

# READING (INTO) *WINDSOR*: PRESIDENTIAL LEADERSHIP, MARRIAGE EQUALITY, AND IMMIGRATION POLICY

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## ABSTRACT

Following the demise of the federal Defense of Marriage Act in *United States v. Windsor*, the Obama Administration directed a bold, equality-based reading of *Windsor* to immigration law, treating bi-national same-sex couples the same as opposite-sex couples. This Essay argues that the President's interpretation is both constitutionally and politically sound: Constitutionally, because it comports with the Executive's power to enforce immigration law and to guarantee equal protection under the law; and politically, because it reflects the current, increasingly tolerant view of marriage equality. Though still in its infancy, President Obama's policy of treating same-sex beneficiary petitions generally the same as opposite-sex ones is a model of presidential leadership on what would otherwise be a controversial issue. While some might be concerned that the executive branch is overstepping its bounds by creating a *de facto* national immigration policy in the absence of specific congressional fiat and in the midst of a robust national debate over marriage equality, President Obama's directive embraces the promise of integrative egalitarianism, the

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hallmark of our post-*Brown* equality jurisprudence, by setting forth an inclusive, uniform federal policy that enhances, rather than diminishes, equality for all.

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#### I. INTRODUCTION: APPLYING *WINDSOR* TO IMMIGRATION LAW

“It was just kind of a shock, like winning the lottery . . . . The amazing overwhelming fact is that *the government said yes*, and my husband and I can live in the country we chose and we love and want to stay in.”

– Julian Marsh<sup>1</sup>

American Julian Marsh was understandably ecstatic when he learned

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<sup>1</sup> Julia Preston, *Gay Married Man in Florida Is Approved for Green Card*, N.Y. TIMES, June 30, 2013, [http://www.nytimes.com/2013/07/01/us/gay-married-man-in-florida-is-approved-for-green-card.html?hp&\\_r=4&](http://www.nytimes.com/2013/07/01/us/gay-married-man-in-florida-is-approved-for-green-card.html?hp&_r=4&) (emphasis added).

that his Bulgarian spouse, Traian Popov, would receive a permanent resident card after the Supreme Court, in *United States v. Windsor*, ruled unconstitutional the federal Defense of Marriage Act's (DOMA)<sup>2</sup> definition of marriage, which precluded same-sex unions.<sup>3</sup> But in praising the "government" for approving his petition, which specific branch or level of government was the object of Mr. Marsh's gratitude? Was it the Supreme Court, the immigration service, or perhaps the State of New York which issued the marriage license? Most immediately, Marsh was likely grateful to the U.S. Citizenship and Immigration Services (USCIS), the executive agency responsible for approving the family-based petition.<sup>4</sup>

Ultimately though, Mr. Marsh should thank President Obama, who directed all federal agencies to expeditiously implement *Windsor* now that the national definition of marriage is no longer limited to unions between husbands and wives.<sup>5</sup> President Obama appeared to read *Windsor* broadly, as a signal to treat same-sex and opposite-sex marriages equally under the law,<sup>6</sup> and to carry out that mandate in federal immigration policy. Following the USCIS's lead,<sup>7</sup> the State Department now recognizes same-

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<sup>2</sup> Defense of Marriage Act § 3, 1 U.S.C. § 7 (1996).

<sup>3</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013).

<sup>4</sup> See generally *USCIS Policy Manual*, U.S. CITIZENSHIP & IMMIGR. SERVS. 203–21 (Sept. 30, 2013), <http://www.uscis.gov/policymanual/PDF/PolicyManual.pdf> (asserting that the USCIS has the authority to grant petitions for spouses of U.S. citizens).

<sup>5</sup> Quoting then Secretary of Homeland Security Janet Napolitano, the USCIS website notes that:

After last week's decision by the Supreme Court holding that Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional, President Obama directed federal departments to ensure the decision and its implication for federal benefits for same-sex legally married couples are implemented swiftly and smoothly. To that end, effective immediately, I have directed U.S. Citizenship and Immigration Services (USCIS) to review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse.

*Same-Sex Marriages*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/family/same-sex-marriages> (last visited Nov. 12, 2013) (quoting *Statement by Secretary of Homeland Security Janet Napolitano on the Implementation of the Supreme Court Ruling on the Defense of Marriage Act*, U.S. DEP'T OF HOMELAND SEC. (July 1, 2013), <http://www.dhs.gov/news/2013/07/01/statement-secretary-homeland-security-janet-napolitano-implementation-supreme-court>).

<sup>6</sup> Interestingly, the Obama Administration has yet to treat same-sex "domestic partnerships" or "civil unions" in the same light as same-sex "marriages" even within immigration law. For a strong argument in favor of such treatment, see Scott C. Titshaw, *Revisiting the Meaning of Marriage: Immigration for Same-Sex Spouses in a Post-Windsor World*, 66 VAND. L. REV. EN BANC 167, 176 (2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2322161](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322161).

<sup>7</sup> *Same-Sex Marriages*, *supra* note 5

sex marriages for immigration purposes so long as the marriage is valid under the laws of the state where it took place.<sup>8</sup> Similarly, in *Matter of Zeleniak*, the Board of Immigration Appeals approved this “place-of-celebration” marriage rule by legally recognizing the Vermont wedding of a same-sex couple that now resides in New Jersey, a non-marriage equality state.<sup>9</sup> Although the Department of Homeland Security (DHS), which oversees the USCIS, does not claim that the laws of a couple’s place of residence never matter,<sup>10</sup> it appears that exceptions will be few and far between.

Judging from the enthusiastic responses from Mr. Marsh and many other proponents of same-sex marriage, President Obama’s decision to expeditiously implement *Windsor* seemed to be a smart *political* move, but was it the *constitutionally* correct one, as applied to immigration law?

Unlike Mr. Marsh’s avidity for President Obama’s broad interpretation of *Windsor*, the legal blogosphere’s response was mixed. Former U.S. Attorney General Alberto Gonzales and Professor David Strange contended that *Windsor* did nothing to alter U.S. immigration law, which, notwithstanding DOMA, had previously been interpreted as limiting marriage benefits to opposite-sex partners.<sup>11</sup> Edith Windsor’s counsel, Roberta A. Kaplan, on the other hand, opined that the Immigration and Nationality Act (INA) only prohibits fraudulent

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(“Q3: My spouse and I were married in a U.S. state or a foreign country that recognizes same-sex marriage, but we live in a state that does not. Can I file an immigrant visa petition for my spouse? . . . A3: Yes. As a general matter, the law of the place where the marriage was celebrated determines whether the marriage is legally valid for immigration purposes. Just as [the] USCIS applies all relevant laws to determine the validity of an opposite-sex marriage, we will apply all relevant laws to determine the validity of a same-sex marriage.”).

<sup>8</sup> *U.S. Visas for Same-Sex Spouses: FAQs for Post-Defense of Marriage Act*, U.S. DEP’T OF ST., [http://travel.state.gov/visa/frvi/frvi\\_6036.html](http://travel.state.gov/visa/frvi/frvi_6036.html) (last visited Nov. 12, 2013).

<sup>9</sup> *Matter of Zeleniak*, 26 I. & N. Dec. 158, 160 (B.I.A. 2013).

<sup>10</sup> *Implementation of the Supreme Court Ruling on the Defense of Marriage Act*, U.S. DEP’T OF HOMELAND SEC., <http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act> (last visited Nov. 12, 2013) (“In evaluating the petition, as a general matter, [the] USCIS looks to the law of the place where the marriage took place when determining whether it is valid for immigration law purposes. That general rule is subject to some limited exceptions under which federal immigration agencies historically have considered the law of the state of residence in addition to the law of the state of celebration of the marriage. Whether those exceptions apply may depend on individual, fact-specific circumstances. If necessary, we may provide further guidance on this question going forward.”).

