrats.⁵ Although he began his first term with a Democratic majority in both the House of Representatives and the Senate, Republicans gained the majority in both houses during the mid-term elections in 1994.⁶

Subsequently, the conservative Right began a campaign against gays and lesbians, energizing its base and influencing Republican Party members to vote.⁷ With his potential re-election looming, President Clinton faced difficult decisions in the midst of a shifting political culture.⁸ For-

1. *Hollingsworth v. Perry*, 570 U.S. ___, 133 S. Ct. 2652, 2659 (2013).

2. *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675 (2013) (finding Section Three of DOMA unconstitutional).

3. *Id.* at ___, 133 S. Ct. at 2680 (2013).

4. Nick Ramsey, *How-and Why-DOMA Became Law in 1996*, MSNBC, (Mar. 30, 2013, 10:13 AM), <http://tv.msnbc.com/2013/03/30/how-and-why-doma-became-law-in-1996>.

5. See Sagar Jethani, *History of DOMA: Don't Blame Bill Clinton for Being Put in a Bind*, POLICYMIC (June 24, 2013), <http://www.policymic.com/articles/50573/history-of-doma-don-t-blame-bill-clinton-for-being-put-in-a-bind> (last visited Oct. 4, 2013) (discussing political turmoil between Republicans and Democrats during Clinton's presidency).

6. *Id.*

7. See *id.* (highlighting Republican attacks on gays and lesbians while campaigning for the 1996 presidential election).

8. See generally *id.* (recognizing the Democratic Leadership Council's pressure on President Clinton to adopt a more center-right approach to the Republican Congress rather than the liberal approach he brought to the Democratic Congress during his first two years in office).

mer Georgia Representative Bob Barr introduced DOMA, arguing it was necessary in protecting “[t]he very foundations of our society.”⁹

DOMA passed with “overwhelming bipartisan support on Capitol Hill” from both houses.¹⁰ President Clinton signed the bill into law at one o’clock in the morning, without holding a press conference or drawing any attention to the occasion.¹¹ Shortly before signing DOMA, President Clinton released a short statement; however, the statement neglected to mention his signing the legislation into law, minimizing the Act by referring to it simply as “H.R. 3396” rather than the “Defense of Marriage Act.”¹²

Relative to its proponents, President Clinton’s statement evidenced incongruous conviction about the law’s purpose.¹³ Instead, he stressed fighting his whole life against discrimination and that the signing of this bill did not endorse discrimination against anyone.¹⁴ He noted this bill merely clarified the words “marriage” and “spouse” for purposes of federal law.¹⁵ On one hand, President Clinton implemented legislation greatly limiting rights of homosexuals; on the other hand, he also simultaneously urged Congressional passage of another bill, the Employment Non-Discrimination Act, which would protect gays and lesbians from employment discrimination.¹⁶

B. *DOMA’s Original Provisions*

DOMA originated as a two-page Act.¹⁷ There are three sections to this law. The first section simply defines the short title of the Act as the “Defense of Marriage Act.”¹⁸ The second and third sections of DOMA, recently scrutinized by the U.S. Supreme Court, state:

9. Ramsey, *supra* note 4.

10. *Id.*

11. *Id.*

12. See generally President Bill Clinton, *President’s Statement on DOMA*, W. PA. FREEDOM TO MARRY COAL., <http://www.cs.cmu.edu/afs/cs/user/scotts/ftp/wpaf2mc/clinton.html> (last visited Nov. 16, 2013) (focusing readers’ attention on the Employment Non-Discrimination Act which Congress failed to pass that term).

13. See generally *id.* (noting state authority in determining their own marriage definition and clarifying the Act is specifically does not endorse discrimination against gays and lesbians).

14. *Id.*

15. *Id.*

16. *Id.*

17. Defense of Marriage Act (DOMA) of 1996, Pub. L. No. 104–199, 110 Stat. 2419, *partially invalidated by* United States v. Windsor, 570 U.S. ___, 133 S. Ct. 2675 (2013); Nick Ramsey, *supra* note 4.

18. 110 Stat. at 2419.

Section 2(a) . . . No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship¹⁹

Section 3(a) . . . In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.²⁰

The Sections’ text clearly evidences DOMA’s main purpose—providing guidance to states in interpreting the Constitution’s Full-Faith-and-Credit Clause as it relates to same-sex marriage and defining, for federal purposes, the terms “marriage” and “spouse.”²¹

When this law was enacted, no state allowed same-sex marriage; therefore, it did not substantively change any laws.²² However, the political culture in this country has evolved greatly since DOMA’s enactment.²³ In fact, Representative Barr, the author of the bill, and former President Clinton have both argued *against* DOMA since its enactment.²⁴ The combined effect of a changing society, led in part by these arguments, compelled rulings in two high profile U.S. Supreme Court cases considering DOMA’s constitutionality on June 26, 2013.²⁵

C. U.S. Supreme Court Strikes the Initial Blow to DOMA

Hollingsworth v. Perry involved the constitutionality of Proposition Eight, a ballot initiative amending the California Constitution to define marriage as “the union of a man and a woman.”²⁶ The petitioners—proponents of the law—argued Proposition Eight did not violate the U.S.

19. § 2, 110 Stat. at 2419 (codified at 28 U.S.C. § 1738C (2012)).

20. § 3, 110 Stat. at 2419 (codified at 1 U.S.C. § 7 (2012)).

21. 110 Stat. at 2419.

22. Jethani, *supra* note 5.

23. *See generally id.* (charting the number of people for and against same-sex marriage and discussing some Republican support).

24. *Id.*

25. Eyder Peralta, *Court Overturns DOMA, Sidesteps Broad Gay Marriage Ruling*, NPR: THE TWO-WAY (June 26, 2013 10:04 AM), <http://npr.org/blogs/thetwoway/2013/06/26/195857796/supreme-court-strikes-down-defense-of-marrage-act>.

26. *Hollingsworth v. Perry*, 570 U.S. ___, 133 S. Ct. 2652, 2659 (2013).

Constitution's Equal Protection Clause.²⁷ For the respondents—two same-sex couples seeking marriage—the issue was “whether California—having previously recognized the right of same-sex couples to marry—may reverse its decision through referendum.”²⁸ Proposition Eight, of course, was approved by California voters.²⁹

In its opinion, the U.S. Supreme Court discussed at length whether the petitioners had standing to appeal before addressing whether Proposition Eight was constitutional.³⁰ The Supreme Court held respondents no longer had standing because they won their case in the lower court.³¹ The U.S. Supreme Court addressed the fact that although a state may feel a private party has “standing to seek relief for a generalized grievance[,]” that is not enough to overcome long lasting and settled law.³² Based on these standards, the U.S. Supreme Court held, “Because petitioners have not satisfied their burden to demonstrate standing to appeal the judgment of the District Court, the Ninth Circuit was without jurisdiction to consider the appeal.”³³

27. *See id.* at ___, 133 S. Ct. at 2659 (2013) (noting the Supreme Court granted certiorari to the petitioners, who are against same-sex marriage, in deciding whether Proposition 8 violates the Equal Protection Clause).

28. *Id.* at ___, 133 S. Ct. at 2659 (2013). Those opposing same-sex marriage want Court determination of whether the Equal Protection Clause prevents a state from classifying marriage as between one man and one woman. *Id.* at ___, 133 S. Ct. at 2659 (2013).

29. *Id.* at ___, 133 S. Ct. at 2659 (2013). Proposition 8 amended the California Constitution, defining marriage as between one man and one woman. *Id.* at ___, 133 S. Ct. at 2659 (2013).

30. *Id.* at ___, 133 S. Ct. at 2661–68 (2013). On appeal, the Ninth Circuit initially asked petitioners to address, “why [the] appeal should not [have been] dismissed for lack of Article III standing.” *Id.* at ___, 133 S. Ct. at 2660 (2013). *See also* Perry v. Schwarzenegger, 630 F.3d 898, 906 (2011) (ruling Movants seeking to intervene in a lawsuit did not have a significant interest in the proceeding); Perry v. Schwarzenegger, 704 F.Supp.2d 921, 921–22 (N.D. Cal. 2010) (holding Proposition Eight and ensuing amendments to the California state constitution violated the U.S. Constitution's Equal Protection Clause). The Ninth Circuit, after hearing the arguments for and against the proponents of the law having the requisite standing to proceed with the case, certified the question to the California Supreme Court. *Hollingsworth*, 570 U.S. at ___, 133 S. Ct. at 2660 (2013). The California Supreme Court affirmed the proponents' standing. *Id.* at ___, 133 S. Ct. at 2660 (2013). The Ninth Circuit concluded same and did not dismiss the appeal. *Id.* at ___, 133 S. Ct. at 2660 (2013). The Supreme Court tackled the jurisdictional question before evaluating Proposition Eight's constitutionality. *Id.* at ___, 133 S. Ct. at 2660 (2013).

31. *Hollingsworth*, 570 U.S. at ___, 133 S. Ct. at 2662–63 (2013).

32. *Id.* at ___, 133 S. Ct. at 2667 (2013).

33. *Id.* at ___, 133 S. Ct. at 2668 (2013).

Consequently, the U.S. Supreme Court withheld further analysis of Proposition Eight issues in this case as neither party proved standing.³⁴ Thus, because the parties did not have standing to appeal the lower court's decision to the Ninth Circuit, Section Two of DOMA was left untouched.³⁵ As a result, although holding was not supported by the U.S. Supreme Court, the ruling and therefore the district court's reasoning in finding Proposition Eight unconstitutional still stands.³⁶ Therefore, Section Two of DOMA remains intact despite being seriously questioned by *Hollingsworth's* reasoning.

The decision in *United States v. Windsor* was issued on the same day as the decision in *Hollingsworth v. Perry*. When Edith Schlain Windsor's long-time partner passed away, New York law recognized and protected Ms. Windsor as a same-sex spouse; however, the Federal Tax Code did not.³⁷ Windsor paid federal taxes owed on the inheritance she received from her lawful spouse, seeking an estate tax exemption afforded to spouses.³⁸ The IRS denied this exemption.³⁹ Ms. Windsor filed suit and challenged the constitutionality of Section Three of DOMA, which defines a "spouse" as a person of the opposite sex, thereby denying federal benefits to same-sex spouses such as Ms. Windsor.⁴⁰

In its opinion, the U.S. Supreme Court emphasized state authority in both defining and regulating marriages within its borders.⁴¹ The Court repeatedly affirmed the state has traditionally and historically held authority over marriage.⁴² No federal court has jurisdiction to preside over divorce or custody issues, regardless of whether such issues arose in diversity, because the states have almost exclusive authority in regulating

34. *Id.* at ___, 133 S. Ct. at 2668 (2013). The case was remanded to the lower court, and the appeal was dismissed due to lack of personal jurisdiction. *Id.* at ___, 133 S. Ct. at 2668 (2013).

35. *Id.* at ___, 133 S. Ct. at 2668 (2013).

36. *Id.* at ___, 133 S. Ct. at 2668 (2013). Because the Supreme Court ruled petitioners lacked standing, and did not otherwise rule, Proposition Eight remains unconstitutional. *Id.* at ___, 133 S. Ct. at 2668 (2013).