<sup>11</sup> *Adams v. Howerton*, 673 F.2d 1036, 1040–41 (9th Cir. 1982); Alberto R. Gonzales & David N. Strange, Op-Ed., *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> (addressing the relevance of *Adams*).

marriages and does not explicitly bar bi-national same-sex couples from seeking benefits.<sup>12</sup> Similarly, Dean Kevin Johnson noted that “[i]t would be far simpler for Congress to expressly recognize gay marriage in the [INA].”<sup>13</sup>

This Essay argues that President Obama’s interpretation of *Windsor*’s application to immigration law is both constitutionally and politically sound: Constitutionally, because it comports with the Executive’s power to enforce immigration law<sup>14</sup> and to guarantee equal protection under the law;<sup>15</sup> and politically, because it reflects the current, increasingly tolerant view of marriage equality.<sup>16</sup> President Obama’s leadership on this issue provides a model for future executive action and reflects well on a presidency sometimes criticized for its failure to adequately address the plight of gay individuals.<sup>17</sup>

This Essay proceeds in three parts. Part II surveys the legal landscape prior to the *Windsor* decision, noting how both the federal courts and

<sup>12</sup> See Roberta A. Kaplan, Letter to the Editor, *Marriage and Immigration*, N.Y. TIMES, July 19, 2013, <http://www.nytimes.com/2013/07/20/opinion/marriage-and-immigration.html>.

<sup>13</sup> Leslie Berestein Rojas, *DOMA Ruling a Victory for Bi-national Couples, but Legal Questions Remain*, 89.33 KPCC S. CAL. PUB. RADIO: MULTI-AMERICAN (June 26, 2013, 11:27 AM), <http://www.scp.org/blogs/multiamerican/2013/06/26/14103/doma-ruling-a-victory-for-bi-national-couples-but>.

<sup>14</sup> See generally Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009) (discussing the President’s asymmetric powers in immigration policy).

<sup>15</sup> See The Executive Branch, THE WHITE HOUSE, <http://www.whitehouse.gov/our-government/executive-branch> (last visited Nov. 16, 2013) (supporting the proposition that the President can guarantee equal protection under the law through his responsibilities to carry out the laws passed by Congress).

<sup>16</sup> Lydia Saad, *In U.S., 52% Back Law to Legalize Gay Marriage in 50 States*, GALLUP (July 29, 2013), <http://www.gallup.com/poll/163730/back-law-legalize-gay-marriage-states.aspx>. Personally, I would prefer that the government simply grant civil unions to all. Andrew F. March, *Civil Unions for All! Why the Government Should Get Out of the ‘Marriage’ Business*, HUFFPOST RELIGION BLOG (Sept. 13, 2010, 4:26 PM), [http://www.huffingtonpost.com/andrew-f-march/civil-unions-for-all-why\\_b\\_711858.html](http://www.huffingtonpost.com/andrew-f-march/civil-unions-for-all-why_b_711858.html). Pragmatically, however, I doubt that most traditional opposite-sex couples would be willing to give up their membership in the marriage club, so I think it will be easier to simply allow gay couples to marry. Cf. Victor C. Romero, *An “Other” Christian Perspective on Lawrence v. Texas*, 45 J. CATH. LEGAL STUD. 115, 127–28 (2006) (arguing that Christians should embrace gay marriage laws as consistent with Jesus’s love ethic).

<sup>17</sup> For a brief timeline outlining the evolution of President Obama’s views on same-sex marriage, see Zack Ford, *TIMELINE: Tracking Barack Obama’s Position on Marriage Equality*, THINK PROGRESS (June 22, 2011, 1:20 PM), <http://thinkprogress.org/lgbt/2011/06/22/250931/timeline-barack-obama-marriage-equality/>; Nick Corasaniti & Josh Williams, *Obama’s Evolution on Same-Sex Marriage*, N.Y. TIMES (May 9, 2012), <http://www.nytimes.com/interactive/2012/05/10/us/politics/20120510-obama.html>.

Congress precluded same-sex couples from enjoying the same immigration benefits as opposite-sex couples. Notwithstanding the recognition of same-sex marriages by some foreign nations and U.S. states, *Adams v. Howerton*<sup>18</sup> and DOMA<sup>19</sup> acted as bars to federal approval of immigration petitions based on same-sex marriages. Part III examines *Windsor* in depth—what it did and did not say—along with its companion case: *Hollingsworth v. Perry*.<sup>20</sup> Taken together, *Windsor* and *Hollingsworth* allow the executive branch to read these cases broadly. This is especially true in the realm of immigration law, where the federal government generally recognizes marriages based on where they took place rather than where the couple resides.

Part IV takes a closer look at President Obama's application of *Windsor* to immigration policy. Though still in its infancy, President Obama's policy of treating same-sex beneficiary petitions generally the same as opposite-sex beneficiary petitions is a model of presidential leadership on what would otherwise be a controversial issue. While some might be concerned that the executive branch is overstepping its bounds by creating a de facto national immigration policy in the absence of specific congressional directive and in the midst of a robust national debate over marriage equality, President Obama's policy is both constitutionally and politically sound as it embraces the promise of integrative egalitarianism, the hallmark of our post-*Brown* equality jurisprudence.

## II. THE IMMIGRATION LAW WORLD PRE-*WINDSOR*: *ADAMS* AND *DOMA*

Those opposed to President Obama's broad reading of *Windsor* are accurate in describing pre-*Windsor* U.S. immigration law: it only recognized opposite-sex marriages.<sup>21</sup> Two legal sources—one judicial, one legislative—support this conclusion: the Ninth Circuit's thirty-year-old opinion in *Adams v. Howerton* and DOMA, enacted more than fifteen years ago. This part discusses both *Adams* and DOMA, and describes several legal workarounds within immigration law that allowed for claims benefitting sexual minorities outside the context of marriage.

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<sup>18</sup> *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982).

<sup>19</sup> Defense of Marriage Act § 3, 1 U.S.C. § 7 (1996).

<sup>20</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

<sup>21</sup> *Gonzales & Strange*, *supra* note 11.

## A. ADAMS V. HOWERTON, 1982

U.S. citizen Richard Adams and Australian national Anthony Sullivan's marriage began as a whirlwind romance over forty years ago.<sup>22</sup> They met in Los Angeles while Sullivan was visiting the United States on a tourist visa.<sup>23</sup> After falling in love, they tried to find ways for Sullivan to legally remain in the country, as his visa was set to expire.<sup>24</sup> Upon learning of a Boulder County clerk who had recently issued marriage licenses to same-sex couples, Adams and Sullivan traveled to Boulder, Colorado and got married.<sup>25</sup> Adams then petitioned the Immigration and Naturalization Service (INS)<sup>26</sup>—the USCIS's predecessor agency—to grant Sullivan permanent residency as a citizen's spouse.<sup>27</sup> Although nothing in the INA explicitly limits spousal benefits to opposite-sex couples,<sup>28</sup> the local INS branch denied the petition in an official letter callously stating, "You have failed to establish that a bona fide marital relationship can exist between two faggots."<sup>29</sup>

The Board of Immigration Appeals (BIA) upheld the INS's decision, and Adams and Sullivan sought judicial review in federal district court, which entered judgment for the INS.<sup>30</sup> On appeal, the Ninth Circuit Court of Appeals affirmed the district court's ruling in favor of the INS on the basis of agency deference, statutory interpretation, and constitutional

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<sup>22</sup> These facts were taken from a New York Times obituary of Adams, who passed away in December 2012. Margalit Fox, *Richard Adams, Same-Sex Spouse Who Sued U.S., Dies at 65*, N.Y. TIMES, Dec. 24, 2012, <http://www.nytimes.com/2012/12/25/us/richard-adams-who-sued-us-after-1975-gay-marriage-dies-at-65.html>.

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

<sup>24</sup> *Id.*

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

<sup>26</sup> The INS was the predecessor agency of the USCIS prior to 2003. For more information on the reorganization of the U.S. immigration bureaucracy following the creation of the Department of Homeland Security, see, e.g., Victor Romero, *Race, Immigration, and the Department of Homeland Security*, 19 ST. JOHN'S J. LEGAL COMMENT. 51 (2004).

<sup>27</sup> *Adams v. Howerton*, 673 F.2d 1036, 1038 (9th Cir. 1982).

<sup>28</sup> Immigration and Nationality Act of 1990 § 201, 8 U.S.C. § 1151(a)–(b) (2006); e.g., 8 U.S.C. § 1151(b)(2)(A)(i) (2009) (mentioning, but not defining, "spouse" under "immediate relatives" section). Interestingly, within the INA's definitional section, the Act also references—but does not define—the terms "spouse," "husband," and "wife," though the primary object of the section appears to be fraud deterrence. See 8 U.S.C. § 1101(a)(35) (2006) ("The term[s] 'spouse', 'wife', or 'husband' do 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.").

<sup>29</sup> Fox, *supra* note 22.