37. *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675, 2683 (2013). Windsor did not qualify for the Federal Estate Tax marital exemption because DOMA denies federal recognition to same-sex spouses. *Id.* at ___, 133 S. Ct. at 2683 (2013). 26 U.S.C. § 2056(a) excludes from taxation "any interest in property which passes or has passed from the decedent to his surviving spouse." *Id.* at ___, 133 S. Ct. at 2683 (2013).

38. *Id.* at ___, 133 S. Ct. at 2683 (2013).

39. *Id.* at ___, 133 S. Ct. at 2683 (2013). Ms. Windsor contended, "DOMA violates the guarantee of equal protection, as applied to the Federal Government through the Fifth Amendment." *Id.* at ___, 133 S. Ct. at 2683 (2013).

40. *Id.* at ___, 133 S. Ct. at 2683 (2013).

41. *See id.* at ___, 133 S. Ct. at 2691 (2013) (detailing justification and validity of the Court's intervention in the marriage issue).

42. *Windsor*, 570 U.S. at ___, 133 S. Ct. at 2691 (2013).

those issues.⁴³ Here, the State of New York used “its historic and essential authority” to protect and confer the right of marriage upon same-sex couples.⁴⁴ The state chose to confer upon “this class of persons” a “dignity and status of immense import.”⁴⁵

Contrastingly, the federal government used the state-defined class in “impos[ing] restrictions and disabilities,” whereas the state chose to protect this group of people.⁴⁶ The Supreme Court felt compelled in “address[ing] whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment.”⁴⁷ The Supreme Court elaborated:

The State’s interest in defining and regulating the marital relation . . . stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form ‘but one element in a personal bond that is more enduring.’⁴⁸

The Supreme Court compared this interest with the argument that the congressional purpose of DOMA is to “discourage enactment of state same-sex marriage laws and to restrict the freedom and choice of couples married under those laws if they are enacted.”⁴⁹ The Supreme Court emphasized, “DOMA writes inequality into the entire United States Code . . . this places same-sex couples in an unstable position of being in a second-tier marriage.”⁵⁰ Finally, the Supreme Court concluded in *Windsor*, “[B]y seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.”⁵¹

III. HOW THE DECISION TO STRIKE SECTION THREE OF DOMA WILL AFFECT IMMIGRATION LAW

The Supreme Court decisions in *Windsor* and *Hollingsworth* have already impacted immigration law. In particular, *Windsor* has had a partic-

43. *Id.* at ___, 133 S. Ct. at 2691 (2013) (citing *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992)).

44. *Id.* at ___, 133 S. Ct. at 2692 (2013).

45. *Id.* at ___, 133 S. Ct. at 2675 (2013).

46. *Id.* at ___, 133 S. Ct. at 2692 (2013).

47. *Id.* at ___, 133 S. Ct. at 2692 (2013).

48. *Windsor*, 570 U.S. at ___, 133 S. Ct. at 2692 (2013) (citing *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)).

49. *Id.* at ___, 133 S. Ct. at 2693 (2013).

50. *Id.* at ___, 133 S. Ct. at 2694 (2013).

51. *Id.* at ___, 133 S. Ct. at 2696 (2013).

ularly noticeable impact on the legal community at large. The decisions have produced some immediately noticeable results, while other consequences of these decisions will likely surface over time.

Since 1952, the basic body of immigration law in the United States has been governed by the Immigration and Nationality Act (INA), codified in the United States Code under Title Eight.⁵² The INA contains various statutes with an accompanying glossary of terms found at the beginning of Title Eight.⁵³ Interestingly, it does not contain a definition for the terms “spouse” or “marriage,” but explains and defines in detail the terms “child” and “parent.”⁵⁴

On January 3, 1996, Congress passed DOMA, defining the word “marriage” as a union between one man and one woman and defining “spouse” as a person of the opposite sex.⁵⁵ As a federal statute, DOMA applied to “spouse” and “marriage” as they existed in all federal legislation, and as such, adjudicators were bound by Section Three’s definitions when processing a same-sex married couple’s petition or any other application within the purview of the Department of Homeland Security (DHS) and Department of State (DOS).

Tragically, as a result of DOMA, both U.S. citizens and lawful permanent residents residing in states allowing same-sex marriage could not petition for their same-sex undocumented spouses for any type of visa; similarly, undocumented spouses could not seek dependent benefits under any visa category held by their spouses.⁵⁶ As a result, many same-sex married couples were forced to live outside of the United States.⁵⁷ Others stayed in the United States, with the undocumented spouse hidden, living “in the shadows.”⁵⁸ Even worse, some couples were separated and living apart in different countries.⁵⁹

52. Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163, enacted June 17, 1952 (codified as amended at 8 U.S.C. § 1101 et. seq.).

53. INA § 101, 8 U.S.C. § 1101 (2012).

54. See INA § 101(b)(1)-(c)(1), 8 U.S.C. § 1101(b)(1)-(c)(1) (defining “child” as it pertains to title I, II, and III of the INA); INA § 101(b)(2), 8 U.S.C. § 1101(b)(2) (2012) (defining “parent”). See also INA § 101(a)(35); 8 U.S.C. § 1101(a)(35) (2012) (stating “the term ‘spouse,’ ‘wife,’ or ‘husband’ does not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated”).

55. Defense of Marriage Act (DOMA) of 1996, Pub. L. No. 104-199, 110 Stat. 2419, partially invalidated by *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675 (2013).

56. *Policy Update: The Harm of the Defense of Marriage Act (DOMA) in an Immigration Context*, THE IMMIGRANT ADVOC. (Immigrant Legal Res. Ctr., S.F. Cal.), Fall 2011, at 5 [hereinafter *Policy Update*].

57. *Id.*

58. *Id.*

59. *Id.*

A. *Treatment of Same-Sex Married and Unmarried Couples in the Immigration Context Before the U.S. Supreme Court Decisions in United States v. Windsor and Hollingsworth v. Perry*

Immediately after DOMA's enactment, immigration authorities did not recognize same-sex marriages. At that time, no U.S. state or any country in the world allowed same-sex couples to marry.⁶⁰ The view held by the U.S. Citizenship and Immigration Services (USCIS), which oversees lawful immigration to the United States,⁶¹ was no legal basis existed in justifying recognition of same-sex marriages for immigration purposes, regardless of the view of the jurisdiction where the marriage was celebrated.⁶²

i. *Treatment of Binational Same-Sex Married and Unmarried Couples for Non-Immigrant Visas*

In July 2001, the State Department issued a cable to all consular posts abroad, instructing them to begin issuing B-2 non-immigrant visas⁶³ to "partners of long-term non-immigrants" if the applicant could establish a lack of immigrant intent underlined in INA § 214(b).⁶⁴ Essentially, applicants had to prove their intended stays were temporary and they main-

60. AM. IMMIGRATION COUNCIL LEGAL ACTION CTR. & IMMIGRATION EQUALITY, IMMIGRATION BENEFITS AND PITFALLS FOR LGBT FAMILIES IN A POST-DOMA WORLD 2-3 (2013), (Aug. 5, 2013), available at http://www.legalactioncenter.org/sites/default/files/immigration_benefits_and_pitfalls_for_lgbt_families_in_a_post-doma_world_fin_8-5-13.pdf.

61. *About Us*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/aboutus> (last visited Oct. 28, 2013).

62. Memorandum from William R. Yates, Assoc. Dir. for Operations at U.S. Citizenship and Immigration Services on Adjudication of Petitions and Applications Filed by or on Behalf of, or Documents Requests by Transsexual Individuals to Regional Dirs., Service Center Dirs., Dist. Dirs., Including Overseas Dir., Office of Int'l Affairs, at 2 (Apr. 16, 2004), available at <http://www.state.gov/documents/organization/82784.pdf> [hereinafter Yates Memorandum].

63. INA § 101(a)(15)(B). A B-2 nonimmigrant visa is an individual "[O]ther than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for pleasure." *Id.*

64. Department of State Cable from U.S. Secretary of State Colin Powell to all Diplomatic and Consular Posts (Jul. 11, 2011) (on file with author) [hereinafter Powell Cable]. See INA § 214(b), 8 U.S.C. § 1184(b) (2012) ("[E]very alien (other than a nonimmigrant described in subparagraph (L) or (V) of section 1101(a)(15) of this title, and other than a nonimmigrant described in any provision of section 1101(a)(15)(H)(i) of this title except subclause (b1) of such section) shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status under section 1101(a)(15).").

tained a residence abroad.⁶⁵ Traditional dependent status of primary non-immigrant visa holders was unavailable to same-sex couples and unmarried heterosexual couples because both categories of individuals were not involved in “traditional marriages”—the necessary basis for securing dependent status.⁶⁶ Primary non-immigrant visa holders’ same-sex spouses, partners, or significant others could not intend to work in the United States, but could only enter the country to accompany their partners under B-2 visas.⁶⁷ Unfortunately, there was no exception or waiver to bypass INA’s § 214(b) requirements for any of the aforementioned relationships.⁶⁸

As a result, the same-sex spouse, partner, or heterosexual partner of a primary non-immigrant visa holder could be issued a B-2 non-immigrant visa, permitting them to stay in the United States for a maximum period of one year.⁶⁹ The DOS’s *Foreign Affairs Manual* cemented this protocol and is currently used as a directive for the department and its employees in visa issuance.⁷⁰

ii. Treatment of Binational Same-Sex Married Couples for Immigrant Visas

Unlike non-immigrant visas, DOMA did not include a special exception for undocumented same-sex spouses of individuals with U.S. citizenship or lawful permanent resident status. Therefore, if a same-sex spouse with lawful status in the United States petitioned for his or her undocumented same-sex spouse by means of an I-130 petition,⁷¹ the petition would be denied. The same result applied to couples in same-sex transsexual marriages.

In a 2004 USCIS interoffice memorandum, adjudicators of spousal and fiancé-related immigrant petitions were prohibited from recognizing marriages in which one of the individuals was transsexual, regardless of sex reassignment surgery.⁷² USCIS’s clarification was the result of varied state practices in issuing state identification documents; some states issued birth certificates and marriage licenses recognizing same-sex rela-

65. Powell Cable, *supra* note 64.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL 9, at 41.31 N14.1-2 (2012), available at <http://www.state.gov/documents/organization/87206.pdf> (describing the process for nonimmigrant aliens who plan to marry).

71. The I-130 is the form used by a USC or LPR who would like to petition for an undocumented qualifying family member under immigration law.

72. Memorandum, *supra* note 62, at 2.

tionships, causing varied decisions by USCIS officers.⁷³ In its memo, USCIS reiterated its ongoing policy: unless the underlying marriage in a marriage petition was recognized under immigration law, it would not be approved.⁷⁴

The first sign of a change in the treatment of transsexuals was a Board of Immigration Appeals (BIA) decision on a marriage between an undocumented male individual and a post-operative transsexual female.⁷⁵ In this case, a post-operative male-to-female transsexual (petitioner) married and filed a petition for her undocumented male spouse (beneficiary).⁷⁶ The petitioner submitted various documents evidencing her sex reassignment surgery.⁷⁷ USCIS faced an important decision—the individuals were both born as males, but because one individual underwent sex reassignment surgery, they were legally classified as a married couple, recognized under their state's law.⁷⁸

In making its decision, the BIA had to consider DOMA's definitions of "marriage" and "spouse." Additionally, the validity of the marriage for immigration purposes required the BIA to perform a two-step analysis: 1) whether the marriage was valid under state law and 2) whether the marriage qualified under the INA.⁷⁹ The validity of a marriage for immigration purposes is based on the law of the place of celebration.⁸⁰ This requires inquiry into applicable state or foreign law where the couple celebrated their marriage.⁸¹

73. *Id.*

74. *Id.*

75. *In re Lovo*, 23 I & N Dec. 746, 747 (BIA 2005).

76. *Id.* at 746–747.

77. *Id.* at 747.

78. *Id.* at 748.

79. *See Adams v. Howerton*, 673 F.2d 1036, 1038 (9th Cir. 1981) (articulating the two-step process in determining whether a marriage is cognizable for immigration claims). *See also* INA § 101(a)(35), 8 U.S.C. § 1101(a)(35) (2012) (defining spouse under the Immigration and Nationality Act); INA § 201(b), 8 U.S.C. § 1151(b) (2012) (outlining when numerical limitations on immigrants will not apply, to include immediate relatives such as spouses).

80. *See, e.g., In Re Ma*, 15 I & N Dec. 70, 72 (BIA 1974).

81. *See id.* at 70 (citing *Loughran v. Loughran*, 292 U.S. 216, 223 (1934)). In *Ma*, the BIA determined a divorce between two individuals could not be recognized in an immigration case because neither party was actually present when the divorce was sought and the parties never lived together during their marriage. *Id.* *See also In re Levine*, 13 I & N Dec. 244, 244 (BIA 1969) (recognizing as valid a divorce obtained in Mexico, even though petitioners were not physically present when the divorce was sought, because both parties were legal, permanent residents of Mexico and domiciled there); *In re P-*, 4 I & N Dec. 610 (BIA, Acting A.G. 1952) (holding petitioner's divorce obtained in Mexico was valid under U.S. law for purposes of an immigration claim on behalf of petitioner's second wife, whom he married in Germany).

Under this two-step analysis,⁸² the marriage was considered valid under state law, but was it a valid marriage pursuant to the INA and DOMA?⁸³ Applying *Chevron* deference,⁸⁴ the BIA reasoned Section Three of DOMA was clear and unambiguous, only prohibiting marriages between persons of the same sex.⁸⁵ Thus, the BIA approved the visa petition, and the post-operative female spouse's petition was approved for her undocumented male spouse.⁸⁶

Applying this two-step analysis, certain transsexual couples could be granted immigration status, while the plain language of DOMA prohibited same-sex couples from attaining lawful immigration status.

iii. The Beginning of Change—The Tide Begins to Turn Toward Acceptance of Same-Sex Marriage

On February 23, 2011, the Obama Administration boldly instructed the Department of Justice (DOJ) to cease defending the constitutionality of Section Three of DOMA.⁸⁷ However, the DOJ noted it would continue enforcing DOMA as a whole and would remain party to lawsuits representing the interests of the United States.⁸⁸

At the beginning of his administration, President Obama made his opposition to DOMA clear.⁸⁹ However, the Administration's opposition was further cemented when, upon conducting an in-depth analysis of the law, U.S. Attorney General Eric Holder concluded Section Three of

82. See generally *Adams*, 673 F.2d at 1038 (stating the two-step analysis for proving a valid marriage for immigration purposes).

83. See *In re Lovo*, 23 I & N Dec. 746, 747 (BIA 2005) (questioning "whether a marriage between a postoperative male-to-female transsexual and a male can be the basis for benefits under [the Immigration and Nationality] Act, where the State in which the marriage occurred recognizes the change in sex of the postoperative transsexual and considers the marriage valid").

84. See generally Taylor Alyse Pack Ellis, Comment, *Why the EEOC Got it Right in Macy v. Holder: The Argument for Transgender Inclusion in Title VII*, 16 SCHOLAR — (2014).

85. See *Lovo*, 23 I & N Dec. at 749–51, 753 (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

86. See *id.* at 753.

87. Z. Byron Wolf, *President Obama Instructs Justice Department to Stop Defending Defense of Marriage Act Calls Clinton-Signed Law "Unconstitutional,"* ABC NEWS (Feb. 23, 2011, 12:39 PM), <http://abcnews.go.com/blogs/politics/2011/02/president-obama-instructs-justice-department-to-stop-defending-defense-of-marriage-act-calls-clinton>.

88. Press Release, U.S. Dep't of Justice, Statement of the Att'y Gen. on Litig. Involving the Defense of Marriage Act (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>.

89. Ben Smith, *Obama Underlines DOMA Opposition*, POLITICO (Aug. 17, 2009, 12:06PM), http://www.politico.com/blogs/bensmith/0809/Obama_underlines_DOMA_oppo_sition.html.

DOMA must be subject to a higher standard of scrutiny than the lowest “rational basis” standard.⁹⁰ Applying a heightened standard of review, the DOJ concluded Section Three of DOMA, as applied to same-sex married couples, was unconstitutional because it failed to meet this heightened standard.⁹¹

The Attorney General sent a letter to the U.S. House of Representatives informing them of their conclusion that Section Three of DOMA was unconstitutional and that matters involving same-sex spouses should be subject to a heightened standard of review.⁹² Moreover, President Obama instructed the DOJ to stop defending Section Three of DOMA and its constitutionality in related cases, including the upcoming *Windsor* and *Hollingsworth* cases.⁹³ The letter essentially offered Congress an opportunity to join, participate, and defend in the litigation of cases involving Section Three of DOMA as it saw fit.⁹⁴

With the Executive Branch calling Section Three into doubt but not yet being held unconstitutional by the Judicial Branch, the question was, what effect, if any, would this have for same-sex married couples in immigration cases? At first, many believed the cases of same-sex married couples would be held in abeyance until there was a final decision on the constitutionality of Section Three of DOMA.⁹⁵ Unfortunately, this point was moot because Section Three continued to be enforced even when the DOJ was no longer defending claims arising under DOMA.⁹⁶ Essentially, while the Obama Administration shifted policy, there was no immediately visible change in the treatment of those affected by Section Three of DOMA.

In advising clients, some immigration attorneys advocated that same-sex couples who were or were not in removal proceedings get married, hoping their marriage would be beneficial for their cases either at the present or in the future.⁹⁷ However, other same-sex couples were ad-

90. See Statement of the Att’y Gen., *supra* note 88 (contrasting the President’s opposition to DOMA with the DOJ’s decision to defend).

91. *Id.*

92. See generally *id.* (noting Attorney General Holder notified members of Congress of developments regarding DOMA).

93. *Id.*

94. See *id.* (stating “[t]he Department will also work closely with the courts to ensure that Congress has a full and fair opportunity to participate in pending litigation”).

95. See Victoria Nielson, Am. Immigration Lawyers Assoc., *What Does the Department of Justice Defense of Marriage Act (DOMA) Announcement Mean for Immigration Cases*, Mar. 31, 2011, at 3, AILA InfoNet Doc. No. 11033160, available at <http://www.aila.org> (giving DOMA’s background).

96. See Statement of the Att’y Gen., *supra* note 88 (stating section Three would still be enforced).

97. Nielson, *supra* note 95 (noting section Three’s continued enforcement).

vised against marrying, especially if one individual possessed a non-immigrant visa and was required to demonstrate a lack of immigrant intent under INA § 214(b).⁹⁸

The general advice given to the majority of married same-sex couples was to avoid filing an I-130 petition or any affirmative applications, because the application would be denied and the applicant would be in danger of being placed in removal proceedings.⁹⁹ Due to the confusion following the DOJ's announcement on February 23, 2011, the American Immigration Lawyers Association (AILA) submitted letters to the Executive Office for Immigration Review (EOIR) under the DOJ, as well as the USCIS, in an attempt to determine the continued viability of Section Three of DOMA and its application in immigration cases.¹⁰⁰

On April 26, 2011, the Attorney General took the unusual step of vacating the removal order of Paul Wilson Dorman, who was in a same-sex civil union with a U.S. citizen (USC).¹⁰¹ Requesting BIA findings on four issues present in the case, the Attorney General vacated the removal order before the Third Circuit Court of Appeals could decide on the petition for review.¹⁰²

Although this decision prevented Dorman's removal, it did not lead to a shift in policy or procedure for adjudicating immigration cases before USCIS or EOIR.¹⁰³ EOIR's Director stated, "[U]ntil DOMA is repealed or struck down, the [EOIR] will continue to apply DOMA as interpreted in the immigration context[.]" but would exercise discretion in individual

98. *See id.* at 4–5. *See also* INA § 214(b), 8 U.S.C. § 1184(b) (2012) (describing the presumption of immigrant status); VICTORIA NIELSON & AM. IMMIGRATION LAWYER ASSOC. LGBT WORKING GROUP, PRACTICE POINTER: PROSECUTORIAL DISCRETION & LGBT FAMILIES 4 (2012), available at <http://www.immigrationequality.org/wp-content/uploads/2012/01/LGBT-PD-advisory.pdf>.

99. Nielson, *supra* note 95, at 4–5 (listing those who should not currently file an I-130).

100. Letter from Juan P. Osuna, Exec. Dir. for Immigration Review, to Crystal Williams, Exec. Dir. of Am. Immigration Lawyers Ass'n (June 6, 2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*). *See also* Letter from Kelly Ryan, Acting Deputy Assistant Sec'y for Policy to Crystal Williams, Exec. Dir. of Am. Immigration Lawyers Ass'n (June 21, 2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*).