<sup>30</sup> *Adams*, 673 F.2d at 1038.

reasonableness.<sup>31</sup> Without referencing the prejudice underlying the INS's official denial letter or the BIA's affirmance thereof, the panel claimed to accord proper weight to the agency's negative determination.<sup>32</sup> More importantly, the court was independently persuaded that the statute's plain and ordinary meaning contemplated marital unions between men and women only.<sup>33</sup> Applying a most deferential<sup>34</sup> rational basis standard, the court found this statutory reading constitutionally permissible notwithstanding Adams and Sullivan's equal protection challenge:

In effect, Congress has determined that preferential [immigration] status is not warranted for the spouses of homosexual marriages. Perhaps this is because homosexual marriages never produce offspring, because they are not recognized in most, if in any, of the states, or because they violate traditional and often prevailing societal mores. In any event, having found that Congress rationally intended to deny preferential status to the spouses of such marriages, we need not further "probe and test the justifications for the legislative decision."<sup>35</sup>

In the post-*Lochner*<sup>36</sup> tradition of applying minimal scrutiny for socioeconomic legislation,<sup>37</sup> the panel chose not to examine the actual reasons for the law's enactment, speculating instead that Congress's thinking may have been based on what may now be considered antiquated, overbroad notions of differences based on sexual orientation.<sup>38</sup> While it is true that, even today, most states do not recognize same-sex marriage,<sup>39</sup>

<sup>31</sup> See *id.* at 1040–43.

<sup>32</sup> See *id.* at 1040 (“[T]he INS, in carrying out its broad responsibilities, has interpreted the term ‘spouse’ to exclude a person entering a homosexual marriage. While we do accord this construction proper weight, we base our decision primarily on the Act itself.”).

<sup>33</sup> *Id.* at 1040–41 (“We think it unlikely that Congress intended to give homosexual spouses preferential admission treatment under section 201(b) of the Act when, in the very same amendments adding that section, it mandated their exclusion. Reading these provisions together, we can only conclude that Congress intended that only partners in heterosexual marriages be considered spouses under section 201(b).”).

<sup>34</sup> In what Professor Gerald Gunther once famously deemed “rational basis with bite,” the Supreme Court has occasionally struck legislation while purportedly applying a deferential rational basis standard. See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18–20 (1972).

<sup>35</sup> *Adams*, 673 F.2d at 1042–43 (quoting *Fiallo v. Bell*, 430 U.S. 787, 799 (1977)).

<sup>36</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>37</sup> See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (upholding minimum wage legislation benefiting women), *overruling* *Adkins v. Children’s Hosp. of D.C.*, 261 U.S. 525, 562 (1923) (striking federal minimum wage benefiting women).

<sup>38</sup> See *Adams*, 673 F.2d at 1042–43.

<sup>39</sup> *Marriage Equality and Other Relationship Recognition Laws*, HUMAN RIGHTS CAMPAIGN (Oct. 22, 2013), [http://www.hrc.org/files/assets/resources/marriage\\_equality\\_10-](http://www.hrc.org/files/assets/resources/marriage_equality_10-)



many states grant civil unions to same-sex couples,<sup>40</sup> all states allow infertile opposite-sex couples to marry,<sup>41</sup> and an increasing number of individuals believe that allowing same-sex marriages better promotes traditional family unity.<sup>42</sup> Moreover, in the context of criminalizing sodomy, the Supreme Court has questioned the imposition of a majority's morality upon a vulnerable minority group.<sup>43</sup> All this notwithstanding, the *Adams* court's views reflected the prevailing norms of the time, and it came as no surprise that the Supreme Court summarily denied certiorari.<sup>44</sup>

Following the Ninth Circuit's ruling, Sullivan was unable to extend his stay or claim asylum, and the INS ordered that he be deported.<sup>45</sup> Sullivan sought to have his deportation suspended on the grounds that it would cause him and Adams "extreme hardship."<sup>46</sup> He claimed that he would be ostracized due to his sexual orientation and that Adams would be unable to emigrate to Australia because he would not be able to secure gainful employment due to his Filipino heritage.<sup>47</sup> Both the immigration judge and the BIA denied relief.<sup>48</sup> Ruling many years before his newfound reputation as a sympathetic, if conservative, vote for gay rights through his majority opinions in *Romer v. Evans*,<sup>49</sup> *Lawrence v. Texas*,<sup>50</sup> and now, *United States v. Windsor*,<sup>51</sup> then-Circuit Judge Anthony Kennedy

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<sup>40</sup> *Id.*

<sup>41</sup> *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting) ("[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples . . . ? Surely not the encouragement of procreation, since the sterile . . . are allowed to marry.").

<sup>42</sup> Adrienne Wilson, Note, *Same-Sex Marriage: A Review*, 17 WM. MITCHELL L. REV. 539, 545 (1991) ("Allowing same-sex marriages would, arguably, promote the same social goals strived for in heterosexual marriages."). For an important, comprehensive philosophical argument for same-sex marriage recognition, see generally CARLOS A. BALL, *THE MORALITY OF GAY RIGHTS* (2003) (arguing that society has a moral obligation to recognize gay rights and that supporters of gay rights should make explicitly moral arguments).

<sup>43</sup> See *Lawrence*, 539 U.S. at 571 ("Our obligation is to define the liberty of all, not to mandate our own moral code." (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992))).

<sup>44</sup> *Adams v. Howerton*, 458 U.S. 1111 (1982).

<sup>45</sup> *Sullivan v. INS*, 772 F.2d 609, 609 (9th Cir. 1985).

<sup>46</sup> *Id.* at 610.

<sup>47</sup> *Id.* at 609–12.

<sup>48</sup> *Id.* at 611.

<sup>49</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>50</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>51</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013).

upheld the BIA's decision as within its sphere of agency discretion.<sup>52</sup> He deferred to the immigration authorities' conclusion that Sullivan's and Adams's suffering would be indistinguishable from that of other families facing deportation, noting that "[d]eportation rarely occurs without personal distress and emotional hurt."<sup>53</sup>

In contrast, Judge Pregerson wrote a stinging dissent, criticizing the majority for failing to scrutinize how "the BIA distorted or disregarded Sullivan's hardship claims with abstract, generalized statements and failed to evaluate Sullivan's special circumstances realistically."<sup>54</sup> Pregerson distinguished Sullivan's claims from those of other deportees, noting that the BIA failed to take seriously the potential impact of discrimination that both Sullivan and Adams would face in Australia:

The BIA also gave short shrift to Sullivan's assertions of employment difficulty and ostracism by his family and former friends in Australia. The BIA concluded that "[t]he lack of job opportunities or the existence of a lower standard of living in the country of an alien's birth or residence" do not constitute extreme hardship, and that Sullivan's readjustment to life in his native country would be "the type of hardship experienced by most aliens who have spent time abroad." These statements distort Sullivan's contentions. Sullivan did not contend that Australia had "fewer job opportunities" or a "lower standard of living"—but rather that he, as a highly publicized homosexual, would be forced to find employment in a country alleged to be much more intolerant of homosexuals than the United States. Sullivan's readjustment to life in Australia would be quite *contrary* to that of "most aliens." As Sullivan points out, most deported aliens do not return to their native country as virtual outcasts from their friends and family. And, most deported aliens can return to their native lands with their closest companions. But Sullivan would be precluded from doing so because Adams allegedly would not be permitted to emigrate to Australia.<sup>55</sup>

Taken together, *Adams* and *Sullivan* shut the door to noncitizen same-sex spouses of U.S. citizens gaining permanent residency in the United States. *Adams* affirmed the BIA's position that noncitizen same-sex partners—even if they are spouses of U.S. citizens under state law—could not receive permanent resident status in the same way that opposite-

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<sup>52</sup> *Sullivan v. INS*, 772 F.2d 609, 611 (9th Cir. 1985).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 612 (Pregerson, J., dissenting).

<sup>55</sup> *Id.* (Pregerson, J., dissenting) (emphasis in original).

sex spouses could.<sup>56</sup> Further, per *Sullivan*, a valid same-sex marriage would not prevent the deportation of a noncitizen same-sex spouse.<sup>57</sup> Aided by the Supreme Court's denial of certiorari,<sup>58</sup> the Ninth Circuit's extreme deference to the BIA's position nationalized the disparate treatment of bi-national same-sex partners and universalized a second-class status for all noncitizen same-sex partners of U.S. citizens.