101. *See In re Dorman*, 25 I & N Dec. 485, 485 (A.G. 2011). The specific issues in the case were: "[First,] whether the respondent's same-sex civil union is the equivalent of a marriage under New Jersey law; [second,] whether in the absence of DOMA, a civil union would be the equivalent of a marriage and more specifically a spouse under immigration law; [third,] the impact, if any of respondent's request for cancellation of removal, a discretionary form of relief and [finally,] if respondent does have a qualifying relative, would he meet the legal hardship standard for cancellation of removal." *Id.*

102. AM. IMMIGRATION COUNCIL, *supra* note 60.

103. Osuna, *supra* note 100. *See also* Ryan, *supra* note 100.

cases based on the existence of special circumstances.¹⁰⁴ Similarly, the Acting Deputy Assistant Secretary for Policy of the Department of Homeland Security (DHS), Kelly Ryan, stated, “[U]ntil DOMA is repealed or struck down, the components of the Department of Homeland Security (DHS) are continuing to enforce DOMA[,]” but DHS would also continue to exercise discretion in individual cases.¹⁰⁵

With an increase in litigation on issues presented by DOMA and its continued applicability to other areas of law, it was only a matter of time before a decision was made on the law’s continued viability, especially the viability of Section Three.¹⁰⁶ After *Dorman* and other pending lawsuits challenging DOMA were filed, many practitioners advised undocumented individuals in removal proceedings, who were in same-sex marriages, to request prosecutorial discretion from DHS, request administrative closure, move for a continuance, or try holding their removal cases in abeyance.¹⁰⁷ Several prosecutorial memoranda included information about the consideration of familial relationships, including same-sex married couples and their families.¹⁰⁸ As a result, prosecutorial discretion was exercised favorably in the cases of individuals who were in committed, same-sex relationships, whether the couples were married or not.¹⁰⁹ Some individuals went further by contacting their local congressional representatives for assistance, leading USCIS to defer action for a set amount of time in certain individual cases.¹¹⁰

Another option for undocumented individuals in removal proceedings was requesting a hearing on the merits or remand from the immigration judge for deciding other non-DOMA aspects of an application for relief, such as grounds of inadmissibility or other legal requirements where exist-

104. Osuna, *supra* note 100.

105. Ryan, *supra* note 100.

106. AM. IMMIGRATION COUNCIL, *supra* note 60, at 2.

107. *Id.*

108. See NEILSON & AM. IMMIGRATION LAWYERS ASS’N, *supra* note 98, at 2–3. See generally Memorandum from John Morton, Dir. of U.S. Immigration and Customs Enforcement to All Field Office Dirs., All Special Agents in Charge, All Chief Counsel (June 17, 2011), available at <http://www.aila.org/content/default.aspx?docid=35942> (offering guidance on prosecutorial discretion in immigration cases); Memorandum from Gary Mead, Exec. Assoc. Dir. of U.S. Immigration and Customs Enforcement to All Field Office Dirs., All Chief Counsel, All Special Agents in Charge (Oct. 5, 2013), available at <http://www.immigrationequality.org/wp-content/uploads/2012/11/PD-memo-10-5-2012-2.pdf> (explaining how prosecutorial discretion should apply to “family relationships involving long-term, same-sex partners”).

109. NEILSON & AM. IMMIGRATION LAWYERS ASS’N, *supra* note 98, at 2.

110. Bob Egelko, *DOMA Demise Allows Gay Spouse to Immigrate*, SFGATE (Aug. 21, 2013), <http://www.sfgate.com/bayarea/article/DOMA-demise-allows-gay-spouse-to-immigrate-4751564.php>.

tence of a valid marriage was not dispositive under immigration laws.¹¹¹ However, the continued advice for same-sex married couples was avoiding affirmative applications, such as I-130 petitions, for same-sex spouses.¹¹²

In the nonimmigrant visa context, as early as 2001, the Department of State (DOS) changed the procedure for issuing B-2 visas to cohabitating partners and household members.¹¹³ USCIS also made changes to B-2 visas as applied to changing status to a B-2 visa and extensions of B-2 visa status. These policy changes affected B-2 visas in situations involving cohabitating partners and household members regularly residing with the principal, or affected primary nonimmigrants carrying and maintaining relationships typical of nuclear family members.¹¹⁴ Interestingly, acknowledgement of the term “same-sex married couples” was absent from the policy memorandum and accompanying sections in the *Foreign Affairs Manual*.¹¹⁵

These changes in the federal government’s policies indicated gradual progression in treating same-sex married and unmarried couples as equal to heterosexual couples. President Obama aptly stated, “[N]o country should deny people their rights because of who they love, which is why we must stand up for the rights of gays and lesbians everywhere.”¹¹⁶ Former Secretary of State Hillary Clinton also opined, “[A]ll people deserve to be treated with dignity and have their human rights respected, no matter who they are or whom they love.”¹¹⁷

Additionally, treatment of transsexual applicants and their marriages slowly improved. For example, USCIS reached a general consensus, concluding if a state or local jurisdiction recognized a legal change in gen-

111. NEILSON & AM. IMMIGRATION LAWYERS ASS’N, *supra* note 98.

112. *See* AM. IMMIGRATION COUNCIL, *supra* note 60, at 8.

113. *See* U.S. DEP’T OF STATE, *supra* note 70 (describing the process for nonimmigrant aliens who plan to marry). *See also* Powell Cable, *supra* note 64.

114. Policy Memorandum, U.S. Citizenship and Immigration Servs., *Changes to B-2 Status and Extensions of B-2 Status for Cohabiting Partners and Other Nonimmigrant Household Members; Revisions to Adjudicator’s Field Manual (AFM) Chapters 30.2 and 30.3; AFM Update AD11-27, PM-602-0045* (Aug. 17, 2011), available at http://www.uscis.gov/USCIS/Laws/Memoranda/2011/August/Cohabiting_Partners_PM_08171.pdf; U.S. DEP’T OF STATE, *supra* note 70.

115. *See id.* (referring to absence of the term “same-sex marriage” in the policy memorandum).

116. Press Release, President Barack Obama, Office of the Press Sec’y, International Initiatives to Advance the Human Rights of Lesbian, Gay, Bisexual, and Transgender Persons (Dec. 6, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/12/06/presidential-memorandum-international-initiatives-advance-human-rights-1>.

117. *See* Sec’y of State Hillary Rodham Clinton, Remarks in Recognition of International Human Rights Day at the United Nations in Geneva, (Dec. 6, 2011), transcript available at <http://www.state.gov/secretary/rm/2011/12/178368.html>.

der—thereby making a same-sex marriage a heterosexual marriage—it would be recognized for immigration purposes even if sexual reassignment surgery had not occurred.¹¹⁸

IV. TREATMENT OF SAME-SEX COUPLES AFTER THE U.S. SUPREME COURT DECISIONS IN *UNITED STATES V. WINDSOR* AND *HOLLINGSWORTH V. PERRY* IN THE IMMIGRATION CONTEXT

The premise behind *Windsor* was simple: Can the federal government treat married same-sex couples differently from married heterosexual couples under federal law and with regard to federal benefits such as taxation and immigration?¹¹⁹ The simple answer is “no,” because Congress cannot regulate a function (e.g., marriage) that has been traditionally regulated by states, and as such, Section Three of DOMA was deemed unconstitutional.¹²⁰ As Justice Anthony Kennedy aptly stated, “When New York adopted a law to permit same-sex marriage, it sought to eliminate inequality; but DOMA frustrates that objective through a system-wide enactment with no identified connection to any particular area of federal law. DOMA writes inequality into the entire United States Code.”¹²¹

The other case before the U.S. Supreme Court, *Hollingsworth v. Perry*, explored whether individual states can define marriage as a legal union between one man and one woman, as contemplated by Section Two of DOMA.¹²² Unfortunately, petitioners did not have standing to bring the claim before the Court, so no decision was reached on this particular is-

118. Memorandum from U.S. Citizenship and Immigration Servs. on Adjudication of immigration Benefits for Transgender Individuals, PM 602-0061 (Apr. 10, 2012), available at http://www.immigrationequality.org/wp-content/uploads/2012/04/USCIC-guidance-Transgender_FINAL.pdf [hereinafter USCIS Memorandum] (explaining a valid marriage could exist for federal purposes without sexual reassignment evidence).

119. See generally *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675, 2683 (2013) (indicating as a result of DOMA there are over 1,000 federal laws in which same-sex married couples are not defined as married and are thus treated differently than heterosexual married couples).

120. See generally *id.* at ___, 133 S. Ct. at 2696 (2013) (referring generally to the holding that the federal statute violates the Fifth Amendment by treating same-sex marriages as less than heterosexual marriages).

121. Bill Mears, *Key Quotes from Supreme Court Ruling on Defense of Marriage Act*, CNN (June 27, 2013, 8:29 AM), <http://www.cnn.com/2013/06/26/politics/scotus-same-sex-doma-quotes/index.html>.

122. See generally *Hollingsworth v. Perry*, 570 U.S. ___, 133 S. Ct. 2652, 2659 (2013) (illustrating the issue before the Court was whether states are prohibited from declaring marriage as between a man and woman).

sue.¹²³ Thus, Section Two of DOMA is still valid and permits state authority in defining marriage within their own jurisdictions.

While both cases affect the immigration landscape, *Windsor* has more immediately impacted immigration law because all marriages must now be treated equally for federal purposes.¹²⁴ Aside from this direct impact, these decisions will also have secondary impacts on children, siblings, and parents of currently undocumented individuals of same-sex marriages, because once undocumented individuals in same-sex marriages become lawful permanent residents (LPR) of the United States, they will then be able to petition for their siblings and parents once they become United States Citizens.¹²⁵ Furthermore, the LPR or USC individual in the same sex marriage can now file for the undocumented individual's child/ren or stepchild/ren. Child/ren can also be considered derivatives of their undocumented parent's petition, if all legal requirements are met.¹²⁶ Additionally, individuals and their child/ren who were in same-sex marriages and were victims of domestic violence can also apply for lawful resident status under the Violence Against Women Act (VAWA).¹²⁷

However, there are potentially negative consequences of the change in the law, specifically in situations involving undocumented same-sex married couples in which one spouse has an immigrant visa petition filed by a USC or LPR parent. Those individuals once considered unmarried sons or daughters of USCs or LPRs are now considered married, thus subject to different visa categories involving significant visa delays, or, in the case of a petition by an LPR parent, are currently ineligible for an immigrant

123. *See id.* at ___, 133 S. Ct. at 2668 (holding without a showing of standing, the Court could not decide whether states could define marriage as between a man and woman).

124. Press Release, Dep't of Homeland Security, Statement by Secretary of Homeland Security Janet Napolitano on the Supreme Court Ruling on the Defense of Marriage Act (June 26, 2013), available at <http://www.dhs.gov/news/2013/06/26/statement-secretary-homeland-security-janet-napolitano-supreme-court-ruling-defense> (highlighting Secretary Napolitano's perspective on *Windsor* and emphasizing its effect on immigration).

125. *See* Sharita Gruberg, *What the DOMA Decision Means for LGBT Binational Couples*, THINKPROGRESS (June 26, 2013, 10:40 AM), <http://thinkprogress.org/immigration/2013/06/26/2218471/doma-lgbt-binational-couples> (showing indirect benefits of striking parts of DOMA, such as increasing the ability for undocumented individuals to become citizens and in turn become sponsors for their family members).

126. *See id.* (describing how the Senate's reform bill creates a new step in the direction of immigration reform).

127. Sharita Gruberg, *Additional Immigration Benefits are Available for Same-Sex Couples After DOMA Repeal*, CTR. FOR AM. PROGRESS (July 17, 2013), <http://www.americaprogress.org/issues/lgbt/news/2013/07/17/69826/additional-immigration-benefits-are-available-for-same-sex-couples-after-doma-repeal> (explaining the Violence Against Women Act can now cover LGBT couples because it is not limited to defining "spouse" as the opposite gender).

visa because a LPR parent cannot petition for a married son or daughter.¹²⁸ USCIS stated cases such as these will not be treated any differently than similar cases involving the marriages of heterosexual individuals.¹²⁹ LPRs seeking U.S. citizenship by means of naturalization and who are in a same-sex marriages with a USC, have reduced residency requirements—from five to three years, even if during the preceding three years the same-sex couple was only in a marital union.¹³⁰

Similarly, the BIA found because Section Three of DOMA is unconstitutional, it will no longer be an “impediment to the recognition of *lawful* same-sex marriages and spouses under the INA if the marriage is valid under the laws of the State where it was celebrated.”¹³¹ However, the BIA noted same-sex married couples must demonstrate both the marriage’s validity for immigration purposes, meaning a legally valid marriage exists, and the beneficiary qualifies as a spouse of a bona fide marriage according to the INA.¹³² In *Zeleniak*, the BIA stated the *Windsor* decision applies to multiple areas of immigration law, including, but not limited to, fiancé/fiancée visas, immigrant and nonimmigrant visa petitions, asylum cases, removal cases, and various waivers including the provisional unlawful presence waiver of inadmissibility.¹³³

For those individuals with pending removal cases on appeal before the BIA, a motion to remand may be made to present new evidence of the now recognized same-sex marriage.¹³⁴ Individuals issued final orders of removal can move the jurisdictionally appropriate court to reopen or reconsider if all legal requirements have been satisfied.¹³⁵

Based on the BIA and USCIS’s initial responses, same-sex couples began marrying in jurisdictions recognizing and permitting same-sex marriage, even if a state was not their domicile.¹³⁶ At the time of this

128. AM. IMMIGRATION COUNCIL, *supra* note 60, at 14–15 (highlighting necessary procedures now that there is a recognized marriage).

129. *Same-Sex Marriages Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/family/same-sex-marriages> (last visited Jan. 20, 2014).

130. *Id.*

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

132. *Id.*; 8 C.F.R. § 204.2 (2013).

133. *Zeleniak*, 26 I & N Dec. at 159. *See generally* INA § 101(a)(15)(K), 8 U.S.C. § 1101(a)(15)(K) (2012); INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (2012); INA § 203, 8 U.S.C. § 1153 (2012); INA § 204, 8 U.S.C. § 1154 (2012); INA § 204(l), 8 U.S.C. § 1154(l) (2012); INA § 207, 8 U.S.C. § 1157 (2012); INA § 208, 8 U.S.C. § 1158 (2012); INA § 212, 8 U.S.C. § 1182 (2012); INA § 237, 8 U.S.C. § 1227 (2012); INA § 204(A), 8 U.S.C. § 1229(b) (2012); INA § 245, 8 U.S.C. § 1255 (2012).

134. AM. IMMIGRATION COUNCIL, *supra* note 60, at 16.

135. *Id.* at 17.

136. Moni Basu, *Historic Ruling Opens Doors for Immigration for Same-Sex Spouses*, CNN (June 29, 2013, 3:31 PM), <http://www.cnn.com/2013/06/26/politics/scotus-doma-immi>

publication, fifteen states and Washington, D.C. permit same-sex marriages.¹³⁷ Likewise, fifteen countries permit same-sex marriages.¹³⁸ While some individuals were marrying, others were already lawfully married, meeting requirements of a marriage under immigration law. In such cases, visa petitions for the undocumented same-sex spouses were approved, according lawful permanent residence status in the United States.¹³⁹

Aiding this transition, several governmental and non-governmental agencies educated and facilitated immigration law's changing landscape post-*Windsor*. DOS released guidance to all overseas posts on adjudications of petitions or applications filed by same-sex married couples.¹⁴⁰ The *Foreign Affairs Manual* was amended by deleting the section limiting the terms "marriage" and "spouse" to individuals of the opposite sex, specifically expressing the place of celebration controls adjudication regardless of where the same-sex couple is domiciled.¹⁴¹ DOS placed a "Frequently Asked Questions" section on their website to assist same-sex married couples in assessing eligibility standards for visas.¹⁴²

USCIS also issued and posted a "Frequently Asked Questions" section on its website identifying how same-sex marriages will be handled by ad-

gration/index.html (showing the story of one couple who got married as the Supreme Court decision took place, and emphasizing the impact it has on same-sex spouses).

137. Jeanne Sahadi, *Married Same-Sex Couples Gain Equal Tax Benefits*, CNN MONEY (Aug. 29, 2013, 5:04 PM), <http://money.cnn.com/2013/08/29/pf/taxes/same-sex-marriage-tax/index.html>.

138. *Where Can We Marry?*, IMMIGRATION EQUALITY (June 1, 2013), <http://immigrationequality.org/issues/couples-and-families/where-can-we-marry> (last updated Oct. 21, 2013).

139. See Gruberg, *supra* note 127 (describing a case in which a same-sex couple's application for immigration benefits was approved after *Windsor*). See also Egelko, *supra* note 110 (demonstrating one same-sex couple's approval of green card); Ameesha Sampat, *After 21 Years, Same-Sex San Francisco Couple Bradford Wells & Anthony Makk Granted Green Card Through Marriage-Based Petition*, IMMIGRATION EQUALITY (Aug. 27, 2013), <http://immigrationequality.org/2013/08/after-21-years-same-sex-san-francisco-couple-bradford-wellsanthony-makk-granted-green-card-through-marriage-based-petition> (highlighting a binational San Francisco couple's journey to receiving immigration benefits).

140. U.S. Dep't of State Cable from U.S. Sec'y of State John Kerry to all U.S. Consular Offices, Next Steps on DOMA: Guidance for Posts (Aug. 2013), available at http://travel901d.his.com/pdf/Next_Steps_On_DOMA_Guidance_For_Posts_August_2013.pdf [hereinafter Kerry Cable].

141. See *id.* (emphasizing new guidance changes on immigration policies related to consular offices). This guidance applied to nonimmigrant and immigrant visas alike. *Id.*

142. U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, U.S. VISAS FOR SAME-SEX SPOUSES: FREQUENTLY ASKED QUESTIONS FOR POST-DEFENSE OF MARRIAGE ACT, available at <http://travel.state.gov/content/dam/visas/DOMA/DOMA%20FAQs.pdf>.

judicators for applications filed before the agency.¹⁴³ Specifically, and more importantly, USCIS issued guidance on what should be done in cases previously denied based on Section Three of DOMA and provided an e-mail address permitting inquiry from those affected.¹⁴⁴ USCIS stated they will open all concurrently filed applications denied under Section Three of DOMA, including applications for residency and employment authorization.¹⁴⁵

Other agencies such as Customs and Border Protection (CBP) have not released guidance after *Windsor*, maintaining “no definite timeframe on when the guidance will be issued.”¹⁴⁶ The CBP did issue guidance based upon the individuals’ status as Canadian citizens or non-Canadians.¹⁴⁷ For non-Canadian citizens, DOS will initially determine eligibility for the visa sought and CBP will be able to request documentation on the same-sex marriage when an individual seeks admission into the United States.¹⁴⁸ For Canadian citizens seeking admission as a dependent of a nonimmigrant visa holder, the validity of the marriage will be assessed, but until official guidance is issued, “it is anticipated that CBP will not admit a same-sex spouse in a dependent classification” unless prior arrangements with the Chief of the Port of Entry are made by an attorney.¹⁴⁹ Until CBP publishes guidance, these individuals may still seek B-2 classification as a cohabitating partner under the *Foreign Affairs Manual*.¹⁵⁰

V. POTENTIAL POSITIVE AND NEGATIVE ISSUES IN THE FUTURE AFTER *UNITED STATES V. WINDSOR* AND *HOLLINGSWORTH V. PERRY* IN THE IMMIGRATION CONTEXT

While there exists some administrative guidance and case law on these potential issues, this material is based on precedent established in cases involving heterosexual marriages. Because so little applicable guidance exists, new issues will arise requiring new legal guidance, especially when

143. See U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 129 (discussing handling of applications).

144. See *id.* (providing specific guidance on the appropriate steps to take if a visa petition was denied solely based on Section Three of DOMA). An e-mail address is provided, but USCIS is taking specific efforts to identify cases denied on this basis. *Id.*

145. See *id.* (explaining the specific section’s procedures).

146. Jacob Sapochnick, *Same-Sex Visa Lawyer: Post-DOMA Guidance for Same-Sex Couples Seeking Admission to the U.S.*, VISA LAWYER BLOG (Aug 5, 2013), http://www.visalawyerblog.com/2013/08/samesex_visa_lawyer_postdoma_g.html.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*; U.S. DEP’T OF STATE, *supra* note 70.

considering approximately 36,000 same-sex binational couples currently reside in the United States.¹⁵¹

A. *Continued Viability of Section Two of DOMA*

Presently, Section Two of DOMA remains binding law applicable to many same-sex relationships and marriages.¹⁵² The *Windsor* decision does not help all same-sex couples—only those able to legally marry in states or countries permitting same-sex marriage.¹⁵³ Hence, in the case of a same-sex married couple living in California, a spouse with lawful status in the United States is able to petition for his or her undocumented same-sex spouse because *Hollingsworth v. Perry* effectively left untouched the constitutionality of same-sex marriages in California.¹⁵⁴ As *Windsor* Court pointed out, “this opinion and its holding are confined to those lawful marriages.”¹⁵⁵ As of June 27, 2013, thirty-seven states ban same-sex marriage because it is legally permissible to do so under Section Two of DOMA.¹⁵⁶

Section Two of DOMA is the main section permitting a state to not recognize a same-sex marriage conducted in another state or country.¹⁵⁷ Stated another way, if a same-sex couple gets married in California their marriage will not be recognized in Texas. However, this scenario has little to no effect on immigration law because even if the marriage is not recognized by the couple’s domiciliary state, it will be recognized for immigration purposes if it is a bona fide marriage.¹⁵⁸

151. Sampat, *supra* note 139.

152. See *Hollingsworth v. Perry*, 570 U.S. ___, 133 S. Ct. 2652, 2652–53 (2013) (determining the Court could not address Section Two’s constitutionality as the proponents did not first establish standing).

153. Gruberg, *supra* note 125.

154. *Id.*

155. *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675, 2696 (2013); Mears, *supra* note 121.

156. Rachel Rodriguez, ‘What About us?’ Ask Same-Sex Couples Who Still Can’t Marry at Home, CNN (June 27, 2013, 8:04 AM), <http://www.cnn.com/2013/06/26/politics/scotus-same-sex-marriage-irpt/index.html>. But see Kate Zernike & Marc Santora, *Judge Orders New Jersey to Allow Gay Marriage*, N.Y. TIMES, Sept. 27, 2013, http://www.nytimes.com/2013/09/28/nyregion/new-jersey-judge-rules-state-must-allow-gay-marriage.html?_r=0 (reporting a New Jersey judge ruled the state must allow same-sex marriage after *Windsor*).

157. Defense of Marriage Act (DOMA) of 1996, Pub. L. No. 104-199, § 2 110 Stat. 2419 (codified at 28 U.S.C. § 1738C (2012)).

158. *Id.* § 2.