### B. DOMA, 1996

By the early 1990s, a few states began to seriously debate the merits of treating same-sex couples the same as opposite-sex couples.<sup>59</sup> In 1993, Hawaii's Supreme Court became the first court to recognize that the state's failure to accord marriage benefits to same-sex couples violated equal protection principles.<sup>60</sup> Three years later, the Circuit Court of Hawaii held that same-sex couples were entitled to marriage licenses.<sup>61</sup> This decision triggered a voter backlash,<sup>62</sup> and the state constitution was amended in 1998 to bar same-sex marriages.<sup>63</sup> In between these events, and in reaction to these developments, the U.S. Congress passed, and President Clinton signed, DOMA into law, limiting all federal definitions of marriage to unions between opposite-sex couples.<sup>64</sup> Any doubts about the national impact of *Adams* and *Sullivan* were dispelled by DOMA. As Congress's final word on the issue, DOMA made clear that all federal law—including immigration law—would recognize only opposite-sex marriages, thereby precluding U.S. citizens, like Adams, from petitioning for their same-sex spouses to permanently remain in the United States.

### C. PRE-*WINDSOR* IMMIGRATION WORKAROUNDS AND THE GROUNDWORK FOR BROADER CONSTITUTIONAL ACCEPTANCE OF GAY RIGHTS

Although spousal benefits were not available to bi-national same-sex

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<sup>56</sup> See *Adams v. Howerton*, 458 U.S. 1040 (1982).

<sup>57</sup> *Sullivan*, 772 F.2d at 611.

<sup>58</sup> *Adams*, 458 U.S. at 1111.

<sup>59</sup> E.g., *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

<sup>60</sup> *Id.* at 67.

<sup>61</sup> *Baehr v. Miike*, CIV. No. 91-1394, 1996 WL 694235, at \*22 (Haw. Cir. Ct., Dec. 3, 1996).

<sup>62</sup> *Baehr v. Miike*, LAMBDA LEGAL, <http://www.lambdalegal.org/in-court/cases/baehr-v-miike> (last visited Nov. 12, 2013).

<sup>63</sup> *Id.*

<sup>64</sup> Defense of Marriage Act § 3, 1 U.S.C. § 7 (1996).

couples, there were other ways for noncitizen spouses to immigrate to the United States, namely—as employees,<sup>65</sup> as children,<sup>66</sup> as asylees<sup>67</sup> or refugees,<sup>68</sup> or via the Diversity Immigrant Visa Program if they were from eligible countries.<sup>69</sup> Homosexuality, like heterosexuality, is irrelevant to many of these categories.<sup>70</sup> For example, sexual orientation is irrelevant to whether one can be an excellent employee at Google or Cisco. Also, regardless of sexual orientation, people are free to enter the diversity lottery so long as they meet the eligibility requirements.

Sexual orientation, however, is relevant when a person seeks asylum or refugee status. Gay and lesbian people may apply for asylum or refugee status based on a well-founded fear of persecution in their home country due to their sexual orientation.<sup>71</sup> In *In re Toboso-Alfonso*, the BIA recognized that one's status as a sexual minority qualified him for "membership in a particular social group,"<sup>72</sup> one of the enumerated bases for seeking asylum or refugee status under the INA.<sup>73</sup> In *Pitcherskaia v. INS*, the U.S. Court of Appeals for the Ninth Circuit ruled that a homosexual woman who provided evidence that her government targeted her because of her sexual orientation was eligible for a discretionary grant of asylum, even though the government was not motivated to punish or inflict harm.<sup>74</sup> Later, in *Karouni v. Gonzales*, however, the court clarified

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<sup>65</sup> *Permanent Workers*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 10, 2010), <http://www.uscis.gov/working-united-states/permanent-workers>.

<sup>66</sup> *Citizenship Through Parents*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 22, 2013), <http://www.uscis.gov/us-citizenship/citizenship-through-parents>.

<sup>67</sup> *Asylum*, U.S. CITIZENSHIP & IMMIGR. SERVS. (June 18, 2013), <http://www.uscis.gov/humanitarian/refugees-asylum/asylum>.

<sup>68</sup> *Refugees*, U.S. CITIZENSHIP & IMMIGR. SERVS. (April 11, 2013), <http://www.uscis.gov/humanitarian/refugees-asylum/refugees>.

<sup>69</sup> *Green Card Through the Diversity Immigrant Visa Program*, U.S. CITIZENSHIP & IMMIGR. SERVS. (April 30, 2012), <http://www.uscis.gov/green-card/other-ways-get-green-card/green-card-through-diversity-immigration-visa-program/green-card-through-diversity-immigrant-visa-program>. See Sara E. Farber, Note, *Presidential Promises and the Uniting American Families Act: Bringing Same-Sex Immigration Rights to the United States*, 30 B.C. THIRD WORLD L.J. 329, 336–40 (2010), for a thorough discussion of the benefits, strengths, and weaknesses of the alternatives to spousal benefits for immigrating to the United States.

<sup>70</sup> See Farber, *supra* note 69.

<sup>71</sup> See *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 822 (B.I.A. 1990); *Asylum*, *supra* note 67; *Refugees*, *supra* note 68.

<sup>72</sup> *In re Toboso-Alfonso*, 20 I. & N. Dec. at 822.

<sup>73</sup> *Asylum*, *supra* note 67; *Refugees*, *supra* note 68.

<sup>74</sup> *Pitcherskaia v. INS*, 118 F.3d 641, 644, 647 (9th Cir. 1997). The BIA majority concluded that Pitcherskaia was not persecuted and did not have a well-founded fear of persecution because her involuntary treatment and confinement were not intended to punish her, but rather to cure

that a foreign government could choose to criminalize homosexual conduct.<sup>75</sup>

Outside the realm of immigration law, the conservative Supreme Court occasionally evinced surprising openness to gay rights claims. Two cases in particular—*Romer v. Evans*<sup>76</sup> and *Lawrence v. Texas*<sup>77</sup>—stand out. In *Romer v. Evans*, the Supreme Court struck down a Colorado constitutional amendment that outlawed equal rights “legislation, executive or judicial action at any level of state or local government” designed to benefit sexual minorities.<sup>78</sup> Finding that the sweeping breadth of the amendment belied its alleged interests in protecting landlord and employer rights and in conserving government resources, the Supreme Court viewed the amendment as a special disability imposed upon a vulnerable minority, which was therefore, irrational:

We find nothing special in the protections [the amendment] withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.<sup>79</sup>

Writing for the majority, Justice Kennedy ruled that the amendment failed even rational basis review because it evinced “a bare . . . desire to harm a politically unpopular group.”<sup>80</sup>

A mere seven years later, in *Lawrence v. Texas*, the Supreme Court found a Texas law criminalizing private, homosexual sodomy unconstitutional.<sup>81</sup> Although written neutrally to apply to both opposite-sex and same-sex sodomy, the state applied the law against a gay couple, leading the Court to reconsider its conservative anti-gay rights position in *Bowers v. Hardwick*.<sup>82</sup> Again writing for the majority, Justice Kennedy opined that states violate due process when they criminalize private,

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her of her homosexuality. *Id.* at 646.

<sup>75</sup> *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005). This distinction has led Professor Michael Scaperlanda to argue that getting married is an act—not a status—and, therefore, does not qualify for immigrant benefit recognition. See generally Michael A. Scaperlanda, *Kulturkampf in the Backwaters: Homosexuality and Immigration Law*, 11 WIDENER J. PUB. L. 475 (2002).

<sup>76</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>77</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>78</sup> *Romer*, 517 U.S. at 623–24.

<sup>79</sup> *Id.* at 631.

<sup>80</sup> *Id.* at 634–35 (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

<sup>81</sup> *Lawrence*, 539 U.S. at 578.

<sup>82</sup> *Id.*

consensual adult sexual activity, including same-sex sexual activity.<sup>83</sup> The *Lawrence* decision made it so all individuals were free to engage in consensual sodomy in the privacy of their own homes, and overruled *Bowers v. Hardwick*.<sup>84</sup>

Though correctly hailed by advocates as important gay rights opinions,<sup>85</sup> the outcomes in *Romer* and *Lawrence* are not that striking because the laws in both cases were particularly unjustifiable. Laws that deny an individual the right to petition the government for political change in the same way as everyone else (*Romer*) or that throw an individual in jail for engaging in an activity that commonly takes place in homes across the country (*Lawrence*) seem particularly mean-spirited, and as the Court noted, irrational.<sup>86</sup> Still, the conservative Court's acknowledgment that vulnerable groups are constitutionally entitled to equal treatment and a level playing field provided solace to the gay rights community and its supporters.<sup>87</sup>

In short, even as federal immigration law closed the door to bi-national same-sex couples via spousal petitions,<sup>88</sup> permanent resident cards awaited those who could meet sexual orientation-neutral laws for other family and employment categories, as well as those selected through the diversity lottery. Where one's homosexual status—and not activity—became particularly relevant, though, was within claims for asylum and refugee status, where a well-founded fear of persecution for such status in one's home country could be the basis for obtaining permanent residency in the United States. Finally, outside of immigration law, federal courts began to lay the groundwork for a broader constitutional acceptance of gay rights, if not marriage equality.