B. *Further Litigation*

While Section Three of DOMA was found unconstitutional, there are individuals who believe Congress still has power “to enact laws on marital rights and privileges[,]” including those in the immigration context.¹⁵⁹ Based on this argument, it is unknown if same-sex married couples will have difficulty in seeking federal benefits, including immigration status benefits. This argument may spark some litigation; on the other hand some in other states argue, based on the *Hollingsworth* and *Windsor* opinions, not permitting same-sex marriages in states violates the U.S. Constitution.¹⁶⁰ Therefore, there may be potential litigation involving Congressional limitations on benefits to same-sex couples and future litigation further granting benefits to same-sex couples.

C. *Marriage-Based Issues*

There are many issues arising with same-sex couples, and there may be many more unanticipated issues as well. This section discusses some issues that will certainly play a role in redefining the scope of immigration law.

i. *Void v. Voidable Marriages*

Some marriages are void, meaning they are invalid at their inception, and some are deemed voidable, meaning they may be invalidated, depending on each state’s laws.¹⁶¹ In this examination of immigration law, a voidable marriage is still valid for immigration purposes, while a void marriage is not.¹⁶² Although some states, including Texas, consider same-sex marriages void or non-marriages, as long as the place of celebration permits same-sex marriage immigration courts will treat the marriages as valid, regardless of the domiciliary state’s definition.¹⁶³

159. 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?_r=0.

160. Zernike & Santora, *supra* note 156.

161. TEX. FAM. CODE ANN. § 6.204 (West 2012).

162. U.S. CITIZENSHIP & IMMIGRATION SERVS., ADJUDICATOR’S FIELD MANUAL, at 21.3, available at <http://www.uscis.gov/sites/default/files/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-3481/0-0-0-4484.html#0-0-0-389>.

163. See TEX. FAM. CODE ANN. § 6.204 (West 2012) (illustrating the Texas Family Code’s provision voiding same-sex marriage); see also TEX. CONST. art. I, § 32 (defining marriage as a union between one man and one woman).

ii. Religious and Common Law Marriages

A religious marriage is recognized for immigration purposes only if it is legally recognized in the state or country in which it was performed.¹⁶⁴ For example, religious marriages in Mexico are not legally recognizable, as the Mexican Constitution allocates sole jurisdiction of marriage to civil authorities.¹⁶⁵ Therefore, in the context of same-sex marriages, determining whether a religious marriage is valid in the state or country of celebration before making any sort of application for immigration benefits, regardless of whether or not the marriage at issue was same-sex, is extremely important. The gender of the individuals in the ceremony is secondary to the initial determination of whether or not the jurisdiction recognizes religious ceremonies as legal marriages.

Likewise, a common law marriage is valid for immigration purposes if it is recognized in the state or country where it was performed, and the couple can meet the individual requirements of the jurisdiction in which the marriage was celebrated.¹⁶⁶ Some jurisdictions permit common law marriages but expressly ban same-sex marriages; therefore issues for same-sex married couples arising in these jurisdictions are: (1) whether the jurisdiction permits common law marriages based upon the jurisdiction's individual requirements; and (2) whether the jurisdiction recognizes same-sex marriages.

iii. Civil Unions and Domestic Partnerships

Even after *Windsor*, civil unions and domestic partnerships are *not* treated as lawful marriages for immigration purposes.¹⁶⁷ It is unclear if civil unions or domestic partnerships will be considered in the future. Individuals immediately affected by the non-inclusion of civil unions or domestic partnerships include children and stepchildren of same-sex couples, who are ineligible for immigrant visas and who risk "aging out" of other potential visa categories.¹⁶⁸ Therefore, individuals currently in a civil union or legal partnership must be cautious before making any affirmative applications before the DHS or DOS.

iv. Transgender Marriages

Prior to *Windsor*, USCIS issued guidance on the treatment of transgender individuals in heterosexual marriages; the consensus has been treating them like any other heterosexual marriage as long as the mar-

164. *In re Alvarez-Quintana*, 14 I & N Dec. 255, 255–56 (BIA 1973).

165. *Id.* at 255.

166. *Id.* at 256.

167. AM. IMMIGRATION COUNCIL, *supra* note 60, at 10.

168. *Id.*

riage meets their individual state's marriage requirements.¹⁶⁹ After *Windsor*, transgender individuals are not subjected to these additional requirements, but it is important to note if individuals consider changing their gender identification so their immigration documents identify their new gender, the USCIS memo and its accompanying guidance should be followed in proving gender change.¹⁷⁰

v. Proving the Existence of a Bona Fide Marriage

Proving a marriage was entered into in good faith may be more problematic for same-sex couples than heterosexual couples because they must obtain evidence of joint assets and liabilities, which may be extremely difficult.¹⁷¹ The difficulty lies for those same-sex married couples domiciled in a state or country that does not recognize their marriage, or worse—criminalizes their marriage.¹⁷² For those reasons, they may be unable to demonstrate joint assets and liabilities necessary in proving the existence of a bona fide marriage as defined by the INA.¹⁷³

vi. Marriage Fraud, Marriage During Removal Proceedings, and Misrepresentations

Immigration officials should not scrutinize same-sex couples' marriages any more than heterosexual couples. However, same-sex married couples should still consider the INA's marriage fraud provisions.¹⁷⁴ An individual who has entered into a marriage to evade immigration laws and was previously denied on that basis will be permanently barred in the future from receiving any sort of immigration visa, regardless of a subsequent marriage's validity or any other type of family-based or employment-based relationship.¹⁷⁵ Moreover, there is a difference between a

169. USCIS Memorandum, *supra* note 118.

170. IMMIGRANT LEGAL RES. CTR., MARRIAGE EQUALITY IN IMMIGRATION LAW: IMMIGRATION BENEFITS FOR SAME-SEX MARRIED COUPLES 1, 3 (2013), available at http://www.ilrc.org/files/documents/marriage_equality_in_immigration_law__immigration_benefits_for_same-sex_married_couples.pdf.

171. AM. IMMIGRATION COUNCIL, *supra* note 60, at 5–6. A petitioner's burden is showing by a preponderance of evidence that the marriage was entered into in good faith. *Id.*

172. *Id.* at 6.

173. *Id.* Unfortunately, evidence of joint assets and liabilities is often unavailable to these couples, and without it, proving bona fide marriage is almost impossible. *Id.*

174. INA § 204(c), 8 U.S.C. § 1154(c) (2012); INA § 204(g), 8 U.S.C. § 1154(g) (2012).

175. See INA § 204(c), 8 U.S.C. § 1154(c) (2012) (outlining example documentation requirements for proving a marriage was entered into in good faith and not for the purpose of legal entry into the country, including documentation showing joint property ownership, a lease showing joint tenancy of a common residence, documents showing commingling of financial resources, and birth certificates of children born to the petitioner and benefici-

couple failing to establish a bona fide marriage versus a finding the marriage to be a sham marriage.¹⁷⁶

Same-sex couples, as well as heterosexual couples, marrying during removal proceedings are subject to some restrictions.¹⁷⁷ A visa petition filed by a USC or LPR based upon a marriage entered into during the pendency of removal proceedings may not be approved until the beneficiary has lived outside of the United States for two years after the marriage.¹⁷⁸ There is an exemption if the married couple can prove the marriage was entered into in good faith, was in accordance with the laws of the place of celebration, was not for the sole purpose of attaining the individual's admission as an immigrant, and finally, was not entered into in exchange for financial consideration.¹⁷⁹

One of the main issues facing same-sex married couples in the future pertains to those individuals holding non-immigrant visas, but were dishonest or untruthful about their same-sex marriages on their nonimmigrant visas applications for fear of the potential denial of their applications.¹⁸⁰ Based upon *Windsor*, if a USC or LPR petitioned for their same-sex spouse, immigration authorities may find the same-sex spouse made prior misrepresentations or committed fraud to attain immigration benefits when they failed to disclose their marriages on non-immigrant applications.¹⁸¹ Fortunately, a waiver is available to same-sex spouses if they can prove they are spouses or son or daughter of a USC or LPR and refusal of admission would result in extreme hardship to these aforementioned relatives.¹⁸²

ary). *See also* AM. IMMIGRATION COUNCIL, *supra* note 60, at 7 (explaining consequences for falsifying a bona fide marriage).

176. *See* 8 C.F.R. § 204.2(a)(1)(iii)(B) (2013) (outlining requirements for establishing a bona fide marriage and prohibiting approval of a visa if the marriage occurred during the removal proceedings); *see also* AM. IMMIGRATION COUNCIL, *supra* note 60, at 7 (describing characteristics of fraudulent marriages).

177. *See* INA § 204(g), 8 U.S.C. § 1154(g) (2012) (restricting marriage petitions when the marriage was entered into during deportation proceedings).

178. INA § 204(g), 8 U.S.C. § 1154(g) (2012).

179. INA § 245(e)(3), 8 U.S.C. § 1255(e)(3) (2012).

180. *See* INA § 214(b), 8 U.S.C. § 1184(d) (2012) (stating approval still rests on whether satisfactory evidence was or can be presented by petitioner). *See also* AM. IMMIGRATION COUNCIL, *supra* note 60, at 8–9 (explaining prior to *Windsor*, same-sex couples were not always truthful about their relationships when interacting with federal agencies).

181. INA § 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C) (2012). *See also* AM. IMMIGRATION COUNCIL, *supra* note 60, at 8–9 (describing how federal agencies may treat such situations post-*Windsor*).

182. INA § 212(i), 8 U.S.C. § 1182 (i) (2012). *See also* AM. IMMIGRATION COUNCIL, *supra* note 60, at 12–13 (discussing available waivers).

vii. Subsequent Separation after Marriage

The BIA has previously ruled subsequent separation after marriage does not undermine a viable marriage, or rather, does not lead to the conclusion it is a fraudulent or sham marriage, as long as the couple can meet the requirements of a bona fide marriage.¹⁸³ Therefore, lawfully married same-sex couples who subsequently separated would fall under this purview, requiring them only to establish the existence of a bona fide marriage.¹⁸⁴

viii. Divorce

A divorce is valid for immigration purposes if it is valid in the jurisdiction in which it is attained.¹⁸⁵ Further, a divorce is valid in the jurisdiction in which the parties to the divorce were domiciled at the time of their divorce, regardless of whether the divorce was finalized there.¹⁸⁶ A divorce must be finalized in the jurisdiction where it was attained before a new marriage can legally exist.¹⁸⁷

For same-sex married couples, if their marriages are not valid where they are domiciled, they may be unable to divorce if needed, even if they originally married in a state or country recognizing their marriages.¹⁸⁸

D. Immigration Reform

There has been some movement toward reforming immigration policies to benefit same-sex couples. This progress is exemplified by the Uniting American Families Act (UAFSA), which would not only permit same-sex couples application for lawful immigration status, but would also recognize civil unions and domestic partnerships as “marriages” for purposes of immigration law.¹⁸⁹ Similarly, a senator introduced an

183. See *In re Boromand*, 17 I & N Dec. 450, 454 (BIA 1980) (stating denial of an adjustment cannot occur simply because of marriage dissolution).

184. *Id.*

185. See *In re Ma*, 15 I & N Dec. 70, 72 (BIA 1974) (listing cases recognizing foreign divorces obtained by absentee non-domiciliaries of the divorcing jurisdiction).

186. See *In re Weaver*, 16 I&N Dec. 730, 733 (BIA 1979) (explaining if a divorce is considered valid in the place in which a person resided at the time of the divorce, then the divorce should be recognized wherever a person goes); *In re Hosseinian*, 19 I & N Dec. 453, 456 (BIA 1987) (holding foreign divorces should not be recognized under California law if both of the parties involved in the proceeding were domiciled in California at the time of the divorce).

187. See *In re Hann*, 18 I & N Dec. 196, 197 (BIA 1982) (asserting a marriage must be dissolved before another is entered into or it will be considered bigamy).

188. AM. IMMIGRATION COUNCIL, *supra* note 60, at 5.

189. See *Policy Update*, *supra* note 56 (advocating for acts granting gay and lesbian citizens ability to apply for legal immigration status).

amendment to the Border Security, Economic Opportunity, and Immigration Modernization Act, allowing same-sex married couples to apply for lawful immigration status.¹⁹⁰ However, this amendment was withdrawn during markup, perhaps anticipating the U.S. Supreme Court's decision.¹⁹¹

Critics argue the *Windsor* decision moots the proposed legislation, but *Windsor* only addressed lawful marriages rather than civil unions and domestic partnerships.¹⁹² The U.S. Supreme Court's failure to define the significance of civil unions and domestic partnerships left these other relationships in immigration "limbo," not included as marriages under the INA but recognized as marriage-equivalents by the jurisdiction where it was attained, eligible for all legal benefits of traditional marriages in their individual states.

The Senate passed the bipartisan Border Security, Economic Opportunity, and Immigration Modernization Act by a vote of sixty-eight to thirty-two, but no further action has been taken on the bill.¹⁹³ The Respect for Marriage Act is a broader, more inclusive piece of legislation, applying not only to immigration law, but also to other federal laws.¹⁹⁴

Passing federal marriage equality legislation could potentially allow more same-sex couples to seek and attain immigration benefits above and beyond those permitted by *Windsor*. For that reason, same-sex couples should continue pushing for comprehensive immigration reform.

E. *More Immigration Petitions and Lawful Residents*

While there are potential issues and problems in the wake of the two aforementioned Supreme Court decisions, there are also many positives outweighing any potential issues. First and foremost, the number of immigration petitions will increase, thus leading to a concomitant increase in LPRs in the United States married to citizens or other LPRs. These individuals will be able to petition for other qualified family members to attain residency.¹⁹⁵ Additionally, more individuals can apply for Cancel-

190. Gruberg, *supra* note 125.

191. *See id.* (stating Leahy withdrew his motion for the amendment).

192. *See Basu, supra* note 136 (citing Leahy withdrew his amendment proposal because the Supreme Court's DOMA decision mooted the provision).

193. LGBT Progress Team, *What's next for LGBT Equality*, CTR. FOR AM. PROGRESS (July 9, 2013), <http://www.americanprogress.org/issues/lgbt/report/2013/07/09/69047/whats-next-for-lgbt-equality>.

194. *See Policy Update, supra* note 56, at 6 (suggesting the Respect for Marriage Act would help civil unions, with domestic partnerships receiving justice through federal laws).

195. *See David North, Some Thoughts on the Immigration Side Effects of the DOMA Decision*, CTR. FOR IMMIGRATION STUDIES (June 26, 2013), <http://www.cis.org/north/some-thoughts-immigration-side-effects-doma-decision> (highlighting an indirect result of an in-

lation of Removal for Non-Lawful Permanent Resident status in immigration courts.¹⁹⁶

F. *Other Federal Benefits that May be Affected by Windsor and May Involve Immigration*

Listing all the federal benefits or programs potentially affected by the *Windsor* decision is a nearly impossible task. This Article presents a brief overview of issues currently arising, but other issues will surface over time depending on how federal agencies implement changes associated with *Windsor*.

While the BIA and immigration agencies now recognize same-sex marriages as “marriages” for immigration purposes, it is unclear how *Windsor* will affect other federal programs and benefits not following the “place of celebration” standard.¹⁹⁷ Hence, different rules may apply for different benefits or programs that rely on the same-sex couples’ domicile and not the “place of celebration” standard resulting in the non-recognition of same-sex marriages.¹⁹⁸

For example, the Department of Defense (DOD) has taken steps to begin extending military benefits to same-sex married couples as it currently does for heterosexual married couples, but it is uncertain when this change will occur and what problems same-sex couples residing in overseas countries not recognizing same-sex marriages will encounter.¹⁹⁹ It is also unknown how veteran benefits will be handled.²⁰⁰

Other examples *Windsor’s* consequences appear in tax and employment law. On taxation issues, recognition of same-sex marriages may have both beneficial and detrimental effects. For example, a same-sex married couple living in California may face higher federal and state in-

creased migration stream—allowing potentially deportable illegals with gay American partners to stay in the United States).

196. *See id.* (noting canceling removal cases can produce no more than 4,000 immigration slots per year).

197. Scott Titshaw, *Immigration for Same-Sex Spouses in a Post-DOMA World*, HUFFINGTON POST (July 26, 2013, 8:45 PM), http://www.huffingtonpost.com/scott-titshaw/immigration-for-same-sex-spouses-in-a-post-doma-world_b_3661282.html.

198. *Id.*

199. Bryant Jordan, *DoD to Move Quickly on Same-Sex Benefits*, MILITARY.COM (June 27, 2013), <http://www.military.com/daily-news/2013/06/27/dod-to-move-quickly-on-same-sex-benefits.html>. *See also* Terry Howell, *Same-Sex Spouses to Get Military Benefits*, MILITARY.COM (June 27, 2013), <http://militaryadvantage.military.com/2013/06/same-sex-spouses-to-get-military-benefits>. Benefits include medical care, access to stores on military bases, including exchanges and commissaries, travel reimbursement, and allowances for housing. *Id.*

200. *See* Howell, *supra* note 199 (explaining the Veterans Administration has not yet commented on the ways in which the Supreme Court’s will affect veterans’ benefits).

come taxes.²⁰¹ However, same-sex married couples can potentially mitigate this impact by jointly filing an amended federal income tax return for the previous three years as a married couple.²⁰² *Windsor's* retroactivity is still uncertain, and it is unclear how the Internal Revenue Service will deal with these impending issues.²⁰³

In employment law, the LGBT community and same-sex married couples face workplace discrimination based on their sexual orientation and gender identity, and unfortunately are not protected by federal law for discriminatory acts committed against them by their employers and fellow employees.²⁰⁴ There have been several attempts at passing legislation protecting the LGBT community in the workplace; however, no federal legislation has passed into law.²⁰⁵

For the first time on November 7, 2013 the Senate passed a bill designed to protect “gay, lesbian and transgender employees from discrimination in the workplace.”²⁰⁶ Speaker of the House John Boehner does not support this bill, and the House of Representatives will not consider the bill this year.²⁰⁷ The Employment Non-Discrimination Act originated in the 1990s—the same bill that President Clinton urged Congress to pass

201. See Egelko, *supra* note 110 (relating how California’s community property laws cause individuals to pay higher federal and state income taxes as a married person).

202. Sahadi, *supra* note 137. See also Stephen Miller, *Now What? Employer Benefits Obligations Post-DOMA*, SOC’Y FOR HUMAN RES. MGMT. (Sept. 23, 2013), <http://www.shrm.org/hrdisciplines/benefits/articles/pages/employer-benefits-doma.aspx> (discussing ways in which the DOMA ruling will affect employers and the benefits and taxes related to their employees).

203. See Miller, *supra* note 202 (discussing ambiguity in whether same-sex couples could claim retroactive benefits).

204. See LGBT PROGRESS TEAM, CTR. FOR AM. PROGRESS, *WHAT’S NEXT FOR LGBT EQUALITY 1–2* (2013), available at <http://www.americanprogress.org/wp-content/uploads/2013/07/NextForLGBT.pdf> (outlining forms of workplace discrimination LGBT persons encounter).

205. See *id.* at 2 (discussing Congress’s continuing failure to pass the Employment Non-Discrimination Act). But see Leigh Ann Caldwell, *Senate Passes LGBT Anti-Discrimination Bill*, CNN (Nov. 8, 2013, 7:46 AM), http://www.cnn.com/2013/11/07/politics/senate-lgbt-workplace-discrimination/index.html?hptHP_t2 (reporting that the United States Senate passed the Employment Non-Discrimination Act in 2013, but will not likely pass in the House of Representatives).

206. Caldwell, *supra* note 205. “For the first time, the U.S. Senate approved legislation that would protect gay, lesbian and transgender employees from discrimination in the workplace.” *Id.*

207. See *id.* (indicating a Republican-led House it is unlikely to take up the bill as Speaker John Boehner believes it will increase frivolous litigation and cost Americans jobs).

when he signed DOMA in 1996—and has recently gained momentum in Congress.²⁰⁸

Additionally, federally regulated employment benefits including employee benefit plans, health benefits including COBRA coverage, pension plans, 401(k) plans, and family and medical leave plans will also be affected by the *Windsor* opinion.²⁰⁹ Currently, precisely anticipating to what extent these benefits will be affected is difficult.

The Social Security Administration is also determining how to distribute benefits in light of *Windsor*, but it has encouraged individuals in same-sex marriages to apply for benefits to prevent any potential losses.²¹⁰ Currently, the Social Security Administration defines marriage based upon the couple's place of domicile rather than place of celebration, the standard in immigration law, potentially affecting individuals living in one of the more than thirty states not recognizing same-sex marriages.²¹¹

The Attorney General, along with other cabinet heads, is reviewing all federal statutes to ensure *Windsor* is “implemented swiftly and smoothly.”²¹² The Obama Administration may issue an executive order “direct[ing] federal agencies, in interpreting federal statutes, to treat the state where the marriage celebration occurred as the governing state for purposes of determining whether the couple is married.”²¹³

VI. CONTINUED FRICTION BETWEEN FEDERAL AND STATE LAWS

Section Two of DOMA, whereby states may invalidate marriages deemed lawful in other states, will continue to cause problems for same-sex couples seeking immigration relief, especially due to increasing applicant mobility.²¹⁴ Guidance for federal agencies in resolving this friction is still evolving. According to USCIS, “[a]s a general matter, the law of the

208. *Id.* See also, President Clinton, *supra* note 12. “I therefore would take this opportunity to urge Congress to pass the Employment Non-Discrimination Act, an act which would extend employment discrimination protections to gays and lesbians in the workplace.” *Id.*

209. Miller, *supra* note 202.

210. Press Release, Soc. Sec. Admin., Update on the Supreme Court Decision Regarding the Defense of Marriage Act and Its Implications for Social Security Benefits, (July 17, 2013), available at www.ssa.gov/pressoffice/pr/doma-pr.html.

211. Miller, *supra* note 202.

212. Kerry Cable, *supra* note 140.

213. Miller, *supra* note 202; see also Rodriguez, *supra* note 156 (speculating President Obama will issue an Executive Order directing federal agencies' interpretation in light of the *Windsor* opinion).