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* *Bowers v. Hardwick* dealt with a statute that was written neutrally to apply to both opposite-sex and same-sex sodomy, however, the State applied it to just same-sex couples. *Bowers v. Hardwick*, 478 U.S. 186, 188. Hardwick brought suit challenging the constitutionality of the state after being charged with violating the statute but the Supreme Court upheld the statute. *Id.*

<sup>85</sup> Sahil Kapur, *Gay Marriage Supporters Optimistic About Winning Anthony Kennedy's Vote*, TALKING POINTS MEMO (Dec. 14, 2012, 10:05 AM), <http://talkingpointsmemo.com/dc/gay-marriage-supporters-optimistic-about-winning-anthony-kennedy-s-vote>.

<sup>86</sup> *Lawrence*, 539 U.S. at 578.

<sup>87</sup> See Richard Wolf, *Gay Marriage Rulings: Experts Predict What Court Will Do*, USA TODAY (June 9, 2013), <http://www.usatoday.com/story/news/nation/2013/06/09/gay-marriage-rulings/2405423/>.

<sup>88</sup> See *Adams v. Howerton*, 458 U.S. 1040, 1042 (1982).

### III. THE *WINDSOR* CASE (AND ITS SILENT PARTNER, *HOLLINGSWORTH*)

For bi-national same-sex couples, like American Bradford Wells and Australian Anthony John Makk, spousal sponsorship was but a dream before summer 2013.<sup>89</sup> Wells and Makk had wed in Massachusetts, the first state to formally recognize gay marriage,<sup>90</sup> and like Adams and Sullivan, petitioned the immigration authorities for a permanent resident card based on their marriage.<sup>91</sup> Abiding by President Obama's directive to continue to enforce DOMA,<sup>92</sup> the USCIS denied Wells and Makk's petition and ordered that Makk be deported to Australia.<sup>93</sup> Because of sympathetic congressional intervention and a pre-*Windsor* directive to stay deportation proceedings,<sup>94</sup> however, Makk received a temporary reprieve while waiting for the Supreme Court to address DOMA's constitutionality.<sup>95</sup>

#### A. *UNITED STATES V. WINDSOR*

The *Windsor* case was the vehicle to test DOMA's federal ban on

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<sup>89</sup> See Carolyn Lochhead, *S.F. Gay Married Couple Loses Immigration Battle*, SFGATE (Aug. 9, 2011, 4:00 AM), <http://www.sfgate.com/news/article/S-F-gay-married-couple-loses-immigration-battle-2336013.php>.

<sup>90</sup> Rose Arce, *Same-Sex Couples Ready to Make History in Massachusetts*, CNN (May 17, 2004, 4:41 AM), <http://www.cnn.com/2004/LAW/05/17/mass.gay.marriage/>.

<sup>91</sup> *Lochhead*, *supra* note 89.

<sup>92</sup> While President Obama decided that DOMA was unconstitutional and that he would no longer defend it against legal challenges, he nevertheless directed the USCIS and other federal agencies to continue to enforce DOMA. Letter from Eric H. Holder, Jr., U.S. Attorney Gen., to John A. Boehner, Speaker of the U.S. House of Representatives 5 (Feb. 23, 2011) (*available at* [http://metroweekly.com/poliglot/LETTER\\_-\\_BOEHNER.pdf](http://metroweekly.com/poliglot/LETTER_-_BOEHNER.pdf)) [hereinafter Letter from Attorney Gen. Eric Holder].

<sup>93</sup> *Lochhead*, *supra* note 89.

<sup>94</sup> An individual is classified as "low priority" based on all relevant factors, such as the individual's length of presence in the United States, the individual's criminal history, whether the person has a U.S. citizen or permanent resident spouse, and whether the person is the primary caretaker of a person with disability. Memorandum from John Morton, Dir., U.S. Immigration and Customs Enforcement, to all Field Office Directors, all Special Agents in Charge, and all Chief Counsel 4-5 (June 17, 2011) (*available at* <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>). Makk met several of the factors specified in the Memorandum.

<sup>95</sup> Carolyn Lochhead, *Deportation Threat Lifted from S.F. Gay Spouse*, SFGATE (Jan. 5, 2012, 4:00 AM), <http://www.sfgate.com/nation/article/Deportation-threat-lifted-from-S-F-gay-spouse-2442468.php>.

same-sex marriage.<sup>96</sup> New Yorkers Edith Windsor and Thea Spyer met in 1963, when no state recognized same-sex marriages and, indeed, several southern states forbade interracial ones.<sup>97</sup> Windsor and Spyer had a longstanding and loving relationship that they celebrated in 2007 by traveling to Ontario, Canada, to get married.<sup>98</sup> When Spyer passed away in 2009, she left her sizeable estate to Windsor, and although New York recognized Windsor as a surviving spouse based on the Canadian wedding, under DOMA, the federal government still viewed Windsor and Spyer as single individuals.<sup>99</sup> Consequently, the Internal Revenue Service (IRS) slapped a \$363,053 estate tax on Windsor's inheritance, finding her ineligible for the surviving spouse tax exemption allowed opposite-sex couples.<sup>100</sup>

Windsor sued, arguing that DOMA was unconstitutional and that she was entitled to a refund of the estate tax she paid.<sup>101</sup> The Bipartisan Legal Advisory Group (BLAG) of the House of Representatives intervened to defend DOMA's constitutionality.<sup>102</sup> The District Court ruled in Windsor's favor,<sup>103</sup> as did the U.S. Court of Appeals for the Second Circuit, holding that DOMA could not pass intermediate scrutiny and therefore violated the equal protection guarantees of the Fifth Amendment's due process clause.<sup>104</sup> Because the executive branch continued to enforce DOMA,<sup>105</sup> however, Windsor did not receive her refund.<sup>106</sup>

In a 5–4 opinion issued in June 2013, Justice Kennedy, writing for the majority, upheld the lower court rulings, but on different grounds.<sup>107</sup>

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<sup>96</sup> Adam Liptak, *Supreme Court Bolsters Gay Marriage with Two Major Rulings*, N.Y. TIMES, June 26, 2013, <http://www.nytimes.com/2013/06/27/us/politics/supreme-court-gay-marriage.html>.

<sup>97</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013). The statutes banning interracial marriages were rendered unconstitutional in *Loving v. Virginia*, 388 U.S. 1, 12 (1967). For a recent scholarly celebration of the significance of *Loving*, including several essays on the case's implications for the current debate on marriage equality, see *LOVING V. VIRGINIA IN A POST-RACIAL WORLD: RETHINKING RACE, SEX, AND MARRIAGE* (Kevin Noble Maillard & Rose Cuison Villazor eds., 2012).

<sup>98</sup> *Windsor*, 133 S.Ct. at 2682–83.

<sup>99</sup> *Id.* at 2683.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 2684.

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

<sup>104</sup> *Id.*

<sup>105</sup> Letter from Attorney Gen. Eric Holder, *supra* note 92.

<sup>106</sup> *Windsor*, 133 S. Ct. at 2684.

<sup>107</sup> *Id.* at 2696.



After finding that BLAG had standing to defend DOMA,<sup>108</sup> Justice Kennedy opined that DOMA discriminated against state sanctioned same-sex marriages and failed to respect the traditional prerogative of the fifty states to set forth marriage laws as they saw fit:

The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.<sup>109</sup>

Although much of Justice Kennedy's opinion abounds in equality rhetoric and specifically grounds its reasoning in the Fifth Amendment's Due Process Clause, the constitutional principle underlying the decision is federalism.<sup>110</sup> As such, DOMA is unconstitutional not because states are universally required to grant marriage equality to same-sex couples, but because states traditionally have the right to decide whether to mandate marriage equality, free from federal interference.<sup>111</sup> Thus, Justice Kennedy's opinion does not force all states to recognize same-sex marriage.<sup>112</sup>

Immediately after the *Windsor* decision was announced, commentators began to wonder how the decision would affect the tax liabilities of same-sex couples that wed in a state that recognizes same-sex marriage but subsequently moved to a state that does not.<sup>113</sup> The answer to

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<sup>108</sup> *Id.* at 2688.

<sup>109</sup> *Id.* at 2694–96.

<sup>110</sup> *See id.* at 2693–94.

<sup>111</sup> *Id.* at 2693.

<sup>112</sup> *Id.* at 2696.

<sup>113</sup> David G. Savage, *Married Same-Sex Couples Uncertain About Their Taxes*, L.A.-TIMES, July 6, 2013, <http://articles.latimes.com/2013/jul/06/nation/la-na-adv-gay-marriage-benefits-20130706>; see also Chris Hoenig, *Supreme Court Ruling Continues to Leave Questions for LGBT Couples*, DIVERSITYINC, <http://www.diversityinc.com/news/supreme-court-ruling-continues-to-leave-questions-for-lgbt-couples/> (last visited Nov. 18, 2013) (“The IRS and Social Security Administration (SSA), for example, have historically determined a spouse by the legal definition of marriage in the couple’s state of *residency*. Under the current guidelines, an LGBT couple legally married in New York or California but living in a state such as Kansas, which

this question is beyond the scope of this Essay, but it illustrates that further interpretation needs to occur within the realm of tax law, which *Windsor* touched upon. The need for interpretation becomes even more evident in other areas of law that require uniform and efficient application of federal law. Indeed, Justice Kennedy noted a federal immigration law prohibiting sham marriages regardless of the applicable state definition of marriage as an example of such a law requiring uniform and efficient application.<sup>114</sup>

The Court could have avoided the federalism issue by ruling on the merits of the marriage equality claim that, under the equal protection guarantees of the Constitution, denying married same-sex couples the same benefits as married opposite-sex couples is unconstitutional. That avenue was also open to the Court in *Windsor*'s companion case, *Hollingsworth v. Perry*.<sup>115</sup> Instead of tackling the issue head on, however, the Court dodged it and decided the case on standing grounds—something it chose not to do in *Windsor*.<sup>116</sup> Although *Hollingsworth* was neither a federal case nor decided on marriage equality grounds, it is worth mentioning because it could have been the vehicle for nationally legalizing same-sex marriages, much in the same way that *Loving v. Virginia* did for interracial marriages.<sup>117</sup>

#### B. *HOLLINGSWORTH V. PERRY*

In *Hollingsworth*, the Supreme Court was presented with a dispute over California's Proposition 8, a ballot measure that amended the California Constitution to limit marriage to opposite-sex couples.<sup>118</sup> Proposition 8 arose in response to the California Supreme Court's ruling in *In re Marriage Cases*,<sup>119</sup> which found that a state statute limiting marriage to opposite-sex couples violated the rights of same-sex couples

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does not recognize marriages, civil unions or domestic partnerships of same-gender couples, is not viewed as a married couple by those federal agencies. As of this writing, the SSA's handbook has not been updated and still defines a spouse under DOMA's restrictions, though the agency does say it is working to determine the path forward.”).

<sup>114</sup> *Windsor*, 133 S. Ct. at 2690.

<sup>115</sup> See *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

<sup>116</sup> *Id.* at 2668.

<sup>117</sup> See discussion *supra* note 97.

<sup>118</sup> *Hollingsworth*, 133 S. Ct. at 2659.

<sup>119</sup> *In re Marriage Cases*, 183 P.3d 384 (2008), superseded by constitutional amendment, Cal. Const. art. 1, § 7.5 (Proposition 8), as recognized in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

under the California Constitution.<sup>120</sup> Both the federal district court and the U.S. Court of Appeals for the Ninth Circuit found Proposition 8 unconstitutional under the Fourteenth Amendment's Equal Protection Clause because it failed to meet the heightened scrutiny standard applied to discriminatory laws against a vulnerable group, like sexual minorities.<sup>121</sup>

Judge N.R. Smith, in his vigorous Ninth Circuit dissent, cited two reasons for why he believed Proposition 8 to be constitutional: (1) it promotes “responsible procreation,” and (2) it fosters an “optimal setting for the responsible raising and care of children—by their biological parents in a stable marriage relationship.”<sup>122</sup> Proposition 8 advocates contended that both theories were valid justifications for limiting marriage to opposite-sex couples.<sup>123</sup> Under the “responsible procreation” theory, Proposition 8 proponents claimed that limiting marriage to potentially procreative opposite-sex couples serves a legitimate state interest because it reduces the risk of irresponsible procreation (unintended pregnancies) by providing an incentive to form stable families; however, the same incentive is unnecessary for same-sex couples because they are incapable of irresponsible procreation.<sup>124</sup> Furthermore, under the optimal parenting theory, Proposition 8 proponents alleged that limiting marriage to opposite-sex couples is rationally related to the state interest in fostering a favorable environment for children who are, though debatable, best raised by their biological parents.<sup>125</sup>

However, neither theory quite comports with the realities of how marriage laws actually function. First, if “responsible procreation” is a valid theory for denying marriage to same-sex couples, heterosexual elderly and infertile couples should also be denied the ability to marry. Second, for the “optimal parenting” theory to be a plausible legal principle, laws permitting divorce, abortion, and adoption should all be abolished because they take children away from one or both of their biological parents. Moreover, failing to recognize same-sex marriages runs afoul of the optimal parenting theory because it thwarts the interest of children who are already living in “optimal settings” with their same-sex parents. As Justice Kennedy commented during oral argument: “There are

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<sup>120</sup> *Hollingsworth*, 133 S. Ct. at 2659.

<sup>121</sup> *Id.* at 2660–61.

<sup>122</sup> *Perry v. Brown*, 671 F.3d 1052, 1106 (9th Cir. 2012) (Smith, J., dissenting).

<sup>123</sup> *Id.* at 1086.

<sup>124</sup> *Id.* at 1106 (Smith, J., dissenting).

<sup>125</sup> *Id.* at 1107–09 (Smith, J., dissenting).

some 40,000 children in California . . . that live with same-sex parents, and they want their parents to have full recognition and full status. The voice of those children is important in this case.”<sup>126</sup>

In the end, the Supreme Court decided to punt on the merits and instead ruled that the defenders of Proposition 8—the initiative’s official proponents—had no standing to appeal an adverse federal court ruling when the state refused to appeal it.<sup>127</sup> Opponents of Proposition 8—California residents who wanted to see their same-sex unions formally recognized as marriages—filed suit against then-Governor Schwarzenegger in the district court, and they prevailed on both due process and equal protection grounds.<sup>128</sup> Schwarzenegger’s successor, Governor Jerry Brown, chose not to appeal.<sup>129</sup> However, the case did not end there. Because the original authors of Proposition 8 were allowed to intervene before the district court, they filed an appeal to the Ninth Circuit, ultimately litigating the case all the way to the Supreme Court.<sup>130</sup> Writing for a five-person majority, Chief Justice John Roberts found that the intervenors had no standing to bring suit because they could not point to any particularized harm they would suffer from Proposition 8’s demise that would differ from the harm suffered by voters who favored Proposition 8’s enactment:

[P]etitioners had no “direct stake” in the outcome of their appeal. Their only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law. We have repeatedly held that such a “generalized grievance,” no matter how sincere, is insufficient to confer standing.<sup>131</sup>

Writing for the dissent, Justice Kennedy contended that California suffered a cognizable injury to its initiative process that the intervenors were well poised to vigorously defend.<sup>132</sup> Because none of the Justices reached the merits of the case, the Supreme Court’s decision to dismiss the appeal and vacate the Ninth Circuit’s opinion left the district court’s ruling intact.<sup>133</sup>

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<sup>126</sup> Transcript of Oral Argument at 21, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144).

<sup>127</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2660, 2668 (2013).

<sup>128</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1004 (N.D. Cal. 2010).

<sup>129</sup> *Hollingsworth*, 133 S. Ct. at 2660.

<sup>130</sup> *See id.* at 2662.

<sup>131</sup> *Id.* at 2662–63.

<sup>132</sup> *Id.* at 2668–70 (Kennedy, J., dissenting).

<sup>133</sup> *Id.* at 2668.