214. See Petition for Review to the Supreme Court of Texas, Brief for Petitioner-Appellant at 4, *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654 (Tex. App.—Dallas 2010, pet. filed Feb. 17, 2011), No. 11-0024 (Tex. argued Nov. 5, 2013). See also *In re G-*, 9 I&N

place where the marriage was celebrated determines whether the marriage is legally valid for immigration purposes . . . The domicile state's laws and policies on same-sex marriages will not bear on whether USCIS will recognize a marriage as valid."²¹⁵

This position markedly differs from USCIS's position published just two months earlier. In July 2013, USCIS's website stated, "Federal immigration agencies historically have considered both the law of the state of residence and the state in which the marriage legally took place. Every case will depend on individual, fact-specific circumstances."²¹⁶ Scholars speculated, "early indications seem to be that USCIS will recognize out-of-state marriages for same-sex couples domiciled in states that merely prohibit and do not outright criminalize same-sex marriage."²¹⁷

For divorce, one must fall within the jurisdiction of that state.²¹⁸ Again, divorce is valid for immigration purposes if it was valid in the jurisdiction in which it was attained.²¹⁹ Furthermore, a void marriage is not valid for immigration purposes whereas a voidable marriage is.²²⁰ Those seeking to obtain certain federal benefits will encounter difficulty if same-sex spouses only have the option of voiding a marriage rather than obtaining a legal divorce.²²¹ In fact, a void marriage has no binding legal effect²²² and may nullify any possible benefit to same-sex spouses, as same-sex marriages are void *ab initio* in many states.²²³

In granting divorce, states must contend with whether individual states must recognize same-sex marriages legally initiated in another state, or alternatively, whether a couple has the right to divorce without the state

Dec. 39, 39 (BIA 1960) (describing the complicated relationship between marriage and immigration).

215. U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 129.

216. See Benjamin P. Edwards, *Welcoming a Post-DOMA World: Same-Sex Spousal Petitions and Other Post-Windsor Immigration Implications*, 47 FAM. L.Q. 173, 183 (2013) (citing USCIS's website, last updated July 2, 2013).

217. *Id.* at 183–84.

218. See *State v. Naylor*, 330 S.W.3d 434, 441 (Tex. App.—Austin 2011, pet. granted Aug. 23, 2013) (recognizing a court must have jurisdiction for a divorce action).

219. See *In re Ma*, 15 I & N Dec. 70 (BIA 1974), available at <http://www.justice.gov/eoir/vll/intdec/vol15/2314.pdf> (noting if a divorce is not valid in the jurisdiction it was attained, it is not valid for immigration purposes).

220. See *id.* (showing if a divorce is not valid in the jurisdiction it was attained, it is not valid for immigration purposes).

221. See, e.g., *In re G-*, 9 I & N Dec. 39, 39 (BIA 1960) (describing a void marriage unsuitable for immigration purposes).

222. See *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 665 (Tex. App.—Dallas 2010, pet. granted Aug. 23, 2013) (declaring same-sex marriages are void as to Texas public policy and have no legal effect).

223. Cf. *G-*, 9 I & N Dec. at 39 (warning of the implications that *ab initio* classification of same-sex marriages will have by drawing a parallel to immigration cases).

recognizing or giving effect to the marriage.²²⁴ The answer to these questions may impact the availability of certain federal benefits, including immigration benefits.

For example, Texas does not recognize marriage between same sex couples.²²⁵ The state is also currently involved in at least two cases determining whether it will allow same-sex spouses to divorce: *In re Marriage of J.B. and H.B.*²²⁶ and *State v. Naylor*.²²⁷ Appellant J.B.'s attorney argued Texas does not have to recognize the marriage to grant the divorce.²²⁸ The marriage is an issue of pleading and neither party denied parties in these cases were actually married in Massachusetts.²²⁹

Justice Guzman inquired into whether the parties would try to avail themselves of Texas Community Property laws once the petition for divorce was entered.²³⁰ J.B. argued the parties entered into an agreement as to the division of property.²³¹ However, Texas courts use the most-significant-relationship test, applying community property principles; therefore, they will likely avail themselves of these protections.²³²

This is important as the Texas legislature also included section 6.204(c) in the Texas Family Code:

(c) The state or an agency or political subdivision of the state may not give effect to a:

- (1) public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction; or
- (2) right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction.²³³

Therefore, the Texas Supreme Court must determine whether allowing same-sex couples the ability to divorce in Texas violates the Texas Family Code.

224. Video recording: Texas Supreme Court Oral Arguments on Cause Numbers 11-0024 and 11-0114 and 11-0222 (Nov. 5, 2013), available at <http://texassupremecourt.media.site.com/mediasite/Play/c90b48105cb6409d9f3b0092ee45ebd61d>.

225. TEX. CONST. art. I, § 32.

226. *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654 (Tex. App.—Dallas 2010, pet. granted).

227. *State v. Naylor*, 330 S.W.3d 434 (Tex. App.—Austin 2011, pet. granted).

228. *J.B. and H.B.*, 326 S.W.3d at 654.

229. Video recording: Texas Supreme Court Oral Arguments, *supra* note 224.

230. *Id.*

231. *Id.*

232. *Id.*

233. TEX. FAM. CODE ANN. § 6.204 (c) (West 2012).

J.B. brought to the Texas Supreme Court's attention Texas is not the first state to hear this issue, as Wyoming had dealt with this issue in 2011.²³⁴ Wyoming held there was a difference between invoking marriage rights and invoking divorce rights.²³⁵ J.B. claimed this was an issue of a "Texas resident, married out of state to a same-sex spouse needing a divorce[.]"²³⁶ and argued Texas treats out-of-state same-sex marriages differently from out-of-state opposite-sex marriages.²³⁷

J.B. further argued marriage voidance is an improper vehicle in dissolving these marriages, as this method targets only a group of people—same-sex married couples—and treats them as second-class citizens.²³⁸ Complicating matters is the legal fiction of voidance does not apply as the marriage is void *ab initio*.²³⁹ Here, these same-sex marriages were already valid *ab initio* and legal in the place of celebration.²⁴⁰

J.B. posited if the Texas Supreme Court affirmed the Texas court of appeals' approach in declining subject matter jurisdiction, the Court will be unconstitutionally abolishing a group's right to be heard in court.²⁴¹ The State argued if the Texas Supreme Court heard the case, it is giving the marriage some effect in violation of Texas law.²⁴² Indeed, petitioning for divorce gives courts the ability to use principles of equity in the dissolution of a marriage.²⁴³ Therefore, the State claimed there was no way to grant a divorce without first giving effect to the marriage.²⁴⁴

The Texas Supreme Court expressed concern over declaring a marriage void as it would be a "wreck of the full faith and credit" among the states, "discredit[ing] or invalidat[ing]" too many decisions made during the marriage.²⁴⁵ The Court asked the State whether voidance of the marriage *ab initio* in Texas would render it void in all other states, including the state of inception.²⁴⁶ The Texas Supreme Court noted at times, Texas courts have recognized other marriages disallowed in Texas such as when those married were too closely related or too young.²⁴⁷

234. Video recording, Texas Supreme Court Oral Arguments, *supra* note 224.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. Video recording, *supra* note 224.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. Video recording, *supra* note 224.

247. *Id.*

Such complex marriage equality issues impact immigration law in nuanced fashion. For example, if an applicant is currently validly married in one state and has since moved to another state, such as Texas, where same-sex marriages are not valid, that person must be able to divorce in order to validly marry the potential petitioner.²⁴⁸ If Texas considers the marriage void *ab initio*, as suggested in the cases discussed above, it does not follow that the marriage is considered void *ab initio* in the state of celebration.²⁴⁹ Therefore, an applicant will likely encounter difficulty proving they are not currently married to another person and may potentially face bigamy issues. Furthermore, if prevented from divorcing in the state they reside, another court does not have jurisdiction to divorce them anywhere else.²⁵⁰

VII. CONCLUSION: CHANGES ON THE HORIZON

The California lower court's ruling in *Hollingsworth* indicates some states are recognizing the right to marry as a basic right and are moving away from the traditional view codified in DOMA.²⁵¹ This view is shared among other states as well, demonstrating a shift in national political opinion.²⁵² Various federal agencies have stated "partners in civil unions would not be extended benefits, including those having to do with immigration"²⁵³

Additional changes are also on the horizon at the federal level. Recently, Senator Dianne Feinstein urged Congress to repeal DOMA completely and reintroduced the Respect for Marriage Act.²⁵⁴ Those supporting the proposed Act argue it will afford all lawfully married couples recognition "under federal law, no matter where they live."²⁵⁵ Designed to repeal DOMA, the Respect for Marriage Act "ensure[s] that

248. See *In re Ma*, 15 I & N Dec. 70, 72 (BIA 1974).

249. See Video recording, *supra* note 224.

250. See *In re Hann*, 18 I & N Dec. 196, 197 (BIA 1982).

251. See Peralta, *supra* note 25 (noting while the court did not address the merits of the case, some states are apparently moving in that direction).

252. See, e.g., Zernike & Santora, *supra* note 156 (detailing a New Jersey ruling that same-sex couples must be allowed to marry).

253. Zernike & Santora, *supra* note 156. "[S]everal federal agencies have since said that partners in civil unions would not be extended benefits, including those having to do with immigration, tax status and health care." *Id.*

254. United States Senator Dianne Feinstein, *Feinstein, Nadler Reintroduce Legislation to Repeal DOMA: Respect for Marriage Act Repeals Discriminatory Defense of Marriage Act* (June 26, 2013), available at <http://www.feinstein.senate.gov/public/index.cfm/press-release?ID=3ec55fb0-2b41-437c-ad4c-02c45a11d871>.

255. *Id.* ("The bill also provides a uniform rule for recognizing couples under federal law, ensuring that all lawfully married couples will be recognized under federal law, the matter where they live.").

every married couple has the certainty that federal benefits and protections will flow from a marriage valid where it was performed, even if that couple moves or travels to another state.”²⁵⁶ This Act does not force state recognition of same-sex marriages.²⁵⁷ It will not force jurisdictions to “celebrate or license a marriage,” but would only afford same-sex married couples the “full range of federal benefits and responsibilities” bestowed upon all “long term, committed relationships.”²⁵⁸ Preventing denial of federal benefits requires alleviating friction between state and federal laws affecting same-sex married couples through clarification by state or federal courts or U.S. Agency advisories.

256. See *Respect for Marriage Act*, HUMAN RIGHTS CAMPAIGN (July 30, 2013), http://www.hrc.org/laws-and-legislation/federal-legislation/respect-for-marriage-act?gclid=CJvRw8_ToLoCFQto7AodGAoAVw. “The Respect for Marriage Act (RMA) repeals DOMA in its entirety and ensures that every married couple has the certainty that federal benefits and protections will flow from a marriage valid where it was performed, even if that couple moves or travels to another state.” *Id.*

257. *Id.* “The bill *does not* require states that have not yet enacted legal protections for same-sex couples to recognize a marriage.” *Id.*

258. *Id.* “The Respect for Marriage Act would provide all married same-sex couples the full range of federal benefits and responsibilities already associated with long-term, committed relationships.” *Id.*