While both *Windsor* and *Hollingsworth* say nothing about the merits of the marriage equality debate, they suggest that the debate should be left in the hands of voters and legislators.<sup>134</sup> The majority opinion in *Hollingsworth* opens by stating that “[t]he public is currently engaged in an active political debate over whether same-sex couples should be allowed to marry.”<sup>135</sup> The Court’s decision to deny standing while acknowledging the political debate signals its desire to leave the debate to the political process, at least for now. But which level of government—federal or state—should carry out this debate? Perhaps an answer begins to emerge when *Windsor* and *Hollingsworth* are read together: Because *Windsor* reaffirms the longstanding view that marriage laws have traditionally been left to the states and that, absent some strong federal interest, should be respected, the Court seems to suggest that this debate should proceed among the states, unless the federal government has some particularly strong interest.<sup>136</sup>

At the state level, the debate continues: as of this writing, sixteen states and the District of Columbia celebrate marriage equality, but the majority of states do not.<sup>137</sup> What does this mean at the federal level? As mentioned earlier, though not addressed in this Essay, there is some debate about the implications of DOMA’s demise with respect to federal income taxes when same-sex couples are married in one state but reside in a state that does not recognize same-sex marriage.<sup>138</sup> Of concern here however, is federal immigration law. Specifically, Part IV contends that the ambiguity arising out of *Windsor* and *Hollingsworth* creates the space for President Obama to take a broad, equality enhancing position toward bi-national

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<sup>134</sup> See *United States v. Windsor*, 133 S. Ct. 2675, 2693–94 (2013); *Hollingsworth*, 133 S. Ct. at 2659 (explaining that standing is an “essential limit” on judicial power as “[i]t ensures that [judges] act as *judges*, and do not engage in policymaking properly left to elected representatives”) (emphasis in original).

<sup>135</sup> *Hollingsworth*, 133 S. Ct. at 2659.

<sup>136</sup> One might argue that I am reading too much into *Hollingsworth* as it was dismissed for lack of standing rather than decided on the merits. However, given that this was a 5–4 decision, and that Kennedy had some very strong arguments as to why standing should have been allowed (just as Justice Scalia presented strong arguments against standing in *Windsor*), I do not think that it is a stretch to read the cases together as evincing the Court’s reluctance, at this time, to reach the merits of the marriage equality debate and preference that the states continue to take the lead, with the federal government weighing in on a limited basis, as the Obama Administration properly has in the immigration context.

<sup>137</sup> Monique Garcia, *Signed and Sealed: Illinois 16th State to Legalize Gay Marriage*, CHICAGO TRIBUNE (Nov. 21, 2013, 5:01 AM), <http://my.chicagotribune.com/#section/-1/article/p2p-78265203/>.

<sup>138</sup> Savage, *supra* note 113.

same-sex couples within current immigration law.

#### IV. PRESIDENTIAL LEADERSHIP: MARRIAGE EQUALITY COMES TO IMMIGRATION LAW

President Obama's decision to seek full implementation of *Windsor* has had profound consequences for bi-national same-sex couples, as the USCIS has begun to grant petitions to noncitizen spouses regardless of their sexual orientation.<sup>139</sup> The positive response to Mr. Marsh's petition is a drastic departure from the homophobic language used in the INS's denial letter in *Adams*. Some commentators, however, have questioned President Obama's directives and it is worth examining their three main objections: (1) President Obama misread *Windsor* because authority over immigration law is vested in Congress; (2) *Windsor*'s single reference to immigration law suggests a limit on state authority to define marriage when it thwarts legitimate federal concerns; and (3) affirming same-sex marriages for couples currently residing in non-marriage equality states violates *Windsor*.<sup>140</sup> For the reasons discussed below, none of these objections are fatal, and indeed, President Obama's approach to *Windsor* is both constitutionally and politically sound.

##### A. PRESIDENTIAL AUTHORITY TO READ *WINDSOR* BROADLY

At the narrowest interpretive level, *Windsor* explains that DOMA's intrusion upon marriage law, which is traditionally a state's prerogative, is unconstitutional because it conflicts with principles of federalism.<sup>141</sup> However, relying on *Adams*, former Attorney General Gonzales and Professor Strange argue that *Windsor* says nothing about immigration law, which is traditionally a federal concern:

In our view, the DOMA decision does not appear to override the Ninth Circuit's 1982 ruling [in *Adams*]. The Supreme Court last month recognized the constitutionality of limited federal laws that regulate the meaning of marriage to further policy—for example, in regulating immigration—but concluded that DOMA was simply too broad, as applied across the full spectrum of federal activity. At the end of its opinion in *Windsor*, the [C]ourt was very clear to confine its holding to “those whom the State, by its marriage laws, sought to protect.” Because

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<sup>139</sup> *Same-Sex Marriages*, *supra* note 5.

<sup>140</sup> See *infra* Part IV.A–C.

<sup>141</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013).

immigration is reserved to the federal government, the . . . states that have legalized same-sex marriage (along with the District of Columbia) cannot, by definition, protect through their marriage laws same-sex couples seeking immigration benefits.<sup>142</sup>

Gonzales and Strange conclude that unilateral executive action to grant immigration benefits to noncitizen same-sex spouses of U.S. citizens is impermissible.<sup>143</sup> They contend that granting bi-national same-sex couples the same spousal benefits as opposite-sex ones for immigration purposes would require an act of Congress.<sup>144</sup> Indeed, Congress had exactly that opportunity when, in debating the Senate immigration bill, a provision allowing same-sex beneficiaries was introduced but then summarily dropped as a political non-starter.<sup>145</sup> That a gay marriage provision was contemplated by Congress signals its awareness that there currently is no specific statutory provision that allows noncitizen same-sex spouses to immigrate, just as *Adams* held.<sup>146</sup>

Congress's refusal to incorporate the provision conducive to marriage equality does not necessarily mean it would oppose the President's interpretation of the term "spouse" to enhance marriage equality. In an influential article on inherent presidential authority, Dean Erwin Chemerinsky proffered a comprehensive framework describing the Supreme Court's treatment of Executive power, articulating four different perspectives on when the President may act absent explicit constitutional or statutory authority: (1) the President has no inherent power; (2) the President enjoys inherent power unless usurping the power of another branch; (3) the President enjoys inherent power unless Congress or the Constitution specifically limits it; and (4) the President enjoys broad inherent power, especially in the realm of foreign relations.<sup>147</sup>

Applying Dean Chemerinsky's framework, Gonzales and Strange appear to favor the first view—that the Executive enjoys no power aside from that specifically granted to him by Congress or the Constitution.<sup>148</sup>

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<sup>142</sup> Gonzales & Strange, *supra* note 11.

<sup>143</sup> *See id.*

<sup>144</sup> *See id.*

<sup>145</sup> Alan Gomez, *Leahy Withdraws Gay Couples Amendment in Immigration Bill*, USA TODAY (May 21, 2013, 11:03 PM), <http://www.usatoday.com/story/news/politics/2013/05/21/leahy-same-sex-immigration-amendment/2348763/>.

<sup>146</sup> *Adams v. Howerton*, 673 F.2d 1036, 1040–41 (9th Cir. 1982).

<sup>147</sup> Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863, 870–78 (1983).

<sup>148</sup> *See* Gonzales & Strange, *supra* note 11.

They contend that because *Windsor* says nothing about immigration law and because *Adams* recognizes that “Congress has almost total power over immigration law,” there is no explicit authority for the President to read *Windsor* as broadly as he has.<sup>149</sup>

However, there is another view: under the third model, President Obama (via his designee, the Secretary of the Department of Homeland Security) may read the ambiguity in the INA broadly in the wake of *Windsor*. As *Adams* acknowledges, there is nothing in the INA that specifically limits spousal petitions to opposite-sex couples.<sup>150</sup> And as *Windsor* sets forth, applying a uniform federal definition that restricts the rights of same-sex couples that a state intends to protect violates federalism principles.<sup>151</sup> Further, the Senate’s decision to pull the marriage equality provision from its comprehensive immigration bill was not an explicit rejection of the President’s exercise of Executive power. Indeed, there is evidence to suggest that at least some Senate members—including Democrat Patrick Leahy and Republican John McCain—thought that if the Supreme Court struck DOMA as it did in *Windsor*, there would be no need for a provision permitting same-sex spousal petitions.<sup>152</sup>

To the extent that the USCIS generally recognizes marriages based on their place of celebration rather than where the couples currently reside, the President is arguably free to grant the petitions of those, like Mr. Marsh, who wed in marriage equality states.<sup>153</sup> Indeed, Professors Adam Cox and Cristina Rodriguez have observed that the President sometimes exercises de facto enforcement power within immigration policy, even without an explicit grant of congressional authority.<sup>154</sup>

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<sup>149</sup> *Id.* Because *Adams* read Congressional intent narrowly such that the INA does not explicitly grant the President power to approve same-sex spousal immigration petitions, utilizing Dean Chemerinsky’s first perspective on presidential power, Gonzales and Strange contend that the President was without authority to direct such a broad interpretation of *Windsor*. See *id.* As Dean Chemerinsky notes, Justice Black’s approach in the *Youngstown* case illustrates this model. Chemerinsky, *supra* note 147, at 871; see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (“The President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.”).

<sup>150</sup> See discussion *supra* note 28.

<sup>151</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013).

<sup>152</sup> Ryan Lizza, *What the DOMA Decision Means for Immigration Reform*, THE NEW YORKER NEWS DESK BLOG (June 26, 2013), <http://www.newyorker.com/online/blogs/newsdesk/2013/06/what-the-doma-decision-means-for-immigration-reform.html>.

<sup>153</sup> See Chemerinsky, *supra* note 147, at 874–75 (“[T]he President may exercise inherent power until Congress acts to limit him.”).

<sup>154</sup> Cox & Rodriguez, *supra* note 14, at 510–28. Although Cox and Rodriguez specifically mention prosecutorial discretion as within the President’s de facto delegated authority, the



## B. INTERPRETING *WINDSOR*'S SINGLE REFERENCE TO IMMIGRATION LAW

Theoretical models aside, Gonzales and Strange would still argue that the *Windsor* majority seemed to urge caution because the only reference to immigration law and marriage suggested limits on a state's ability to gain federal recognition for its same-sex marriage law.<sup>155</sup> Specifically, the *Windsor* Court notes:

In addressing the interaction of state domestic relations and federal immigration law Congress determined that marriages "entered into for the purpose of procuring an alien's admission [to the United States] as an immigrant" will not qualify the noncitizen for that status, even if the noncitizen's marriage is valid and proper for state-law purposes.<sup>156</sup>

Gonzales and Strange read this as suggesting that the Court intended not to overrule *Adams*'s refusal to recognize marriage equality within immigration law.<sup>157</sup> However, Roberta Kaplan, *Windsor*'s counsel, noted that the specific statutory provision mentioned by the Court focused on immigration marriage fraud, an issue that would apply to all marriages.<sup>158</sup> A neutral rule of general application would not seem to bar President Obama from using his inherent authority to read *Windsor* broadly.

## C. OBAMA'S IMMIGRATION STRATEGY AND THE NON-MARRIAGE EQUALITY STATES

While the Obama Administration has adopted a liberal "place-of-celebration" rule that seems to favor marriage equality states over non-marriage equality states, what do we make of the DHS's caveat that sometimes the laws of the state of residence may matter?<sup>159</sup> If part of what *Windsor* advocates is respect for federalism, how does the Obama Administration's immigration strategy respect non-marriage equality states?

Professor Kerry Abrams notes that immigration courts have

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Executive's enforcement power arguably extends to granting implicit benefits as well as imposing burdens, as apparently Senators Leahy and McCain had in mind when contemplating the effects of DOMA's dissolution on bi-national same-sex marriages. See Lizza, *supra* note 152.

<sup>155</sup> *Windsor*, 133 S. Ct. at 2690.

<sup>156</sup> *Id.* at 2690 (quoting 8 U.S.C. § 1186a(b)(1) (2006 ed. and Supp. V)).

<sup>157</sup> Gonzales & Strange, *supra* note 11.

<sup>158</sup> Kaplan, *supra* note 12.

<sup>159</sup> *Implementation of the Supreme Court Ruling on the Defense of Marriage Act*, *supra* note 10.

traditionally employed a more conservative rule that ignores the place of celebration if the couple chose to marry in a different state to evade their home state's public policy against such marriages.<sup>160</sup> Abrams points out, for example, that Wisconsin imposes a criminal penalty of up to nine months imprisonment or a \$10,000 fine for visiting another state to enter into a marriage prohibited under Wisconsin law.<sup>161</sup> While Abrams acknowledges that Obama's more liberal rule impinges upon state sovereignty, she concludes that it may be the most pragmatic solution in a world where couples sometimes live in more than one state and move frequently.<sup>162</sup>

To the extent that *Windsor*'s equality rhetoric derives from its respect for federalism,<sup>163</sup> Professor Abrams correctly raises the specter of federal overreaching. However, *Windsor* itself provides a way to break this impasse by recognizing the importance of "limited federal laws that regulate the meaning of marriage in order to further federal policy."<sup>164</sup> Here, the adoption of a liberal, equality-enhancing "place-of-celebration" rule in lieu of the traditional one "implements immigration law's bedrock principle of family unification," as Professor Scott Titshaw has noted.<sup>165</sup>

Constitutionally, this uniform "place-of-celebration" rule appears to be a fair reading of *Lawrence v. Texas*, which precluded a state from imposing its morals on a vulnerable minority.<sup>166</sup> As applied here, non-marriage equality states should not be able to curtail immigration benefits recognized by the federal government based on a neutral "place-of-

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<sup>160</sup> Kerry Abrams, *Marriage and Immigration—Which State's Law Applies?*, CONCURRING OPINIONS (July 8, 2013, 12:08 PM), <http://www.concurringopinions.com/archives/2013/07/marriage-and-immigration-which-states-law-applies.html>.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> For a different perspective on this, see Titshaw, *supra* note 6, at 171 ("Although the majority opinion in *United States v. Windsor* included a great deal of language about Section 3 of DOMA undermining states' traditional authority over family law, federalism was not its ultimate rationale. In the end, Justice Kennedy found it 'unnecessary to decide whether the federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance' since DOMA presents discrimination of an unusual character and thereby 'violates basic due process and equal protection principles' guaranteed by the Fifth Amendment. On this point, the opinion echoed the refrains of equality, personhood[,] and dignity in choice of intimate and familial relationships that featured prominently in Justice Kennedy's opinions in *Lawrence v. Texas* and *Romer v. Evans*. These ideas also support a unified place-of-celebration rule for marriage validity.").

<sup>164</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2690 (2013).

<sup>165</sup> Titshaw, *supra* note 6, at 171.

<sup>166</sup> See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *supra* text accompanying notes 84–85.

celebration” rule. Indeed, such a policy furthers the equality-based aspects of *Windsor*, granting same-sex couples the same advantages opposite-sex couples currently enjoy under federal immigration law. Finally, *Hollingsworth* teaches that it would be exceedingly difficult for those who reside in non-marriage equality states to claim sufficient harm to challenge the Obama Administration’s policy, which does not curtail any rights or privileges under state law.<sup>167</sup> Any objection would, therefore, amount to only a generalized grievance against this federal directive.<sup>168</sup>

#### V. CONCLUSION: THE PROMISE OF INTEGRATIVE EGALITARIANISM

While we await the full development of this new immigration initiative, President Obama’s reading of *Windsor* is constitutionally sound and politically bold. If, as it appears, the trend is toward greater recognition of same-sex marriages across the states, then we can anticipate more bi-national same-sex couples marrying in one of the seventeen U.S. marriage equality jurisdictions and petitioning the federal government for status adjustments for the noncitizen spouse.

The President’s reading of *Windsor* is also consistent with our modern post-*Brown* equality jurisprudence. President Obama’s reading exemplifies what I have termed “integrative egalitarianism,” the idea that “governmental programs . . . designed to overcome arbitrary inequalities stemming from accidents of birth are a worthwhile investment in society’s future.”<sup>169</sup> The President’s reading helps to integrate outsiders by extending the benefits of marriage to noncitizen spouses and ensures equality by treating same-sex couples the same as opposite-sex couples under federal immigration law.

Thus far, the President’s leadership has highlighted aspects of *Windsor*’s promises of equality while respecting federalism concerns, which appeared to animate the majority’s decision. Indeed, the President’s leadership may spur the march to marriage equality if more beneficiaries turn to activism. Following the grant of their petition, Mr. Marsh and Mr. Popov told the *New York Times* that they planned to “become same-sex marriage activists in Florida, a state that does not recognize such unions. ‘We are first-class citizens in New York and in the eyes of the federal

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<sup>167</sup> See *supra* Part III.B.

<sup>168</sup> See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659, 2666 (2013).

<sup>169</sup> Victor C. Romero, *Immigrant Education and the Promise of Integrative Egalitarianism*, 2011 MICH. ST. L. REV. 275, 276–77 (2011).

government, but second-class citizens in Florida,' Mr. Marsh said. 'We won't stand for that.'"<sup>170</sup>

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<sup>170</sup> Preston, *supra* note 1.